

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of)	
)	
Tom Villegas)	
and)	
Amy Villegas,)	MOTION FOR RECONSIDERATION OF
)	ORDER ON MOTION TO STAY OR TO
Respondents)	FORWARD ORDER FOR EAB REVIEW
)	
Proceedings under Section 309(g) of the)	Docket No. CWA-07-2022-0104
Clean Water Act, 33 U.S.C. § 1319(g))	
)	

Complainant EPA Region 7 hereby moves this Tribunal for reconsideration of the Order on Agency’s Motion to Stay (“Stay Denial Order”) dated May 17, 2023, and hereby now requests a short time-limited stay of proceedings until August 8, 2023, to provide additional time to consider whether to pursue the violations alleged in the Complaint and Notice of Opportunity for Hearing (“Complaint”) in district court. If the Tribunal denies the time-limited stay request, Complainant requests that the Tribunal forward both the Stay Denial Order and the denial of the time-limited stay request to the Environmental Appeals Board (“EAB”) for review. Complainant states below the grounds for reconsideration of the earlier Stay Denial Order as modified, and its alternative grounds to request appeal.

1. On or about April 20, 2023, Respondents filed a civil action in the U.S. District Court for the District of Kansas that has been docketed as *Thomas Villegas and Amy Villegas v. Regan et al.*, No. 23-cv-2171 (D. Kan.). Respondents’ district court action challenges the proceedings in this matter as violative of the Appointments Clause of the Constitution and

Article III of the Constitution.

2. In addition, Respondents filed a Motion for Preliminary Injunction to Stay Proceedings before the Tribunal on May 5, 2023, in the District of Kansas.

3. On May 15, 2023, the Agency moved to stay this proceeding pending resolution of *Thomas Villegas and Amy Villegas v. Regan et al.*, No. 23-cv-2171 (D. Kan.). As noted in the Agency's filing, Respondent did not object to the Agency's motion to stay.

4. On May 17, 2023, this Tribunal denied the Agency's motion to stay the proceedings.

5. In denying the Agency's motion, the Tribunal explained the responsibility "to ensure that the matters on the docket move ahead in a timely fashion," and that a stay cannot be "so extensive that it is immoderate or indefinite in duration." This Tribunal reasoned, noting that the "matter has already been prolonged by several extensions of filing deadlines," that the existence of a lawsuit challenging the proceeding was not a "pressing need" and that staying the proceeding would result in "unreasonable and unnecessary delay that would not serve the interests of judicial economy." The Stay Denial Order concluded that "[f]urther indefinite delay, in the face of an unknown judicial ruling coming at an unknown time, is not warranted."

6. The Agency had not previously requested an extension. The Agency acknowledges that resolution of this matter has been delayed by four prior requests for extensions of filing deadlines due to changes in counsel and expert witnesses and that these extensions have had an adverse effect on timely movement of matters on the Tribunal's docket. In part for these reasons, Complainant now seeks a short, time-limited stay of proceedings until August 8, 2023, in order to provide sufficient time to consider pursuing the alleged claims in district court. If claims are pursued in a judicial forum, the Agency would seek to withdraw the

Complaint, which would enable closure of the matter on the Tribunal's docket. If not, then Complainant would vigorously press its allegations of violation and assessment of penalties before the Tribunal.

7. Whether to grant a motion to stay is a discretionary question "incident to [the Tribunal's] power to control its own docket." *In Re Strong Steel Products, LLC*, 2004 WL 1089217, at *1 (quoting *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citations omitted)); "It is beyond dispute that whether to grant a stay is a matter within the discretion of an Administrative Law Judge." *In the Matter of: Borla Performance Industries, Inc. (Borla)*, 2022 WL 887454, at *3 (quoting *E.I. du Pont de Nemours & Co.*, EPA Docket Nos. TSCA-HQ-2004-0016, RCRA-HQ-2004-0016, 2004 WL 2920519, at *1 (ALJ, Nov. 23, 2004)). "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254–55 (1936) (Cardozo, J.).

8. Granting this time-limited stay of approximately 11 weeks would serve the interests of judicial economy, and the short further delay would be reasonable and would eliminate any unnecessary expense and effort by the parties and the Tribunal. The prehearing exchange is not yet complete, so declining to issue a stay would require the unnecessary expenditure of further effort by Respondents, Complainant, and the Tribunal in completing that exchange, proceeding with motion practice, and preparing for a hearing — all of which might become effectively moot if the alleged violations are filed in district court and EPA withdraws the Administrative Complaint. *In Re Von Roll America, Inc.*, 2006 WL 2847399, at *1 (noting

that during a six-month stay for filing substitute action in federal court, none had been filed but settlement discussions had occurred, and granting second, three-month stay “in the interest of efficiency, conserving parties’ resources and encouraging the settlement of action”); *Borla*, 2022 WL 887454, at *3 (factors considered include “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 [d]ocket; and the likelihood of records relating to the case being preserved and of witnesses being available at the time of any hearing.”). On these grounds, and without waiver of any argument the Agency may assert before this Tribunal or in the now pending action in federal district court, the Agency moves for reconsideration of a stay in these proceedings until August 8, 2023.

8. Should the Tribunal deny this Motion for Reconsideration of the Stay Denial Order that requests a short, date certain stay of proceedings, Complainant requests that the Tribunal forward the Stay Denial Order and the denial of the Motion for Reconsideration that requests a time-limited stay to the EAB for review upon issuance pursuant to 40 C.F.R. 22.29(a). The Agency submits that both orders would be appropriate for interlocutory appeal under 40 C.F.R. 22.29(b)(1) as they would involve an important question of policy concerning for which there are substantial grounds for difference of opinion regarding both the availability of a stay during a parallel district court action challenging the constitutionality of an administrative proceeding and the appropriate strategy to resolve the allegations of violation in this matter. Furthermore, an interlocutory appeal of the Stay Denial Order and a denial of Complainant’s request for a short, time-limited stay would be appropriate under 40 C.F.R. 22.29(b)(2) because immediate appeal from the Orders will materially advance either the ultimate termination of the

proceeding or accelerate its resolution. Interlocutory review of a denial of the Agency's Motions would also be appropriate under 40 C.F.R. 22.29(b)(2) because Respondents' Motion for Preliminary Injunction to Stay Proceedings before the Tribunal is currently pending in the United States District Court for the District of Kansas and EAB review after a final Order on this Motion (as defined by 40 C.F.R. 22.3) will be inadequate or ineffective because the opportunity for relief from the Board to grant either the earlier Motion to Stay or a time-limited stay would be moot should the federal Court grant the pending Motion for Preliminary Injunction.

9. As directed by the Tribunal's Prehearing Order of September 8, 2022, the undersigned has conferred with counsel for Tom and Amy Villegas prior to filing this Motion. EPA understands Respondents to not oppose this motion.

RESPECTFULLY SUBMITTED this 24th day of May 2023.

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CERTIFICATE OF SERVICE

I certify that on the date noted below I filed via the E-Filing system the original of this Motion for Reconsideration of Order on Motion to Stay or to Forward Order for EAB Review.

A copy was sent by email to Vanessa Silke and Hannes Zetsche, counsel for Respondents, at *vsilke@bairdholm.com* and *hzetsche@bairdholm.com*, respectively.

Date: 5/24/2023

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