

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

**ORDER DENYING RESPONDENT'S
MOTION TO STAY PROCEEDINGS**

The Environmental Protection Services, Inc. (“EPS”), moves for a stay of proceedings in this matter pending the resolution of a Freedom of Information Act (“FOIA”) action which the respondent has initiated against the United States Environmental Protection Agency (“EPA”) in Federal District Court for the Northern District of West Virginia.¹ In this federal district court proceeding, EPS seeks a declaratory judgment that EPA has acted unlawfully in withholding records which respondent has requested from the Agency through the Freedom of Information Act. Resp. Mem. at 3. EPS maintains that “any documents that EPS receives as a result of the FOIA action are likely to bolster EPS’ selective prosecution defense” in the present administrative matter. Resp. Mem. at 5. Apparently, some of the documents which EPS seeks relate to a competitor of respondent which is located in EPA Region II. EPS is located in EPA Region III. *See* Resp. Reply at 2-4.² Complainant EPA opposes the motion to stay these administrative enforcement proceedings.

EPS' motion to stay must be viewed in light of the procedural developments of the present case. Here, EPA filed an administrative complaint against EPS on June 29, 2001. Thereafter, at the request of the parties, the matter was referred to the Office of Administrative Law Judges Alternative Dispute Resolution program on September 6, 2001. Alternative Dispute Resolution proved unsuccessful and the case was placed on the undersigned's docket on October 25, 2001.

¹ This action is docketed as Civil Action No. 5:03-CV-32.

² Respondent submits: “Throughout this period, EPS has strongly questioned the accuracy of Region 2’s factual positions and compliance interpretations, which has left one of EPS’ business competitors virtually unregulated without any TSCA commercial storage approval. In contrast, Region 3 pursued its enforcement action against EPS in 2001, based on the same or very similar conditions as those that have existed at EPS’ competitor.” Resp. Reply at 3.

Since that time, there have been numerous filings by the parties and various orders issued in this matter. Noteworthy among the developments in the present case is the fact that this proceeding has already been stayed twice. The first stay of proceedings was ordered on February 25, 2002, due to a medical emergency of one of the parties. This stay lasted until April 18, 2002. The second stay of proceedings occurred from June 12, 2002, to September 30, 2002. This stay was ordered pursuant to the parties' request for an opportunity to exchange settlement information. This settlement effort also proved unsuccessful and the parties jointly requested that the matter proceed to litigation.

More recently, discovery orders have been issued in this case directing both parties to provide certain requested information and allowing for EPA to conduct depositions. In addition, respondent currently has pending before this Tribunal a request to depose several EPA employees. This discovery is taking place in expectation of an administrative hearing which is scheduled to be held in this case on June 2-6, 2003, in Wheeling, West Virginia.

It is against this backdrop that EPS requests a stay of proceedings. Given the circumstances and procedural status of this case, respondent's request for a stay is *denied*. As noted, 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. All that EPS has offered at this stage are possible scenarios of the government's abuse of its prosecutorial authority.³

Moreover, while EPS asserts that it "is being forced to litigate against EPA on the basis of incomplete information," an assertion not supported by the exhibits attached to its pleadings, respondent offers no explanation as to its delay in pursuing its FOIA request in the first place. As noted, EPA filed the complaint in this case on June 29, 2001. Even though EPS raises the defense of selective prosecution in its answer to the complaint, it did not submit a Freedom of Information Act request to EPA until June 26, 2002, almost one year later. *See* Resp. Ex 1, Attach B. Whatever the reason respondent had for making this FOIA request when it did, this delay is significant in considering EPS' present motion because respondent asks that the proceedings in this case grind to a halt pending a resolution of this FOIA dispute. Respondent has offered no explanation for this delay.

³ Indeed, the basis for respondent's selective prosecution claim is somewhat unclear. A reading of the complaint that respondent has filed in federal district court, as well as the pleadings that it has filed in this case, fail to identify whether its selective prosecution defense is based on the allegation that EPA is enforcing the Toxic Substances Control Act, the statute involved here, differently in its ten regions, whether EPA is treating EPS differently from a competitor located in a different EPA region, or whether EPA is proceeding against EPS because respondent complained to EPA about the practices of that competitor.

In sum, given the current posture of this case, and given respondent's failure to present a reason compelling enough to support another delay in this case, it would not be in the interests of justice to grant EPS' request for a stay of proceedings. Accordingly, EPS' Motion to Stay Administrative Proceedings Pending Respondent's Freedom of Information Act Action Against Complainant is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: April 17, 2003
Washington, D.C.