



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2008 SEP -3 PM 3:38
REGIONAL HEARING
CLERK

IN THE MATTER OF)
)
QUALITY ENGINEERS AND)
CONTRACTORS, INC., and) DOCKET NO. CWA-02-2007-3411
CIDRA EXCAVATION, INC.,)
)
RESPONDENTS)

ORDER DENYING MOTION REQUESTING LEAVE TO WITHDRAW
COMPLAINT WITHOUT PREJUDICE

ORDER DENYING MOTION REQUESTING DISMISSAL OF COMPLAINT OR RAPANOS
EVIDENTIARY HEARING ON CWA JURISDICTION

ORDER GRANTING TEMPORARY STAY OF PROCEEDINGS

On July 17, 2008, Complainant filed a Motion Requesting Leave to Withdraw Complaint Without Prejudice ("Motion to Withdraw") and Stay of the Prehearing Exchange Order ("Motion for Stay") in the above-captioned matter.^{1/} Complainant moves to withdraw the Complaint without prejudice pursuant to 40 C.F.R. § 22.14(d).^{2/} On

^{1/} The Complaint alleges violation of Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), and proposes the assessment of a civil administrative penalty of \$80,683 under Section 309(g)(2)(B) of the CWA. This proceeding arises under the authority of Section 309(g)(2)(B) of the Federal Water Pollution Control Act, commonly referred to as the CWA, as amended, 33 U.S.C. § 1319(g)(2)(B).

^{2/} This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. Under the Rules of Practice, a complainant may withdraw the complaint without prejudice after the filing of an answer only upon motion granted by the

(continued...)

August 14, 2008, Respondents filed with the Regional Hearing Clerk ("RHC") a Motion Opposing Request for Leave to Withdraw Complaint Without Prejudice ("Opposition to Withdrawal") and Requesting Dismissal of Complaint or *Rapanos* Evidentiary Hearing on CWA Jurisdiction ("Motion to Dismiss or Hold Evidentiary Hearing").^{2/} See 40 C.F.R. § 22.16(a), (b). Although Respondents did not file their Opposition to Withdrawal in a timely manner pursuant to 40 C.F.R. § 22.16(b), such is nonetheless before me for consideration.

On August 25, 2008, Complainant filed its Reply to Respondents' Motion Opposing Request for Leave to Withdraw Complaint Without Prejudice ("Reply to Opposition to Withdrawal") and Requesting Dismissal of Complaint or *Rapanos* Evidentiary Hearing on CWA Jurisdiction ("Response to Motion to Dismiss or Hold Evidentiary Hearing"). See 40 C.F.R. § 22.16(b).

According to Complainant's Motion to Withdraw, inspections conducted after the filing the Complaint allowed Complainant to identify new violations as well as the continuance of violations previously included in the Complaint against one or more of the Respondents. Mot. to Withdraw at 2. Additionally, Complainant asserts that information provided by Respondents in their responses to requests for information suggests that there may be additional responsible parties in this case. *Id.* Due to these developments, Complainant states that it may use its prosecutorial discretion and choose to pursue this matter as part of a civil action in Federal District Court pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b). Complainant thus moves to withdraw the Complaint without prejudice pursuant to 40 C.F.R. § 22.14(d), arguing that "continuing with the [instant] proceeding[] at this time may affect Complainant's ability to timely and justly prosecute the case." *Id.* at 2-3.

^{2/} (...continued)
Administrative Law Judge. 40 C.F.R. § 22.14(d).

^{3/} The certificate of service accompanying Respondents' aforementioned motions indicates only that such were filed with the RHC and served upon Complainant on August 14, 2008. See 40 C.F.R. § 22.5(a), (b). Respondents failed to serve such motions upon the undersigned's office. 40 C.F.R. § 22.5(b). Upon becoming aware of this oversight, Respondents submitted a copy of its motions to the undersigned's office via facsimile, received on August 15, 2008, and via mail, received on August 18, 2008. Respondents did not provide another certificate of service to reflect service upon the undersigned's office; however, such are nonetheless before me for consideration. 40 C.F.R. § 22.5(a)(3).

Respondents' Opposition to Withdrawal asserts, *inter alia*, that Complainant's motion "exposes Respondents to continued, potentially spurious demands" and subjects Respondents to the "unnecessary expense and financial harm" that could result from delaying the resolution of this matter. Resps. Opp'n. to Withdrawal at 3. Complainant's Reply to Opposition to Withdrawal again emphasizes that Complainant's Motion to Withdrawal is an exercise of its enforcement discretion and is sought "to avoid [the] unnecessary expenditures and delays that would entail if this process is continued before this Honorable Court." Reply to Opp'n to Withdrawal at 2.

Although Complainant's arguments concerning its Motion to Withdraw are somewhat persuasive, Respondents' position is more compelling. Specifically, Respondents seek finality with regard to the potential claims brought against them. Moreover, Complainant is not without a remedy. If Complainant wishes, it can withdraw the complaint with prejudice. Therefore, Complainant's Motion to Withdraw is **DENIED**.

Respondents' Motion to Dismiss or Hold Evidentiary Hearing challenges the jurisdictional basis of the Complaint in light of the tests set forth in *Rapanos v. United States Army Corps of Engineers*, 547 U.S. 715 (2006), and subsequent agency guidance jointly issued by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers. Resps. Mot. to Dismiss or Hold Evid'y H'rg at 3-4. Specifically, Respondents contest Complainant's position that the waters at issue in the instant proceeding are "navigable waters" under the CWA. *Id.* at 4-9; see 33 U.S.C. § 1342. Thus, Respondents seek to dismiss the Complaint for lack of subject matter jurisdiction or to hold an evidentiary hearing on the jurisdictional basis of this proceeding. Resps. Mot. to Dismiss or Hold Evid'y H'rg at 9.

In response to Respondents' jurisdictional challenge, Complainant argues that such is "unfounded and based on incomplete evidence." Response to Mot. to Dismiss or Hold Evid'y H'rg at 3. Complainant alleges that information contained within the proposed exhibits in this proceeding sufficiently establishes jurisdiction. *Id.* at 3-4.

Under the Rules of Practice, the undersigned may, upon motion of the respondent, dismiss a complaint only "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). The burden to prove a motion for dismissal is on the movant. 40 C.F.R. § 22.16.

A motion to dismiss under 40 C.F.R. § 22.20(a) is analogous to a motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure: "failure to state a claim upon which relief can be granted."^{4/} *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB 1993); *In re Minor Ridge, L.P.*, Docket No. TSCA-07-2003-0019, 2003 EPA ALJ LEXIS 21 (ALJ, Mar. 26, 2003) ("Order on Respondent's Motion to Dismiss"); *In re Julie's Limousine & Coachworks, Inc.*, Docket No. CAA-04-2002-1508, 2002 EPA ALJ LEXIS 74 (ALJ, Nov. 26, 2002) ("Order Denying Respondent's Motion to Dismiss and Order Denying Respondent's Motion for Bill of Particulars"). It is well established that "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); accord *Minor Ridge*, 2003 EPA ALJ LEXIS 21, at *3-4; *Julie's Limousine*, 2002 EPA ALJ LEXIS 74, at *3. For purposes of ruling on a motion for dismissal, in reviewing the sufficiency of the complaint the factual allegations made must be assumed to be true and all inferences must be drawn in favor of the complainant. *Minor Ridge*, 2003 EPA ALJ LEXIS 21, at *4; *Julie's Limousine*, 2002 EPA ALJ LEXIS 74, at *3.

Accordingly, to prevail on its Motion to Dismiss, Respondents must show that EPA's allegations, assumed to be true, do not prove a violation of the CWA as charged. *Minor Ridge*, 2003 EPA ALJ LEXIS 21, at *4; *Julie's Limousine*, 2002 EPA ALJ LEXIS 74, at *3-4. Here, Respondents have failed to do so. The factual allegations in the Complaint, taken as alleged, sustain Complainant's cause of action. Additionally, conducting an evidentiary hearing on issues of jurisdiction at this point in the proceeding is premature. At the appropriate time, I will afford the parties the full opportunity to present their cases and grant a hearing if one proves warranted. 40 C.F.R. §§ 22.15(c), .21(b); see *In re Green Thumb Nursery*, 6 E.A.D. at 786-94. Thus, Respondents' Motion to Dismiss or Hold Evidentiary Hearing is **DENIED**.

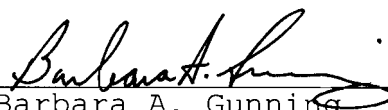
Complainant's Motion for Stay apparently seeks an indefinite stay of the prehearing exchange schedule that was set in the Prehearing Order, dated March 14, 2008, while Complainant decides whether it will pursue this matter as part of a civil action in Federal District Court pursuant to Section 309(b) of the CWA, 33

^{4/} The Federal Rules of Civil Procedure are not binding on the EPA, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *In re B&L Plating, Inc.*, CAA Appeal No. 02-08, 2003 EPA App. LEXIS 8, slip op. at 8 n.10 (EAB, Oct. 20, 2003), 11 E.A.D. 183, at 188 n.10.

U.S.C. § 1319(b). Mot. for Stay at 1-3. Complainant cites no authority in support of its motion. An indefinite stay is not an appropriate request. The Rules of Practice direct the Presiding Officer to avoid delay in the proceedings governed by the Rules.^{5/}

While an indefinite stay is not appropriate, I will consider Complainant's Motion for Stay as a motion for a temporary stay of proceedings. Considered as such, and in light of the above rulings, a temporary stay of proceedings is **GRANTED** for good cause shown. The prehearing exchange schedule set forth in the Prehearing Order is hereby amended to the following:

- December 19, 2008 - Complainant's Initial Prehearing Exchange
- January 19, 2009 - Respondents' Prehearing Exchange, including any direct and/or rebuttal evidence
- February 2, 2009 - Complainant's Rebuttal Prehearing Exchange (if necessary)



Barbara A. Gunning
Administrative Law Judge

Dated: August 29, 2008
Washington, DC

^{5/} The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. § 22.3(a).

In the Matter of *Quality Engineers & Contractors, Inc., and Cidra Excavation, Inc., Respondent.*
Docket No. CWA-02-2007-3411

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Motion Requesting Leave to Withdraw Complaint Without Prejudice; Order Denying Motion Requesting Dismissal of Complaint or *Rapanos* Evidentiary Hearing on CWA Jurisdiction; Order Granting Temporary Stay of Proceedings**, dated August 29, 2008, was sent this day in the following manner to the addressees listed below.



Mary Angeles
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Original and One Copy by Pouch Mail to:

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Copy by Regular Mail to:

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Dated: August 29, 2008
Washington, D.C.