

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Environmental Protection Services, Inc.,) **Docket No. TSCA-03-2001-0331**
)
Respondent)

**ORDER DENYING RESPONDENT'S REQUEST TO CERTIFY
PREHEARING ORDER FOR INTERLOCUTORY APPEAL**

This matter will be heard on June 17-21, 2003, in Wheeling, West Virginia. In anticipation of this hearing, an Order on Hearing Procedure was issued on June 10, 2003. With respect to this order, respondent Environmental Protection Services, Inc. ("EPS"), requests an "Expedited Clarification For Interlocutory Appeal."¹ Complainant U.S. Environmental Protection Agency ("EPA") opposes this request. For the reasons that follow, EPS's request for certification for interlocutory appeal is *denied*.

Respondent cites three grounds in support of its motion. First, it refers to this tribunal's statement that following the June 17-21, 2003, hearing in Wheeling, West Virginia, "[t]here will be no subsequent hearing in Washington, D.C." In respondent's view, "[t]his means that should additional time be necessary, EPS will not be permitted to fully present its selective prosecution defense." Mot. at 1.

EPS's reading of the June 10, 2003, prehearing order is incorrect. In that regard, the only venue set for this hearing has been Wheeling, West Virginia. The prospect of reconvening in Washington, D.C., to conduct a selective prosecution phase of this case, was offered to the parties only as a possible alternative. A hearing date was never selected for Washington, D.C. Furthermore, this tribunal decided that because of the parties' inability to reach agreement on this matter, it was best to hear this case, from beginning to end, in Wheeling, West Virginia. Moreover, the five days allotted for this hearing is not an automatic cut-off of proceedings. If necessary, the hearing in this matter will be extended.

EPS's second ground is that the June 10 order "denies EPS any delay in the proceedings which would allow time for EPA to provide to EPS the documents responsive to its FOIA requests, and substantiating its selective prosecution defense." Mot. at 2. In this regard, EPS is referring to its Freedom of Information Act complaint filed against EPA and presently pending in Federal District Court for the Northern District of West Virginia. *Environmental Protection Services, Inc. v. U.S. EPA*, Civil Action 5:03, CV32.

¹ Interlocutory review to the Environmental Appeals Board is governed by 40 C.F.R. 22.29.

EPS's FOIA related arguments have been previously considered by this tribunal and will not be repeated in full here. Suffice it to say that on two occasions this tribunal has denied EPS's motion to stay proceedings in this case pending resolution of the matter before the federal district court.² In the first order, this tribunal in part stated:

. . . EPA filed the complaint in this matter on June 29, 2001. Now, almost two years later, respondent asks that the case once more be set aside, for an undetermined period of time, while it pursues FOIA litigation in federal district court. Respondent has offered no persuasive reason justifying what would appear to be yet another substantial delay in the resolution of this case while it pursues information in a federal forum that may, or may not, support a defense of selective prosecution.

April 17, 2003, Order at 2.³

Finally, respondent relies on portions of Judge Stamp's ruling in the Federal District Court civil action which it believes supportive of its current effort to obtain interlocutory review. *See Attach. 2 to Resp. Mot.*⁴ This tribunal declines to read Judge Stamp's ruling in the manner suggested by respondent.

Accordingly, EPS's motion to certify for interlocutory review the June 10, 2003, Order on Hearing Procedure, is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: June 11, 2003
Washington, D.C.

² The first Order Denying Respondent's Motion to Stay Proceedings was issued on April 17, 2003. The Order Denying Respondent's Second Motion To Stay Administrative Proceedings was issued on June 9, 2003.

³ In any event, the governing procedural rules in this administrative enforcement action do provide a mechanism for the reopening of this hearing. *See* 40 C.F.R. 22.28.

⁴ Judge Stamp denied respondent's motion for a preliminary injunction.