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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
John Crescio,)	DOCKET No. 5-CWA-
98-004)	
)	
Respondent)	

ORDER ON JOINT MOTION FOR STAYING PROCEEDINGS

I. Background

This proceeding was initiated on August 21, 1998 by the filing of a Complaint by Region V of the United States Environmental Protection Agency against Respondent, John Crescio. The Complaint charged Respondent with two counts of violating the Clean Water Act (CWA) by discharging pollutants into navigable waters of the United States without a permit issued under Section 404 of the CWA . Specifically, the Complaint alleges in Count I that Respondent is the owner of wetland property, that pursuant to contract with Slinger Drainage, Inc., drain tile was placed on the property in 1991 using a Hoes Trenching Machine, resulting in a discharge of dredged material into wetlands, and that Respondent had no permit for such discharge. In Count II, the Complaint alleges that in 1995, Respondent reconstructed and extended a drainage ditch on the property using a backhoe, resulting in a discharge of dredged material into emergent wetlands, and that Respondent had no permit for such discharge. The Complaint alleges that the dredged material which was discharged has remained in place on the site. The penalty proposed in the Complaint is \$60,000.

Respondent filed an Answer to the Complaint, denying the alleged violations and asserting several defenses. The parties entered into an Alternative Dispute Resolution proceeding to resolve this matter, but no settlement was reached. The undersigned was designated to preside in this matter on January 14, 1999, and on January 22, 1999, a Prehearing Order was issued, directing the parties, *inter alia*, to file either a Consent Agreement and Consent Order by March 19, 1999, or prehearing exchange documents.

On February 12, 1999, the parties filed a Joint Motion for Staying Proceedings. The parties stated therein that the issue of whether soil displaced by a Hoes Trenching Machine is a discharge under Section 301(a) of the CWA is identical to the legal issue currently on appeal before the Environmental Appeals Board (EAB) in *Slinger Drainage, Inc.*, CWA Appeal No. 98-10. The parties assert that the EAB's decision in that case will be dispositive of the present matter, and urge that it should be stayed pending the EAB's decision in *Slinger Drainage*. The parties assert that a stay would avoid duplicative litigation, and to help conserve judicial resources and the parties' resources. The parties suggest that if the EAB reverses the Initial Decision in *Slinger Drainage*, that Complainant may move to dismiss Count I of the Complaint, and if the EAB upholds the Initial Decision, the parties may settle this matter without litigation.

II. Discussion

The parties correctly acknowledge that a stay of proceedings is a matter of discretion for the presiding judge. See, *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). In deciding whether to stay a proceeding, EPA administrative law judges have considered the following factors: whether or not the stay will serve the interests of judicial economy, result in unreasonable or unnecessary delay, or eliminate any unnecessary expense and effort; the extent, if any, of hardship resulting from the stay, and of adverse effect on the judge's docket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing. *Unitex Chemical Corp.*, EPA Docket No. TSCA-92-H-08, 1993 EPA ALJ LEXIS 146 (ALJ, Order Staying Proceedings, March 18, 1993)(granting a stay of one year or until decision by D.C. Circuit, whichever occurs first, where D.C. Circuit had already scheduled briefs and oral argument, and decision would affect most or all claims in the administrative proceeding); citing, *General Motors Corp.*, EPA Docket No. II-TSCA-PCB-91-0245 (ALJ, Order Staying Proceedings, February 5, 1993); *Fountain Foundry Corp.*, EPA Docket No. CAA-0005-94, 1994 EPA ALJ LEXIS 71 (ALJ, Order Denying Motion to Stay Administrative Proceedings, September 30, 1994)(motion to stay pending district court decision on respondent's motion for declaratory judgment on legal issue denied, where respondent did not demonstrate why judgment on the issue in administrative proceeding would not adequately and more efficiently address it, and where unreasonable delay may result); *Hall-Kimbrell Environmental Services, Inc.*, EPA Docket No. TSCA-II-ASB-92-0235 et al., 1992 EPA ALJ LEXIS 216 (ALJ, Order Denying Motion for Stay and Granting Extension of Time)(motion for stay pending district court decision on complaint against EPA filed by the respondent denied, where administrative proceedings were close to being set for hearing, both forums had jurisdiction over the same question of law, and administrative complaints were filed first).

A federal trial court generally may not grant a stay so extensive that it is "immoderate or indefinite" in duration, and a trial court abuses its discretion by issuing "a stay of indefinite duration in the absence of a pressing need." ⁽²⁾ *Landis*, 299 U.S. at 255, 257. In determining whether to stay proceedings indefinitely, a "pressing need" is identified by balancing interests favoring a stay against interests frustrated by a stay, but "[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases before it." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413 (Fed. Cir. 1997) (Court of Federal Claims' concern for avoiding duplicative litigation and conserving judicial resources was not "pressing need" sufficient to stay proceedings pending "speculative and protracted" quiet title suits). A motion to stay was denied where a similar issue pending before another court had the propensity to be dispositive of the case, but there were other issues in the case which also were potentially dispositive. *Sam Galloway Ford, Inc. v. Universal Underwriters Insurance Co.*, 793 F.Supp. 1079 (M.D. Fla. 1992). Similarly, where a legal issue in an administrative proceeding was pending on appeal in another proceeding before the EAB, but the respondent had other viable legal and factual defenses not based on that issue, a motion to stay the proceeding was denied. *Chem-Met Services, Inc.*, EPA Docket No. RCRA-V-W-011-92, 1992 EPA ALJ LEXIS 365 (ALJ, Order Denying Motion for Stay, October 16, 1992).

In this proceeding, the parties request a stay for an indefinite duration, inasmuch as the time at which the EAB will issue a decision in *Slinger Drainage* is unknown. The appeal in that case was filed on or about September 25, 1998. As of the date of this Order, the EAB has neither scheduled *Slinger Drainage* for oral argument nor set a briefing schedule. Therefore, either a "pressing need" must be demonstrated by the parties, or the stay should be limited in duration.

The present case has much in common with *Slinger Drainage*. Not only is the same violation alleged, *i.e.*, discharging dredged material into a wetland without a permit, but the same method of discharge is alleged in Count I as in *Slinger Drainage*, namely removal and deposit of dredged material into a wetland using a Hoes Trenching Machine, for the same purpose of installing drain tile, performed by the same company, *Slinger Drainage, Inc.*, which operated the machine. In both cases, the respondents' position is that the use of the Hoes Trenching Machine did not cause the "discharge of a pollutant" within the meaning of the CWA. The parties in the two cases are represented by the same counsel.

Thus, the expense and effort on the part of the parties and their counsel in preparing and filing prehearing exchanges and in litigating this case may be unnecessary in light of the appeal before the EAB in *Slinger Drainage*.

Respondent in this case asserts some defenses which go beyond the issues raised on appeal in *Slinger Drainage*, such as the defense that the site in question is not a wetland as pertaining to the time alleged in the Complaint. However, where Respondent has not opposed a stay on the basis of its additional defenses, denial of a stay on that basis would be unwarranted. Denial of a stay is also not supported by the fact that the allegations of Count II of the Complaint differ to some extent from those in Count I, because many of Respondent's defenses appear to be related to both counts, and the EAB's decision in *Slinger Drainage* may have some bearing on Count II.

However, the parties do not demonstrate a "pressing need" for a stay of indefinite duration, which after some time may become an unreasonable delay, and may adversely affect the presiding judge's docket. The Administrative Procedure Act requires that "within a reasonable time," the agency must "proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Thus, a stay of this proceeding until the EAB issues its decision, but no longer than seven months, ⁽³⁾ is appropriate and best serves the interests of judicial economy.

III. Order

1. The Joint Motion for Staying Proceedings is **GRANTED**. This proceeding is stayed until a decision is issued by the Environmental Appeals Board in *Slinger Drainage, Inc.*, or until September 27, 1999, whichever occurs first.
2. In the event a decision in *Slinger Drainage* is not issued by September 27, 1999, the parties shall prepare for hearing and shall serve prehearing exchange documents, as directed in the Prehearing Order dated January 22, 1999, in accordance with the following schedule:

October 1, 1999 Complainant's Initial Prehearing Exchange

October 22, 1999 Respondent's Prehearing Exchange

November 3, 1999 Complainant's Rebuttal Prehearing Exchange.

3. Respondent shall preserve all records which relate in any way to matters referenced in the Complaint without regard to the age of the document, until the conclusion of this proceeding.
4. The Environmental Protection Agency shall preserve all documents in its files that are pertinent to the subject proceeding, until the conclusion of this proceeding.
5. In the event any potential witnesses for either party may be unavailable to

appear at the hearing, the party should obtain, for possible use at the hearing, the affidavit of such potential witnesses while he or she is still available. See, 40 C.F.R. § 22.22(d).

6. The parties shall continue their good faith efforts to settle this matter.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 26, 1999
Washington, D.C.

1. The docket number appearing on the motion is not the same as that appearing on the Complaint and Answer in this proceeding, EPA Docket Number 5-CWA-98-004, but the name of the Respondent, date of Complaint, and facts asserted in the motion match those of this proceeding. The docket number appearing on the motion is assumed to be a typographical error.
2. Federal court practice is frequently used as guidance in administrative proceedings.
3. Seven months hence would be one year from the date of appeal of *Slinger Drainage*.

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