UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
STRONG STEEL PRODUCTS, LLC,	**)**	**Docket No. CAA-05-2004-0015**
	)	
Respondent.	**)**	

ORDER STAYING PROCEEDING

By Motion dated April 2, 2004, Respondent Strong Steel Products, LLC (Strong Steel) moved to dismiss this proceeding as impermissible duplicative litigation. On April 20, 2004, Complainant, the United States Environmental Protection Agency Region 5 (EPA), filed a response in opposition to the Motion to Dismiss and further requested that the instant proceeding be consolidated with the case styled Strong Steel Products, LLC, docket number CAA-05-2003-009. In its reply dated April 29, 2004, Respondent objected to the request to consolidate and again urged that this proceeding be dismissed.

For the reasons stated below, the Motion to Dismiss is DENIED, the Motion to Consolidate is DENIED, and this proceeding is hereby STAYED until further notice.

I. Background

Over the past several years, EPA has initiated a number of administrative actions against Respondent Strong Steel. On September 28, ***2001***, EPA initiated a nine-count complaint against Strong Steel Products, LLC, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, MM-05-2001-0006 ("2001 Complaint"), Counts 1 and 2 of which alleged violations of the Clean Air Act ("CAA"), 42 U.S.C. §§ 7401 *et seq*. Specifically, Respondent was charged in Count 1 with improperly disposing of refrigerant-containing appliances in violation of 42 U.S.C. § 7413(a)(3) and 40 C.F.R. § 82.156(f), and Count 2 alleged that Respondent did not maintain or retain appropriate records related to the refrigerants, in violation of 42 U.S.C. § 7413(a)(3) and 40 C.F.R. §§ 82.166(i) and (m).

By Order dated August 13, 2002, Counts 1 and 2 of the 2001 Complaint were dismissed on the grounds that Complainant had failed to meet the jurisdictional prerequisite, set forth in Section 113(d)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7413(d)(1), of obtaining the Attorney General's agreement to "waive" the 12 month time limitation and the penalty limitation *before*

the Complaint was filed.[1] *See Strong Steel Products, LLC*, 2002 EPA ALJ LEXIS 52 at *9 (Order Granting Respondent's Motion to Dismiss Counts 1 and 2, August 13, 2002).[2]

Approximately a year later, on June 20, ***2003***, Complainant filed a second complaint against Respondent, Docket No. CAA-05-2003-009, and an amended complaint was filed on January 16, 2004 ("2003 Complaint"), proposing a penalty of $611,260. The 2003 Complaint alleged the same two counts of CAA violations as dismissed from the 2001 Complaint, except that the periods of violations were expanded. Respondent's Answer to the 2003 Complaint included an affirmative defense that no waiver determination was made by EPA or the Attorney General as required by Section 113(d) of the CAA, 42 U.S.C. § 7413(d), for exceeding the penalty limit or the 12-month limit on bringing an administrative action. The parties completed the prehearing exchange as to the 2003 Complaint, then by Motion dated February 19, 2004, Respondent moved to stay further proceedings in the 2003 Complaint pending decision of the Environmental Appeals Board ("EAB") in the matter of *Julie's Limousine & Coachworks, Inc.*, CAA Appeal No. 03-06. That appeal arose out of a November 14, 2003 Order issued by my esteemed colleague, Judge Barbara Gunning, which dismissed the Complaint filed in *Julie's Limousine* (Dkt No. CAA-04-2002-1508) on the basis that EPA had failed to obtain valid waivers under CAA § 113(d). *See, Julie's Limousine and Coachworks, Inc.*, 2003 EPA ALJ LEXIS 192 (Order on Respondent's Motion to Dismiss, November 14, 2003). By my Order dated April 30, 2004, Respondent's Motion to Stay further proceedings in the 2003 Complaint was denied.[3]

On March 9, ***2004***, Complainant filed the instant action, a third complaint against Strong Steel, Docket No. CAA-05-2004-0015 ("2004 Complaint"). The 2004 Complaint alleged the same CAA violations and proposed the same penalty of $611,260 as in the 2003 Complaint. EPA asserted that it filed the 2004 Complaint to avoid delay in the litigation due to any potential administrative defect in regard to the CAA waiver. *See,* Complainant's Response in Opposition

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[1] Section 113(d)(1) states, in pertinent part, that:

> The Administrator's authority under this paragraph [to issue an Administrative action for violations] shall be limited to matters where the total penalty sought does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action.

[2] A hearing was held on the remaining pending Counts in the 2001 Complaint by the undersigned in November and December 2003 and decision on those Counts is currently pending.

[3] Hearing on the 2003 Complaint is scheduled to begin before the undersigned in October 2004.

to Respondent's Motion to Dismiss and Request for Consolidation, dated April 22, 2004 ("Complainant's Response"), at 14. If the 2003 Complaint were dismissed, then the parties could immediately proceed under the 2004 Complaint without any significant additional prehearing exchanges. Complainant's Response at 3. In furtherance of such intent, Complainant, in its Response to Respondent's Motion to Stay Proceedings in the 2003 case, requested that the undersigned, who is presiding in the 2003 case, also preside in the 2004 case. Complainant's Prehearing Exchange Exhibit 1 (Respondent's Motion Exhibit C) at 14. Respondent's Answer to the 2004 Complaint, filed on March 31, 2004, incorporated its Answer to the 2003 Complaint.

On April 2, 2004, Respondent filed a Motion to Dismiss Complaint in Docket No. CAA-05-2004-0015 as Impermissible Duplicative Litigation ("Respondent's Motion") and Memorandum in Support ("Respondent's Memorandum"), requesting dismissal of the 2004 Complaint as impermissibly duplicative of the 2003 Complaint. On April 20, 2004, Complainant filed its Response in Opposition to Respondent's Motion to Dismiss and Request for Consolidation, requesting that the 2004 Complaint be consolidated with the 2003 Complaint ("Complainant's Response"). In reply, Respondent objected to the motion to consolidate and reaffirmed the motion to dismiss. Respondent's Reply in Support of its Motion to Dismiss Complaint in Docket No. CAA-05-02004-015 as Impermissible Duplicative Litigation, dated April 30, 2004, at 8 ("Respondent's Reply").

II. Arguments of the Parties

Respondent argues that the 2004 Complaint is virtually identical to the 2003 Complaint and should, therefore, be dismissed as duplicative. Respondent's Memorandum at 5. Strong Steel contends that the Rules of Practice governing these proceedings, 40 C.F.R. Part 22 ("Rules of Practice"), do not authorize Complainant to pursue two complaints simultaneously against the same respondent for the same violations before the same tribunal. *Id*. at 6-11. Respondent cites to Federal court opinions upholding dismissal of duplicative complaints, including *Oliney v. Gardner*, 771 F.2d 856 (5th Cir. 1985) and *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221 (7th Cir. 1993).

Moreover, Respondent argues that two identical pending actions are wasteful of the parties' and judicial resources, unfairly vexatious to Respondent, and cause Respondent to incur unnecessary legal costs. It suggests that Complainant should have either proceeded with the 2003 Complaint alone, or moved to withdraw the 2003 Complaint so it could file a new complaint. Respondent cites other administrative proceedings in which EPA moved to withdraw complaints to pursue injunctive and/or penalty relief in a judicial forum. Respondent urges that if the 2003 Complaint is withdrawn or dismissed and some alleged violations become time-barred when EPA files a new complaint thereafter, then EPA must suffer the consequence of its "dilatory handling of this case and its persistently cavalier attitude about complying with [CAA] § 113(d)" despite warnings from Respondent in the 2001 case that the waiver may be defective, and its delay in filing the 2003 Complaint.

In opposition to the Motion, Complainant distinguishes the administrative complaints, cited by Respondent, that were withdrawn to pursue injunctive relief in judicial courts. In a footnote, without citing to any authority, Complainant asserts that presiding judges consider whether there is new information, change in circumstances, or new or continuing violation to determine whether to grant withdrawal of a complaint under Section 22.17 of the Rules of Practice. Complainant's Opposition n. 2. EPA distinguishes the Federal court opinions cited by Respondent by asserting that dismissal is discretionary, and appropriate only where there is a waste of judicial resources, such as when cases are before two different courts or two different judges with the possibility of two separate trials, or where the movant attempts to avoid Federal Rule of Civil Procedure (FRCP) 15 or egregiously violates a court's rules, or acts in secrecy, none of which is the case in the present matter. *Id.* at 4-5, 19. Complainant states that it did not seek a procedural advantage to avoid Respondent's Motion to Stay the 2003 Complaint, nor did it seek to avoid the jurisdictional issue presented as to the 2003 Complaint. *Id.* at 19.

Complainant also argues that the two cases are not duplicative due to differences between facts supporting jurisdiction, pertaining to obtaining a waiver from the EPA Administrator and from the Department of Justice ("DOJ"). *Id.* at 5-8. EPA points out that there were different signatories with different authority to authorize the waiver. While for the 2003 Complaint the waiver *request* was signed by George Czerniak, Branch Chief for Air Enforcement Branch of the Air and Radiation Division, the waiver request for the 2004 Complaint was signed by Stephen Rothblatt, Director of Air and Radiation Division. Complainant states that the 2003 waiver was *approved* by the Region V Director for Air and Radiation Division *after* officials at EPA headquarters and DOJ approved the action, while the 2004 waiver was approved by officials at EPA Region V *prior to* approval by officials at EPA Headquarters. *Id.* at 7-8.[4]

Complainant does not wish to withdraw the 2003 Complaint, because it disagrees with the applicability of Judge Gunning's decision in *Julie's Limousine* to the 2003 Complaint, it believes it has a proper CAA waiver, and it wants to avoid delay (presumably of refiling prehearing exchanges in the 2004 case) if the 2003 case is dismissed. Complainant points out that Respondent has not moved to dismiss the 2003 Complaint. Complainant noted in other pleadings that the 2004 Complaint "may reduce the loss of a proposed penalty by virtue of operation of the statute of limitations" and that "the expiration of the limitations period is minimized." Complainant's Prehearing Exchange Exhibit 1 (Respondent's Motion Exhibit C) nn. 8, 12. However, denying that it filed the 2004 Complaint due to concern about the statute of limitations, which will not run for a number of years, Complainant asserts that the harm it was concerned with was that to the environment as a result of Respondent's past and present practices as to handling small appliances and motor vehicles. Complainant' Response at 14 and n. 12; Complainant's Prehearing Exchange Exhibit 1 (Respondent's Motion Exhibit C) at 7.

Complainant asserts that if the cases are consolidated, no significant additional costs or

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[4] The process EPA pursued to obtain a waiver in the 2003 Complaint is described in *Strong Steel Products, LLC*, Docket No. CAA-5-2003-0009, 2004 EPA ALJ LEXIS 12 (April 30, 2004), at *24-29.

confusion would result, and the parties and this Tribunal's resources would be saved. Complainant asserts that consolidation is the proper procedure for cases which are almost identical, and would allow the matter to proceed to a hearing and disposition on the merits.

In its Reply, Respondent asserts that the fundamental objections to duplicative litigation is not cured by consolidating the cases. Respondent asserts that courts have denied requests for consolidation of a duplicative case as a means to avoid statute of limitations problems, citing to *Fawcett v. Ditkowski*, 1992 U.S. Dist. LEXIS 11209 (N.D. Ill. July 24, 1992). Respondent characterizes EPA's purpose for its duplicative filing as "hedging its bets on the outcome of the EPA's forthcoming decision in *Julie's Limousine*," "buy[ing] insurance against the statute of limitations." Respondent's Reply at 4. Respondent asserts that this situation is substantially the same as in *Fawcett v. Ditkowski* where the plaintiffs attempted to consolidate a duplicative complaint to avoid Federal Rule of Civil Procedure (FRCP) 15 because they missed the deadline to amend the first complaint.

Respondent asserts that consolidation would be less efficient than dismissal of the 2004 Complaint. Respondent explains that consolidation does not cause the cases to merge, but that separate dockets must be maintained, and the prehearing orders and prehearing exchanges in the 2003 Complaint could not affect Respondent's rights in the 2004 Complaint. Respondent queries how parties could be bound by orders and discovery in a case in which the court lacked jurisdiction. Respondent argues that each party to the 2004 Complaint would be entitled to the mandatory prehearing process required by 40 C.F.R. § 22.19. Respondent adds that if the parties were limited to the prehearing exchanges in the 2003 case, which do not include the waiver documents in the 2004 case, the 2004 Complaint would not survive, and nevertheless would be the kind of defective *ad hoc* procedure criticized by the Eleventh Circuit in *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1246-7 (11th Cir. 2003). If Complainant were allowed to file new prehearing exchange information, then Respondent also must be allowed. It is inappropriate, Respondent argues, for courts to consolidate a case when one is at the pretrial stage and the other is far more advanced.

Respondent suggests that it has not moved to dismiss the 2003 Complaint because it believes that it would be premature until EAB issues a decision in *Julie's Limousine*. Once that decision is issued, Respondent urges, EPA can either proceed on the 2003 Complaint or file a new complaint.

III. Discussion and Conclusion

Dismissal of complaints is governed by Section 22.20 of the Rules of Practice, which provides, in pertinent part:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding, without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds

which show no right to relief on the part of complainant.

40 C.F.R. § 22.20(a). In order to prevail on its Motion under this Rule, Respondent must show that Complainant has *no right to relief* as to the 2004 Complaint, on the basis that it is duplicative of the 2003 Complaint. Respondent, however, does not cite to this Rule, perhaps recognizing that its request for dismissal is a matter of the judge's discretion rather than a matter of an entitlement to dismissal. Accordingly, Respondent has cited to 40 C.F.R. § 22.4(c)(10), which provides discretionary authority for the presiding judge to "Do all other acts and take all measures necessary for the maintenance if order and for the efficient, fair and impartial adjudication of issues arising in proceedings." Respondent's Memorandum at 6. The general rule in Federal court is that a duplicative complaint "*may* be dismissed 'for reasons of wise judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal court' . . . [and] [d]istrict courts are accorded 'a great deal of latitude and discretion in determining whether one action is duplicative of another.'" *Serlin v. Arthur Andersen & Co.,* 3 F.3d at 223 (quoting *Ridge Gold Standard Liquors v. Joseph E. Seagram*, 572 F. Supp. 1210, 1213 (N.D. Il. 1983)).

The first question to address, whether the 2003 and 2004 Complaints are duplicative, is answered in the affirmative. Federal courts have held that "generally, a suit is duplicative if the 'claims, parties and available relief do not differ significantly between the two actions.'" *Serlin*, 3 F.3d at 223 (7th Cir. 1993)(quoting *Ridge Gold Standard Liquors*, 572 F. Supp. at 1213). The claims, parties and requested relief are the same in the 2004 Complaint as in the 2003 Complaint. *See*, Complainant's Prehearing Exchange Exhibit 1 (Respondent's Motion Exhibit C) at 14. The statements in the two Complaints (¶ 51) as to approval by the Attorney General and EPA Administrator are identical. The difference between the 2003 and 2004 cases in underlying facts with respect to such approval, and the jurisdictional issue arising therefrom, does not show that the claims, parties or available relief significantly differ.

Any argument that the available relief would differ, that is, would not be available from the 2003 Complaint if it was dismissed, is not supported by Federal court opinions which upheld dismissal of a complaint as duplicative even where the plaintiff may find the first complaint also dismissed for having failed to follow an applicable rule. *Serlin*, 3 F.3d at 224 (plaintiff failed to serve complaint according to FRCP 4(j)); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985)(plaintiff failed to establish diversity jurisdiction in first complaint and did not amend it to establish jurisdiction).

The next question is whether there are "any special factors counseling for or against the exercise of jurisdiction" in regard to the 2004 Complaint. *Calvert Fire Ins. Co. v. American Mutual Reinsurance Co*., 600 F.2d 1228, 1234 (7th Cir. 1979). In *Serlin,* the plaintiff argued that there was a special factor because his case could have been barred by the statute of limitations if both complaints were dismissed. The Seventh Circuit nevertheless held that the district court's dismissal and determination that no special factors countervailed dismissal was not an abuse of discretion. However, in that case, unlike the present case, the court considered that there were two federal judges sitting on the same court devoting their scarce resources to the duplicative

cases. In *Oliney*, the plaintiff deliberately attempted to circumvent the local rule requiring notice to the court of a duplicative complaint, and to circumvent FRCP 15 by filing a new complaint instead of timely amending the first complaint, and he kept secret the filing of the second complaint from the court as well as the defendants. 771 F.2d at 859. In *Fawcett v. Ditkowski,* 1992 U.S. Dist LEXIS 11209 *11 (N.D. Ill. 1992), the plaintiff feared that a motion to amend would not be ruled on until after the statute of limitations had run, but the court dismissed the second complaint, similarly being concerned about duplicative complaints before two different judges, and the plaintiff failing to pursue amending the first complaint, and instead filing a second complaint, thereby attempting to circumvent FRCP 15. Moreover, it appears that only the claims which were added in the second complaint were at risk of loss; the first complaint would still remain viable, albeit without the additional claims, after the court dismissed the second complaint with prejudice.

In the present case, the two Complaints are assigned to the same presiding judge, and do not involve the same waste of resources that the courts in *Serlin, Oliney* and *Fawcett* were concerned with. EPA is not attempting to circumvent a procedural rule, as amendment of the 2003 Complaint would not cure the jurisdiction issue. Withdrawal of the 2003 Complaint may not be necessary if either Judge Gunning's decision in *Julie's Limousine* is reversed or if it is found not applicable to the facts as to the waiver obtain in regard to the 2003 Complaint.

EPA faces the loss of both Complaints if the Motion to Dismiss is granted. If the 2003 Complaint is dismissed as well as the 2004 Complaint, EPA would have to start all over again by filing a new (4th) CAA complaint, which would be a very inefficient use, or waste, of parties' and judicial resources. In addition to consideration of this possible outcome, and EPA's option of withdrawing the 2003 Complaint, a determination as to "special factors counseling for or against the exercise of jurisdiction" in the 2004 Complaint requires consideration of alternatives to dismissal, such as consolidation.

Respondent argues stoutly that a party has no right to maintain two duplicative actions at the same time and that a party cannot file such complaints to expand the procedural rights he would otherwise enjoy, citing *Oliney*, 771 F.2d at 859, which in turn quotes *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3rd Cir. 1977). Respondent's Memorandum at 9. Respondent also points out that the district court not only dismissed the second complaint but also rejected plaintiffs' request to consolidate the two duplicative cases in *Fawcett v. Ditkowski*. However, in that case, the court stated that to accept consolidation "would be for all practical purposes to announce to [the judge presiding in the first case] that she is incapable of ruling on a Motion brought before her Court. We shall not grant, on [her] behalf, the Motion to Amend that the Plaintiffs had originally withdrawn." 992 U.S. Dist LEXIS 11209 at *11. That situation does not exist in the present case.

In *Walton v. Eaton*, the Third Circuit considered not only the court's alternatives of dismissal, consolidation, and staying the second complaint. That Court found that the district court's decision to consolidate the duplicative complaints was "obviously unobjectionable." 563 F2d at 71. The Third Circuit stated as follows:

> When a court learns that two possibly duplicative actions are pending on its docket, consolidation may be the most administratively efficient procedure. If a second complaint proves to contain some new matters, consolidation – unlike dismissal of the second complaint without prejudice or staying the second action – will avoid two trials on closely related matters. If, on the other hand, the second complaint proves to contain nothing new, consolidation of the two actions will cause no harm *provided* that the district court carefully insures that the plaintiff does not use the tactic of filing two substantially identical complaints to expand the procedural rights he would have otherwise enjoyed. In particular, the court must insure that the plaintiff does not use the incorrect procedure of filing duplicative complaints for the purpose of circumventing the rules pertaining to amendment of complaints, FRCP 15, and demand for trial by jury.

563 F.2d at 70. According to the Third Circuit's opinion in *Walton*, consolidation of the 2003 and 2004 Complaints would be appropriate provided that EPA would not enjoy any procedural rights stemming from the 2003 Complaint which would be precluded or diminished in the 2004 case.

Not only are there are viable alternatives to dismissing the 2004 Complaint, but there is no significant saving of judicial resources by dismissing it. There is a potential for great prejudice to Complainant in dismissing the 2004 Complaint, if the 2003 Complaint is dismissed on jurisdictional grounds. Complainant's failure to withdraw the 2003 Complaint does not at this point unduly burden the docket, particularly where, as discussed below, the 2004 case is stayed. Indeed, if the 2003 Complaint is dismissed and the 2004 Complaint proceeds, the parties' and judicial resources could be saved by an order providing that the prehearing exchange filed in the 2003 case be simply reaffirmed and constructively refiled in the 2004 case without the necessity of submitting duplicative copies of the same prehearing exchange documents. Contrary to Respondent's rigid view of the prehearing process, this would not be contrary to the Rules of Practice, and both parties would have the opportunity to supplement their prehearing exchanges and conduct any other discovery they deem appropriate under Rule 22.19(e) and (f). *See*, 40 C.F.R. § 22.19(a)("In accordance with an order issued by the Presiding Officer, each party shall file a prehearing exchange.").[5]

Although the 2003 and 2004 Complaints are duplicative, it is concluded that there are special circumstances which counterbalance any interest in dismissing the 2004 Complaint for judicial efficiency. Accordingly, the motion to dismiss this proceeding is denied.

As to consolidation, the Rules of Practice provide:

> The Presiding Officer . . . may consolidate any or all matters at issue in two or more proceedings . . . where: there exist common parties or common questions of

[5] To the extent that Respondent may be prejudiced by having had to expend resources to file motions and other documents in more than one case alleging the same violations, it may argue that such prejudice be taken into account in determining any penalty against it.

> fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

40 C.F.R. § 22.12(a).

The fact that the 2003 and 2004 Complaints allege the same violations suggests that consolidation might simplify and expedite consideration of the issues pertaining to the 2004 case. However, to have both Complaints proceed would be less efficient than simply staying the 2004 Complaint until the 2003 Complaint is adjudicated.

An order to stay is largely a discretionary matter and "incident to [the court's] power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *see also Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Ray and Jeanette Veldhuis*, Docket No. CWA-9-99-0008, 2002 EPA ALJ LEXIS 27 (ALJ 2002); *John Crescio*, Docket No. 5-CWA-98-004, 1999 EPA ALJ LEXIS 25 (ALJ 1999).

Therefore this proceeding shall be stayed pending a disposition of the waiver issue in the 2003 Complaint.

ORDER

1. Respondent's motion to dismiss is hereby **DENIED**.

2. Complainant's request to consolidate is hereby **DENIED**

3. This proceeding is hereby **STAYED** until further notice.

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Susan L. Biro
Chief Administrative Law Judge

Dated: June 21, 2004
Washington, D.C.