

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
ENVIRONMENTAL PROTECTION SERVICES, INC.)	Docket No. TSCA-03-2001-0331
)	
Respondent)	

**ORDER DENYING MOTION TO STRIKE
DEFENSE OF SELECTIVE PROSECUTION**

The present Order comes upon Complainant’s “Motion to Strike Respondent’s Affirmative Defense of Selective Prosecution.” There was no deadline for motions in the prehearing orders, so Complainant’s motion to strike was not untimely.

Motions to strike are not favored and will be denied unless the legal insufficiency of the defense is clearly apparent. *In the Matter of Franklin and Leonhardt Excavating Co., Inc.*, Docket No. CAA-98-011, 1998 EPA ALJ LEXIS 126, at *10 (“Order Denying Complainant’s Motion to Strike Affirmative Defenses,” Dec. 7, 1998). “If the defense depends on disputed questions of law or fact, the motion to strike should be denied.” *In the Matter of Century Aluminum of W. Va, Inc.*, Docket No. CAA-III-116, 1999 EPA ALJ LEXIS 26, at *2 (“Order Granting Complainant’s Motion to Strike Affirmative Defenses,” June 25, 1999). “However, if the defense is insufficient as a matter of law, a court may strike it.” *Id.*

Respondent has raised the affirmative defense of selective prosecution. Amended Answer at ¶ 38. In particular, Respondent alleges that it brought to EPA’s attention certain alleged violations of TSCA and its implementing regulations by another PCB disposal company that is engaged in the same business as Respondent, as well as EPA’s failures to enforce applicable environmental laws with respect to the other company. *Id.* Respondent further alleges, that as a result of its complaints, it has been inappropriately targeted and selectively singled out for inspections and enforcement. *Id.* Respondent also alleges that the proposed penalty is grossly disproportionate to its actual compliance status and that EPA’s actions have deprived and will deprive Respondent of its constitutional rights to equal protection and due process. *Id.*

Governmental authorities have a broad range on discretion in enforcing the law. *United States v. Armstrong*, 517 U.S. 456, 463-64 (1996). Due to limited enforcement budgets, government regulators must make difficult decisions about who to pursue in enforcing the law. *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir.), *cert. denied*, 519 U.S. 928 (1996); *In re B & R Oil Co.*, 8 E.A.D. 39, 52-53 (EAB 1998). However, government enforcement discretion is still subject to constitutional restrictions, such as discrimination based on race, religion, or any other arbitrary classification. *Armstrong*, 517 U.S. at 464.

To prevail in a defense of selective prosecution, the Respondent must show:

(1) defendants have been singled out while other similarly situated violators were left untouched, *and* (2) that the government selected defendants for prosecution “invidious[ly] or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights.”

United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 984-85 (E.D. Va. 1997) (emphasis added).¹

The standard for proving selective prosecution is high. Despite the difficulty in establishing this defense and regardless of EPA’s misgivings as to Respondent’s ability to show selective prosecution, EPA has not persuaded this Tribunal that Respondent should be denied even the opportunity to meet this high burden. As with the Supreme Court, the Environmental Appeals Board recognizes this defense. *E.g.*, *In re Newell Recycling Co.*, 8 E.A.D. 598, 634-35 (EAB 1999), *aff’d*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001); *In re B & R Oil Co.*, 8 E.A.D. at 50-53.

Additionally, Respondent points out that it is still investigating proof for its defense, including Freedom of Information Act (“FOIA”) requests. Although Complainant has provided some documentation that would tend to show that it has enforced the law against one of Respondent’s competitors on at least one occasion,² the Court declines to prohibit Respondent from all attempts to make its case for its selective prosecution defense.

ORDER

¹ *Citing to and quoting in part, United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich.), *opinion adopted by*, 955 F.2d 45 (6th Cir.) (mem.), *cert. denied*, 506 U.S. 820 (1992).

² Complainant has provided a copy of an executed Consent Agreement and Final Order (“CAFO”) against G & S Motor Equipment Company, Inc. (Compl.’s Reply to Resp’s Opposition to Motion to Strike, Attach. 1.) The Affidavit of Keith Reed, provided by Respondent, indicates that G & S Company is a PCB competitor receiving the allegedly preferential treatment. (Resp.’s Opposition to Compl.’s Motion to Strike, Ex. A at ¶¶ 28-33.)

Accordingly, Complainant's Motion to Strike Respondent's defense of selective prosecution is **DENIED**.

Carl C. Charneski
Administrative Law Judge

Issued: February 28, 2003
Washington, DC