

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)	
)	
Environmental Protection)	Docket No. TSCA-3-2001-0331
Services, Inc.,)	
)	
Respondent)	

ORDER DENYING RESPONDENT'S
MOTION FOR PROTECTIVE ORDER AND
ENJOINING ADHERENCE TO RULES

The Environmental Protection Services, Inc. ("EPS"), has filed a motion seeking three-fold relief. First, EPS asks that the U.S. Environmental Protection Agency ("EPA") be prohibited from making any public statements relating to this case, pending its resolution. Second, EPS asks that EPA be enjoined from contacting its customers. Third, the respondent asks that EPA be directed to adhere to the "administrative procedures."¹ EPA has filed an opposition. As set forth below, EPS's motion is *denied* as to all requests for relief.

In support of its requested relief, EPS is alleging prosecutorial misconduct. Respondent asserts that on several occasions, while this case was in the Alternative Dispute Resolution process, EPA improperly contacted its most important client.² EPS asserts that the proper course for EPA to obtain this third-party information would have been through the discovery procedures set forth at 40 C.F.R. 22.19(e) of the Consolidated Rules of Practice.

EPS's charge that EPA acted improperly in contacting one of its clients is rejected. The provisions of Procedural Rule 19(e), upon which respondent relies, lay out the ground rules for discovery between "parties." Rule 19(e) does not govern the relationship with

¹ Respondent alternatively requests that this matter be referred "to an appropriate Federal Court for disposition, as EPS believes it will be unable to obtain a fair, impartial and equitable hearing and disposition by and through the existing Agency mechanisms." EPS Mem. at 9. Setting aside these concerns, which the undersigned does not share, to the extent that EPS is requesting that this matter be referred "to an appropriate Federal Court," its request simply cannot be accommodated. The undersigned is aware of no statutory authority under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 *et seq.*, for such a referral, nor has any such authority been cited by EPS.

² EPS broadly accuses EPA of breaching "the established ADR protocols," a charge which the Agency denies. Respondent, however, fails to explain specifically just what protocols were breached and the relevance of the alleged misconduct to the present litigation.

respect to EPA, who is bringing the present action, and any non-party, even if that non-party is a customer of the respondent. Moreover, Rule 19(e) is a procedural rule only; it can not be stretched to preclude EPA from exercising its investigatory authority under TSCA. *See, e.g.*, 15 U.S.C. § 2610. That investigatory authority includes the kind of information gathering technique used by EPA in contacting respondent's client in the first place. If anything, the Rules of Practice cut in favor of EPA. Rule 19(e)(5) states, in part, "Nothing in this paragraph (e) shall limit ... EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information." 40 C.F.R. 22.19(e)(5).

EPS's request that EPA be enjoined from making any public statements also is rejected. In that regard, respondent doesn't even recite the EPA public statements that it finds objectionable. Instead, it seeks a blanket order directing EPA not to comment publicly on this case until the matter is fully and finally resolved. While EPS cites several cases in an attempt to support its view, cases involving the issuance of injunctions which EPA didn't even attempt to distinguish, respondent fails to offer any persuasive argument as to why this court should even consider the sanction requested. All that respondent offers is the suggestion that it will suffer economic injury if EPA were allowed to publicly comment on this case. The fact that any such economic injury may occur, and that conclusion is speculative at best, is far outweighed in this case by EPA's need to inform the public as to how the Agency is carrying out its mission to enforce TSCA.

Accordingly, respondent's Motion For Protective Order Prohibiting Public Statements And Enjoining Adherence To Administrative Rules is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: January 24, 2002
Washington, D.C.