

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

ALASKA PULP CORPORATION; AND) DOCKET NO. 10-97-0042-CAA
TECHNIC SERVICES, INC.,)
)
RESPONDENTS)

ORDER DENYING JOINT MOTION FOR STAY OR IN THE ALTERNATIVE DISMISSAL WITHOUT
PREJUDICE TO REFILE

The parties' joint Motion for Stay or in the Alternative Dismissal without Prejudice to Refile is **Denied**.⁽¹⁾ In this motion filed on March 20, 1998, the parties move that the instant proceeding be stayed for a period of eighteen (18) months to allow for conclusion of a pending criminal investigation and possible criminal proceeding. In the alternative, the parties request that this proceeding be dismissed without prejudice to refile.

In support of the Motion for Stay or in the Alternative Dismissal without Prejudice to Refile, the parties state that on February 17, 1998, a federal grand jury subpoenaed the Respondent to produce records relating to the same conduct that is at issue in the instant proceeding. The parties maintain that a stay is appropriate for reasons of judicial efficiency and fairness and that the better approach in this situation is to allow the criminal investigation and any potential criminal proceeding to continue in advance of resolving the civil claims. According to the parties, each for its own reasons, there is a reasonable likelihood that the pending criminal investigation will be concluded within eighteen months.

The parties, in the alternative, jointly move that the instant proceeding be dismissed without prejudice to refile. Again, the parties maintain that the dismissal without prejudice would be in the interest of judicial efficiency. In connection therewith, the parties state that they have entered into an agreement to toll the statute of limitations in this case if and only if the Motion for Stay is denied and the Motion for Dismissal without Prejudice To Refile is granted.

First, I address the motion for stay. Even though the parties recognize that there is no bar to adjudicating the liability of the same conduct through both a civil and criminal proceeding, see Hudson v. United States, 118 S. Ct. 488, 495 (1997) (holding that statutorily denominated civil sanctions do not impose jeopardy on the party being sanctioned); see also United States v. Ward, 448 U.S. 242, 248 (1980), the parties maintain that a stay is appropriate in this case for reasons of judicial efficiency and fairness. However, I am not persuaded that a stay is appropriate in the instant matter.

The regulations governing these proceedings, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq., direct the Presiding Officer to avoid delay in the proceedings governed by the Rules.⁽²⁾ 40 C.F.R. § 22.04 (c). In the instant matter, the parties request an eighteen month stay on the belief that the pending criminal investigation will be concluded in that period of time. First, I note that an eighteen month delay in a civil administrative proceeding is significant. Second, there is no assurance that the pending criminal investigation, which recently commenced, will be concluded in eighteen months. Moreover, the parties do not argue that any criminal proceeding that may result will be concluded within eighteen months. Accordingly, to avoid delay in the instant proceeding, the motion for stay is denied. Id.

I now turn to the alternative motion for dismissal without prejudice to refile. As pointed out by the parties in the memorandum in support of the motion, Section 22.14(e) of the Rules of Practice, 40 C.F.R. § 22.14 (e), provides that, after the filing of an answer, the complainant may withdraw the complaint without prejudice upon motion granted by the Presiding Officer. However, the parties have moved for "dismissal without prejudice to refile," a motion governed by Section 22.20 of the Rules of Practice, 40 C.F.R. § 22.20, rather than for withdrawal of the complaint without prejudice pursuant to Section 22.14(e).

The inconsistent language and reasoning employed by the parties in requesting the dismissal, coupled with the citation of Section 22.14(e), leads the undersigned to believe that the parties may have incorrectly identified the action sought. In this regard, I note that the regulation governing a dismissal, found at Section 22.20 of the Rules of Practice, provides, in pertinent part, that "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action 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 the complainant." 40 C.F.R. § 22.20(a). This regulation further provides that if a decision to dismiss is issued as to all the issues and claims in the proceeding, that decision constitutes an initial decision of the Presiding Officer. 40 C.F.R. § 22.20(b). Therefore, if an action is dismissed, there could be no administrative refiling of the complaint. On the other hand, the regulation governing withdrawal of the complaint, found at Section 22.14(e), provides that after the filing of an answer, the complainant may withdraw the complaint without prejudice, only upon motion granted by the Presiding Officer.

As noted above, even though the motion before me indicates that the parties are seeking to withdraw the complaint without prejudice pursuant to Section 22.14(e) of the Rules of Practice rather than to move for dismissal pursuant to Section 22.20 and that such confusion is simply an incorrect identification of the action sought, I cannot substitute my judgment for that of the parties and move for such action on their behalf. Under such circumstances, the Motion for Dismissal without Prejudice to Refile is denied pending further clarification by both parties. However, upon clarification by the parties, a motion for withdrawal of the complaint without prejudice or a renewed motion for dismissal will be readily entertained by the undersigned. [\(3\)](#)

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 3-26-98
Washington, DC

1. The Environmental Protection Agency and Respondent Alaska Pulp Corporation have executed a Consent Agreement and Consent Order which was filed April 10, 1997. Henceforth in this order, the term "Respondent" refers to Respondent Technic Services, Inc.

2. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. Section 22.03 (a) of the Rules of Practice, 40 C.F.R. § 22.03 (a).

3. The undersigned's ruling on the parties' earlier joint Request for Postponement of Hearing is held in abeyance pending clarification of the parties' Motion for Dismissal and the undersigned's ruling thereon.