UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Hawaiian Western Steel, Limited, Inc., and The James Campbell Estate,	)	**Docket No. RCRA-IX-87-0006**
	)	
Respondents	)	

ORDER GRANTING PARTIAL WITHDRAWAL OF COMPLAINT WITH PREJUDICE

The Determination of Violation, Compliance Order and Notice of Right To Request A Hearing (complaint) in this proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6928) (RCRA), filed July 9, 1987, charged Respondents, Hawaiian Western Steel, Limited, Inc. (HWS) and The James Campbell Estate (Estate) with violations of the Act and applicable regulations. Specifically, Count I alleged a failure to determine if solid wastes were hazardous as required by 40 CFR § 262.11, Count II alleged operation of a land disposal unit without a permit in violation of 40 CFR § 270.1(c)[1/] and Count III alleged storage of hazardous wastes in containers without a permit in violation of 40 CFR § 270.1(c). For these alleged violations, it was proposed

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[1/] HWS operates a steel mill on land owned by the Estate, which is occupied by HWS under a long-term lease. The hazardous waste land disposal unit described in the complaint is a separate parcel (landfill) also owned by the Estate and leased to HWS upon which HWS deposited non-hazardous slag and at some point, not determinable on the present record, baghouse dust, containing high concentrations of lead and cadmium.

to assess Respondents a penalty totaling $522,000. The compliance order directed Respondents to, inter alia, certify within 30 days that hazardous waste determinations in accordance with 40 CFR § 262.11 had been made for all waste streams generated at the facility, to submit within 30 days a closure plan complying with 40 CFR § 265.112 and to immediately cease storing hazardous waste at the facility, except in accordance with 40 CFR § 261.5.

HWS and the Estate filed answers, which essentially denied the alleged violations and requested a hearing. The Estate's answer was accompanied by a motion to dismiss which contended that as the mere owner of the land, it could not be held responsible for the failure to obtain a permit under the circumstances alleged in the complaint. This motion was denied upon the authority of Arrcom, Inc., Drexler Enterprises, Inc., RCRA Appeal No. 86-6 (CJO, May 19, 1986).[2/]

On October 15, 1987, Complainant moved for leave to file a First Amended Determination of Violation, Compliance Order and Notice of Right To Request a Hearing (complaint). The only effect of the amendment was to clarify that "Respondent" in the complaint was intended to refer to "Respondents." This motion was granted by an order, dated November 27, 1987.

[2/] Order, dated November 27, 1987. The CJO declined to revisit Arrcom, Inc., Drexler Enterprises, Inc. (supra) and dismissed the Estate's interlocutory appeal from the ALJ's November 27 order (Order On Interlocutory Appeal, February 22, 1988). This decision was affirmed by the Administrator (Order Denying Petition For Reconsideration On Interlocutory Appeal, November 17, 1988).

Although Complainant indicated in a status report, dated June 30, 1989, that it intended to file a second amended complaint, a motion for leave to file an amended complaint was not served until January 25, 1990. The Second Amended Complaint contained only one count, namely, operation of a hazardous waste land disposal unit (landfill) without a permit. The proposed penalty was reduced to $141,636 and the Compliance Order was expanded to require submission of a closure plan, closure of the landfill, groundwater monitoring, submission of a detailed description of final cover design, provision for financial assurance for closure and post-closure, etc., in accordance with applicable regulations and within specified time frames.

Leave to file the Second Amended Complaint was granted by an order, dated April 26, 1990. Respondents filed answers, which were substantially the same as their answers to the initial complaint and requested a hearing.

Without further detailing the long and tortuous history of this proceeding, suffice it to say that Complainant has endeavored for at least the past 18 months and perhaps longer, to have matters alleged in the complaint and related matters heard in another forum. For example, on March 5, 1991, a search and seizure of records and samples at the HWS facility was conducted pursuant to a search warrant issued in aid of a criminal investigation.[3/] In

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[3/] As a result of this investigation and EPA's refusal to reveal whether it suspected continuing violations of environmental laws, HWS alleges that it was forced to cease operations on March 5, 1991. HWS filed for reorganization under Chapter 11 of (continued...)

1992, Complainant's counsel agreed to hearing dates on July 14 and August 25, but then moved for postponements thereof. The Motion For Postponement of Hearing scheduled for August 25, dated July 27, 1992, alleged as a reason that Complainant was seeking approval from the Department of Justice to pursue the instant claims and others against Respondents in federal district court. This was assertedly necessary or desirable, because of the bankruptcy filing by HWS and because enforcement of a judgment against an unnamed, indirect corporate parent of HWS would assertedly be facilitated in federal court.

The hearing was rescheduled to September 22, 1992 (Notice, dated August 27, 1992). This hearing date was rescheduled to January 25, 1993, if a hearing were necessary, pursuant to representations of counsel in a telecon on September 15, 1992, that settlement of this matter was likely.

Expectations of a settlement were not realized and under date of October 29, 1992, Complainant filed a motion to withdraw the complaint insofar as it seeks penalties against the Estate with prejudice and the balance of the claims against HWS and the Estate without prejudice so that the remaining claims could be pursued in federal court.[4/] Attached to the motion was a copy of a complaint,

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[3/](...continued)
the Bankruptcy Code on November 29, 1991.

[4/] Because settlement discussions failed, the Estate, on October 19, 1992, submitted a motion, dated October 16, 1992, for an accelerated settlement conference or in the alternative for an acceleration of the hearing date.

filed September 9, 1992, United States of America v. Hawaiian Western Steel, Limited, Inc. and The Estate of James Campbell, U.S. District Court For The District of Hawaii, Civil No. 92-00587. The complaint seeks injunctive relief with respect to conditions at the HWS plant, closure of the land fill and penalties.

The Estate and HWS opposed the motion for withdrawal (Reply Brief Regarding Motion For Accelerated Settlement Conference dated November 4, 1992; HWS's Memorandum In Opposition To Complainant's Motion For Withdrawal Of Complaint, dated November 9, 1992). Respondents contended, inter alia, that Complainant was engaged in blatant forum shopping, that withdrawal without prejudice and beginning anew in federal court would further delay resolution of this long-delayed proceeding and that any withdrawal should be with prejudice. Respondents urged that the motion for withdrawal should be summarily denied and the hearing date accelerated. These and other contentions of the parties were discussed in a teleconference call on November 12, 1992. Mr. Roger Klein, counsel for Complainant, argued that insofar as the motion sought dismissal with prejudice, the ALJ had no discretion, but to grant it. He agreed, however, that if the motion to dismiss with prejudice were granted, penalties for the violations alleged in the Second Amended Complaint would not and could not be sought against the Estate in the federal court action. Mr. David Andrews, counsel for the Estate agreed to submit a memorandum addressing the question of factual issues which would remain for resolution, if the claim for penalties as to the Estate were dismissed with prejudice.

The Estate contends that under 40 CFR § 22.14(e),[5/] the ALJ has complete discretion in deciding the motion to withdraw, asserts that it does not object to the motion to withdraw with prejudice insofar as the claim for penalties against it is concerned, provided "prejudice" is defined, and argues that the motion to withdraw this proceeding without prejudice, which action was filed more than five years ago, in order to begin anew in federal court, is outrageous and too prejudicial to the Estate to be taken seriously (Memorandum In Opposition To Complainant's Motion To Withdraw Complaint, dated November 17, 1992). The Estate acknowledges, however, that if the claim for penalties against it is withdrawn with prejudice, the "remaining claims," with the exception of the claim for penalties against HWS, may be resolved by the ALJ issuing an initial decision and final order requiring HWS and the Estate to close the landfill in accordance with RCRA requirements (Id. at 9). Proposed orders to accomplish that purpose are attached to the Estate's Memorandum.

HWS opposes Complainant's motion to withdraw the complaint without prejudice, but concurs in the Estate's conclusion that, other than the claim for penalties against HWS, the "remaining

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[5/] Rule 22.14(e) provides:

> (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.

claims" may be resolved without a hearing for it urges the ALJ to enter proposed orders attached to the Estate's Memorandum (Hawaiian Western Steel Limited, Inc.'s Supplemental Memorandum In Opposition To Complainant's Motion For Withdrawal Of Complaint, dated November 17, 1992).

Complainant reiterated its arguments in support of its motion to withdraw the complaint asserting, inter alia, that motions to withdraw without prejudice are generally granted and that the Estate has not shown why the general rule should not be applied here (Response Memorandum In Support Of Motion For Withdrawal Of Complaint, dated November 18, 1992). Complainant argues that in considering its motion, the ALJ should focus on the consequences of denying the motion, which are proceedings or actions in three forums, i.e., the instant administrative proceeding which may drag on for years because of disputes over technical details of implementing closure, the federal district court action concerning, among other things, implementation of corrective action at the HWS plant and lastly, the bankruptcy proceeding wherein the federal government will allegedly pursue the same claims (Id. at 4). Complainant points out that the proposed orders submitted by the Estate are incomplete or inaccurate in many respects in that findings to support the order for closure are not included and the Estate's definition of "prejudice" would include claims beyond the scope of the present proceeding.

D I S C U S S I O N

In a telecon with counsel on November 19, 1992, confirmed by an order of even date, the motion to withdraw the complaint without prejudice was denied. The denial was based on the inordinate length of time this matter has been pending and, to be charitable, Complainant's less than exemplary handling of this case. That this proceeding has been pending for over five years and has been long delayed is obvious. While responsibility for the delay may be less obvious, Agency action or non-action, which can only be described as inexcusable, clearly contributed to the delay.[6/] In short, I am not persuaded that enforcement of environmental statutes, judicial economy or any valid purpose requires that the complaint herein be withdrawn without prejudice so that the same claims may be pursued anew in another forum.

Turning to the motion to withdraw the complaint with prejudice insofar as the claim for penalties against the Estate is concerned, the Estate does not oppose the motion, provided "prejudice" is defined, and it is unnecessary to address Complainant's contention that the ALJ has no discretion but to grant such a motion.[7/] The

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[6/] For example, Complainant steadfastly refused to make discovery ordered by the ALJ until faced with imminent default (Order Conditionally Denying Motion For Default Order, dated July 13, 1990). Additionally, HWS has alleged, and Complainant has confirmed, that Agency personnel flatly refused to discuss the closure plan submitted by HWS unless a written list of questions was submitted in advance (Status Report of HWS, dated August 30, 1991; Response To Motion for Default, dated October 18, 1991).

[7/] Complainant has cited Smoot v. Fox, 340 F.2d 301 (6th Cir. 1964) and Schwartz v. Folloder, 767 F.2d 125 (5th Cir. 1985) for (continued...)

motion to withdraw the claim for penalties against the Estate with prejudice will be granted. Prejudice in this context means that Complainant (EPA or the government) will be precluded from pursuing, either administratively or judicially, a claim for penalties for the violations alleged in the Second Amended Complaint.[8/]

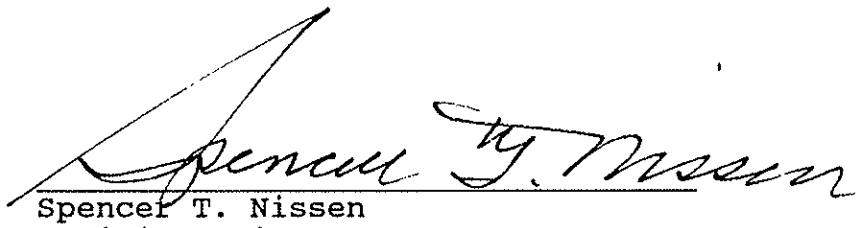
[7/](...continued)
the proposition that it is an abuse of discretion to deny a motion for withdrawal of a complaint with prejudice.

[8/] It should be noted that the claim for penalties against the Estate is of dubious validity in any event. Although the EAB has cited Arrcom, Inc., Drexler Enterprises, Inc. (supra) and prior orders herein (supra note 2) with approval and maintained that the law and Congressional intent are clear, i.e. both owners and operators of hazardous waste TSD facilities are required to have permits, it has acknowledged that Region V and, perhaps other Regions, were confused as to the exact nature of their permit issuing responsibilities, Waste Technologies Industries, Consolidated RCRA Appeal Nos. 92-7, et al. (EAB, July 24, 1992). In responses to the Estate's discovery requests that it be permitted to inspect and copy files on any property for which EPA had issued RCRA permits separately to both the owner and operator and files on any property for which EPA had issued a RCRA permit to cover the unauthorized disposal of hazardous waste either before or after the hazardous waste was discovered, Complainant, after a canvas of other Regions, stated that "no such documents exist" (Response To Order Conditionally Denying Motion For Default Order, July 27, 1990). If the Regions were confused in this respect, the Estate seemingly may not be assessed a penalty for the failure to have a permit under the circumstances herein. See Rollins Environmental Services, Inc. (N.J.) v. U.S. EPA, 937 F.2d 649 (D.C. Cir. 1991).

O R D E R

The motion to withdraw the complaint without prejudice is denied. The motion to withdraw the complaint with prejudice insofar as it claims penalties against the Estate is granted.

Dated this 30th day of November 1992.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING PARTIAL WITHDRAWAL OF COMPLAINT WITH PREJUDICE**, dated November 30, 1992, in re: Hawaiian Western Steel, Ltd., Inc. and The Estate of James Campbell, Dkt. No. RCRA-IX-87-0006, was mailed to the Regional Hearing Clerk, Reg. IX, and a copy was mailed to Respondents and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: November 30, 1992

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