



**BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 ARCH STREET  
PHILADELPHIA, PENNSYLVANIA 19103-2029**



<p>In The Matter of:</p> <p><b>Donald and Kathleen Bohl,</b> <b>Robert and Alice Funk,</b> <b>Brothers Lawn Care, Inc. and</b> <b>Lance Maiocco,</b></p> <p style="padding-left: 100px;">Respondents</p>	<p>:</p> <p>: Proceeding to Assess Class I</p> <p>: Administrative Penalty Under</p> <p>: Section 309(g) of the Clean</p> <p>: Water Act, 33 U.S.C. § 1319(g)</p> <p>:</p> <p>:</p> <p>: Docket No. CWA-3-99-0021</p> <p>:</p> <p>:</p>
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**ORDER ON MOTION TO JOIN ADDITIONAL RESPONDENT**

The Director of the Environmental Services Division for Region III of the United States Environmental Protection Agency (Complainant) filed the complaint in this action on July 15, 1999. Complainant asserted that the named respondents are liable for violations of the CleanWater Act, 33 U.S.C. § 1251 *et seq.*, arising out of the unpermitted wetland filling on properties owned by the Funk and Bohl respondents in Lake Township, Wayne County, Pennsylvania. Complainant proposed an administrative penalty of \$16,500 for these violations under Section 309(g)(2)(A) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(A).

The Bohl respondents filed a timely answer to the administrative complaint on August 12, 1999. No other respondents filed answers. At the same time they filed their answer, the Bohl respondents filed a motion to join an additional respondent. Complainant filed an untimely response to this motion,

stating that Complainant does not oppose the motion.<sup>1</sup> No other responses to the motion to join an additional respondent have been filed. Hence, this motion is unopposed. Nevertheless, I hereby **DENY** the motion to add an additional respondent.

First, notwithstanding the Bohl respondent's repeated invocation of the Federal Rules of Civil Procedure, I am not at liberty to apply those rules to this proceeding, although I may look to them for guidance on procedural issues. The Presiding Officer in a proceeding under 40 C.F.R. Part 22 does not have the broad powers of a Federal court judge, and can order only such relief as is authorized by the statute under which the case is commenced. *See* 64 Fed. Reg. 40162 (July 23, 1999). The Federal Rules of Civil Procedure govern the procedure in the United States district courts in all suits of a civil nature. FRCP # 1. These rules do not govern administrative proceedings in the Executive Branch of government.

Second, EPA administrative precedent very clearly shows that the remedy of joinder is not provided for under 40 C.F.R. Part 22, and that Agency adjudicators "are without authority to consider the motion" for joinder. Waterville Industries, Docket No. RCRA-I-1086, Order of Administrative Law Judge Frank W. Vanderheyden, June 23, 1988, denying respondent's motion for joinder of additional respondents. *See also* Solon Scott, Docket No. CWA-IV-404-89-104, Order of Administrative Law Judge Frank W. Vanderheyden, November 22, 1989, denying respondent's motion for joinder of additional respondent in a wetlands case. Judge Vanderheyden observed that

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<sup>1</sup> Because Complainant's response was untimely and provided no explanation for its untimeliness, I am disregarding it. This does not affect the outcome of my Order.

neither 40 C.F.R. Part 22 nor the Clean Water Act provide for joinder and that, “EPA (*i.e.* the Complainant) has enforcement discretion to proceed against those respondents that it deems responsible for the violations.” In other EPA administrative cases agency adjudicators have considered motions for joinder, and have denied such motions where respondent failed to show that joinder of other persons was necessary to effectuate the purposes of the statute,<sup>2</sup> where other viable mechanisms exist for other parties to participate in the proceeding,<sup>3</sup> and where there was an insufficient nexus between the parties and joinder would work a prejudice against one or more of the parties.<sup>4</sup> In considering a motion to amend the complaint, one Agency adjudicator noted that governing procedures lacked provision for joinder or non parties, and then looked to FRCP # 19 for guidance. He determined that the non-party was “a necessary party for this action” and directed that the complaint be amended to include this person (and dismissed an original respondent).<sup>5</sup>

In this case, Complainant has moved to amend the complaint. This motion is unopposed, and I am granting that motion in a separate order issued today. That order will allow Complainant to proceed against several non-parties instead of the present respondents. If Complainant is able to

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<sup>2</sup> Lancaster Metals Science Corp., Docket No. RCRA-III-137, Decision of Chief Judicial Officer Ronald L. McCallum, December 11, 1980.

<sup>3</sup> John A. Lyddon, Docket No. UICAO-H-88-01, Order on Respondent’s Prehearing Motions, Regional Presiding Officer Steven W. Anderson, February 21, 1989.

<sup>4</sup> Patrick Belcastro d/b/a/ A-1 Auto Sales, Docket No. CWA-VIII-94-01-PI, Ruling and Order of Regional Presiding Alfred C. Smith, June 17, 1994.

<sup>5</sup> Pete Wiesma, d/b/a Fairview Dairy, Docket No. 10-95-0038-CWA, Ruling and Order of Regional Presiding Officer Alfred C. Smith, July 10, 1996.

