

4/23/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
KETCHIKAN PULP COMPANY,) [CWA] Docket No.
) 1090-09-10-309(g)
)
Respondent)

ORDER OF WITHDRAWAL OF COMPLAINT WITHOUT PREJUDICE

Complainant United States Environmental Protection Agency (Complainant or EPA) has filed a Motion to Dismiss Complaint Without Prejudice in this matter. Respondent Ketchikan Pulp Company (Respondent or KPC) has filed an Opposition to Complainant's Motion to Dismiss Without Prejudice.

On September 27, 1990, EPA issued an administrative complaint alleging that Respondent has committed 65 violations of Section 301(a) of the Clean Water Act (the Act), 33 U.S.C. § 1311(a) during the period September through November 1989 at its Ketchikan, Alaska pulp mill (the mill). Respondent filed an answer with the Regional Hearing Clerk on October 22, 1990, in which Respondent requested a hearing in this matter. On November 1, 1990, this matter was referred to the undersigned Presiding Officer who issued a Prehearing Order on December 13, 1990, which required, inter alia, a prehearing exchange. On February 14, 1991, I granted EPA's motion, to which Respondent had agreed, to stay the prehearing exchange requirement pending resolution of EPA's present Motion to Dismiss Complaint Without Prejudice.

EPA seeks dismissal of the complaint on the grounds that subsequent to the filing of the complaint in this matter, EPA learned that KPC allegedly had committed additional violations of the Act at the mill. In light of the subsequent discovery of these additional alleged violations, EPA wishes to refer all outstanding allegations of violations of the Act to the Department of Justice for filing in federal district court.

In support of its motion, EPA contends that dismissal of the complaint herein will promote judicial economy because it will ultimately result in one rather than two enforcement actions and will free my docket of one case. EPA argues that dismissal will not unfairly jeopardize Respondent's interests nor cause Respondent to suffer any injustice. Complainant maintains that no work has been done short of filing an answer to the complaint and whatever effort invested in such answer can be utilized in responding to the civil complaint to be filed in federal district court.

In opposition KPC contends that the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, do not authorize voluntary dismissals of administrative actions at the request of the agency. Having chosen to proceed against KPC in an administrative enforcement proceeding, Respondent asserts that the agency is bound to this forum regardless of whether the agency could have brought the matter initially as a judicial enforcement action.

KPC also submits that granting the motion will subject it to an undue burden and clear legal prejudice. In this regard, Respondent contends that dismissal "will prejudice KPC because the agency forum is more experienced at hearing environmental matters. In addition, trying this matter in federal court will increase the litigation expenses and inconvenience associated with defending the action and expose KPC to higher penalties."

In reply to KPC's contentions, Complainant argues that Part 22 does not prohibit motions to dismiss without prejudice and, hence, the motion may be granted. EPA also rejects Respondent's contention that it would be prejudiced if the motion were granted: "the present case is still in its inception, no briefing has occurred, and no documents have been exchanged." EPA submits that Respondent does not have a vested right to trial in any particular court and no prejudice would result if Respondent is exposed "to what it perceives to be less qualified judges." Further, EPA insists that it could have filed this case originally in federal district court and it should not be denied the right to change to that forum in light of the discovery of the subsequent alleged violations especially when no unfair burden is shifted to Respondent. Finally, EPA contends that dismissal of the present action would result in judicial economy because the parties would be involved in one judicial proceeding rather than "two simultaneous actions in two different courts by one plaintiff against one defendant for multiple violations of the same law."

Although Complainant has denominated its request as a motion to dismiss the complaint, the motion, in substance, constitutes a motion to withdraw the complaint. The withdrawal of a complaint is governed by 40 C.F.R. § 22.14(e) which provides, in pertinent part, "after the filing of an answer, the complainant may withdraw the complaint, . . . without prejudice, only upon motion granted by the Presiding Officer"

Hence, the decision as to whether to permit the withdrawal of the complaint without prejudice is a matter which is within my discretion as Presiding Officer. I find that the Respondent will not be prejudiced by the granting of Complainant's motion. No documents have been filed concerning the substance of this matter since the filing of Respondent's answer. The rules themselves recognize that a complaint may be withdrawn after an answer is filed. I previously stayed my prehearing exchange requirement pending resolution of this motion. Clearly, no hearing has been scheduled and no preparations for a hearing by the parties have been required.

Furthermore, in agreement with Complainant, I find that judicial efficiency would result if Complainant is permitted to withdraw the complaint so that the allegations herein may be included as a part of the action which EPA proposes to bring in federal district court. Contrary to Respondent's concerns, I am confident that the federal district court judge who ultimately tries the matter will be imminently qualified and will render a just and proper decision.

As for KPC's concerns that an action brought in federal district court "will expose it to much higher penalties than the current proceeding," Congress established the statutory scheme about which Respondent complains. In doing so, Congress reached a policy judgment that there were sound reasons for different penalty amounts under 33 U.S.C. § 1391(d) and 33 U.S.C. § 1319(g)(2)(B). Respondent's complaint in this regard should be directed to the legislative branch of government.

IT IS ORDERED that the complaint in this matter be withdrawn without prejudice.


Henry B. Frazier, III
Chief Administrative Law Judge

Dated: April 23, 1991
Washington, DC

IN THE MATTER OF KETCHIKAN PULP COMPANY, Respondent
[CWA] Docket No. 1090-09-10-309(g)

Certificate of Service

I hereby certify that this Order of Withdrawal of Complaint Without Prejudice, dated APR 23 1991, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Marian L. Atkinson
Regional Hearing Clerk
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

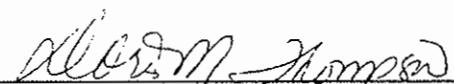
Copy by Regular Mail to:

Attorney for Complainant:

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Attorney for Respondent:

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Ketchikan Pulp Company
111 S.W. Fifth Avenue
Portland, OR 97204



Doris M. Thompson
Secretary

Dated: APR 23 1991