UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

IN THE MATTER OF:	
Michael B. Rapasadi 2106 Lake Road Oneida, NY 13421 **Thomas R. Rapasadi** 2106 Lake Road Oneida, NY 13421 Respondents. Proceeding pursuant to § 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)	**Proceeding to Assess Class I Civil Penalty Pursuant to Section 309(g) of the Clean Water Act** **Docket No. CWA-02-2013-3601**

ORDER ON RESPONDENTS' MOTION TO DISMISS

On June 24, 2013, Michael B. Rapasadi and Thomas R. Rapasadi (Respondents) filed a Motion to Dismiss the Complaint (Motion to Dismiss). Respondents' Motion to Dismiss cites *inter alia* the alleged failure of EPA to respond in a timely manner to Respondents' request for information under the Freedom of Information Act (FOIA) as grounds for dismissal of the Complaint. On July 2, 2013, Respondents filed an answer to the Complaint (Answer), explicitly reserving their prior Motion to Dismiss.

The United States Environmental Protection Agency, Region 2 (EPA or Complainant) filed Complainant's Response to Respondents' Motion to Dismiss (Complainant's Response) on July 8, 2013 and an Errata to Complainant's Response to Respondents' Motion to Dismiss on July 15, 2013.

I have reviewed the Motion to Dismiss and deny the motion, based on the rationale set forth below.

Procedural and Factual Background

On September 28, 2011, EPA issued a Findings of Violation and Order (2011 Compliance Order) against Respondents for violation of Section 301 of the Clean Water Act (CWA), 33 U.S.C. § 1311. The 2011 Compliance Order alleges that Michael B. Rapasadi is the owner of a property in the Town of Lenox, Madison County, New York, and that the property contains wetlands which drain to Cowaselon Creek, which in turn flows to Oneida Lake. 2011 Compliance Order at ¶¶ 2, 4–5.The 2011 Compliance Order further alleges that Thomas R. Rapasadi engaged in construction activities on this property that resulted in the discharge of fill material into the wetlands. Id. at ¶¶ 3, 7. According to the 2011 Compliance Order, the Secretary of the Army had not issued authorization for this discharge, pursuant to Section 404 of the CWA, 33 U.S.C. § 1344. Id. at ¶ 24.

On September 17, 2012, Respondents submitted a FOIA request for the documents on which the determinations of the wetlands designation and the CWA violation were based.[1] By letter dated November 16, 2012, EPA informed Respondents that EPA possessed the responsive documents, but could not process the request until it received an indication from Respondents that they agreed to pay the applicable FOIA fees. EPA's letter also stated that the FOIA request would be cancelled if EPA did not receive a response assuring payment by November 30, 2012. EPA claims that Respondents failed to indicate in a response to the EPA that they intended to pay the applicable fees, pursuant to Section 2.107 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (CROP), and therefore, EPA did not initially produce the requested documents. By email dated January 2, 2013, EPA informed Respondents that their FOIA request was closed, but could be reopened with a new request. On March 1, 2013, Respondents sent an email to EPA indicating that they would pay the required FOIA fee.

EPA served Respondents with a Complaint, Findings of Violation, Notice of Proposed Assessments of a Civil Penalty, and Notice of Opportunity to Request a Hearing (Complaint) on

[1] Under FOIA, 5 U.S.C. § 552(a)(3), an agency shall make records promptly available to the public upon a request which "(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed."

May 31, 2013, for the alleged CWA violation, stipulating the facts alleged in the 2011 Compliance Order and proposing a penalty of $25,000. Complaint at ¶¶ 3, 9. In proposing the Class I civil penalty, EPA cited authority vested in the EPA Administrator by Section 309(g)(2)(A) of the CWA, 33 U.S.C. § 1319(g)(2)(A). Id. at ¶ 1.

By email dated June 17th, Respondents indicated they would pay the required fee in advance, and EPA responded with an email dated June 19th, forwarding an invoice dated June 18th for the full amount of the FOIA fees. However, EPA sent another email dated June 27th, indicating that they still had not received advanced payment of the FOIA fees. On July 2, 2013, EPA received payment of Respondents' FOIA fee and mailed Respondents all responsive documents that day.

In its Motion to Dismiss, the Respondents assert that as a result of EPA's alleged failure to respond to Respondents' FOIA request, they "have been deprived of the opportunity to make use of pre-suit rights and procedures or to prepare a defense and have been deprived of due process generally and specifically." Motion at ¶ 6. Additionally, the Motion claims that the Town of Lenox, where the violation alleged in the Complaint occurred, approved Respondents' work prior to commencement and that EPA's proposed fine would be "ruinous" for the Respondents. Id. at ¶¶ 4, 6.

In Complainant's Response, EPA states that the Presiding Officer should deny the Motion to Dismiss because Respondents have not satisfied the standard for a motion to dismiss. Complainant also claims that Respondents' delay in receiving the responsive documents resulted from Respondents' failure to comply with FOIA's statutory requirements, and in any case, because Respondents have since received all responsive documents, Respondents' claim regarding a failure to obtain information is now rendered moot.

Discussion

1. Standard for a Motion to Dismiss

40 C.F.R. § 22.20(a), provides the standard for a motion to dismiss applicable to this case. Section 22.20(a) states that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, 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.

Numerous decisions rendered by the Environmental Appeals Board (EAB) and Administrative Law Judges provide guidance in applying the standard set forth in Section 22.20(a). Additionally, the Motion before me is analogous to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). Although the FRCP are not binding on administrative agencies, Rule 12(b)(6) and federal court decisions construing it provide instructive guidance to the Presiding Officer in adjudicating a motion to dismiss under the CROP.[2]

In Mercury Vapor Processing Technologies, Judge Gunning set forth the analysis for determining how to rule on a motion to dismiss such as the one presented here. In the decision, it was noted that motions to dismiss under Section 22.20(a) of the CROP are analogous to motions for dismissal under Rule 12(b)(6) of the FRCP, citing Asbestos Specialists, Inc., 4 E.A.D. 819, 827 (EAB 1993), and that Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). See, Mercury Vapor Processing Technologies a/k/a River Shannon Recycling and Laurence C. Kelly, Docket No. RCRA-5-2010-0015, 2011 EPA ALJ LEXIS 15 (ALJ, July 14, 2011). Judge Gunning, in Mercury Vapor Processing Technologies, looks to the Supreme Court which states:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S.

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[2] See, e.g., In re Pyramid Chem. Co., 11 E.A.D. 657, 683 n.34, 2004 WL 14481 (EAB 2004) ("Although the Board is not bound by the Federal Rules of Civil Procedure, the Board may, in its discretion, refer to the Federal Rules of Civil Procedure for guidance when interpreting EPA's procedural rules"); In re Consumers Scrap Recycling, Inc., 11 E.A.D. 269, 285 (EAB 2004) ("As we have said in previous decisions, although the Federal Rules of Civil Procedure do not apply to the proceedings before us, we look to the Federal Rules . . . for guidance"); In re Patrick J. Neman, D/B/A The Main Exchange, E.A.D. 450, 455, n.2 (EAB 1994) ("When a procedural issue arises that is not addressed in Part 22, the Board has the discretion to resolve the issue as it deems appropriate. 40 C.F.R. § 22.01(c) [current version at 40 C.F.R. § 22.1(c)]. In the exercise of this discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules"); Euclid of Virginia, Inc., 13 E.A.D. 616, 657-58 (EAB 2008).

544, 570 (2007)).

As in cases where Rule 12(b)(6) is applicable, in a Part 22 motion to dismiss the Presiding Officer assumes that all well-pleaded facts in the complaint are true and then determines whether these facts plausibly give rise to an entitlement of relief. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). Furthermore, in considering a motion to dismiss and assuming the veracity of well-pleaded factual allegations, the court should make "all reasonable inferences in favor of the complainant." As stated, assuming the well-pleaded facts in the complaint are true, the Presiding Officer may grant a motion to dismiss if the complaint fails to establish a prima facie case. These well-pleaded allegations "are the elements of the complainant's prima facie case." Commercial Cartage Co., Inc., 5 E.A.D. 112, 117 (EAB 1994) (citing Banks v. Pitt, 928 F.2d 1108, 1109 (11th Cir. 1991)); Roger Barber d/b/a Barber Trucking, Docket No. CWA-05-2005-0004 (February 16, 2006).

If the Presiding Officer finds that the complaint establishes a prima facie case, she can nevertheless grant a motion to dismiss if other grounds show no right to relief on the part of the complainant. Regarding Rule 12(b)(6), the United States Supreme Court stated that "[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 246 (1980) (citing Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

2. Standard Applied

Accordingly, to prevail on a motion to dismiss in the present proceeding, Respondents must demonstrate that the allegations in the Complaint, if true, fail to establish a violation by Respondents, as the owners or operators of the site, or otherwise fail to show a right to relief. As explained more fully below, even assuming all facts set forth in Respondents' Motion to Dismiss are true, they have not provided any basis to question the validity of the CWA violation charged in the Complaint.

In considering the first basis for a motion to dismiss pursuant to Part 22.20(a) and assuming the facts in the Complaint are true, the Complainant established a prima facie case by satisfying the requirements for a Section 301 CWA violation.[3] Section 301 of the CWA prohibits

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[3] The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In this matter, Complainant has stated a claim for relief that is plausible based on a preponderance of the evidence.

a person from discharging a pollutant into navigable waters, except as in compliance with the statute. The Complaint asserts as follows: Respondents fall within the statutory definition of a "person;" Respondents conducted construction activities that discharged earthen fill material into wetlands; these wetlands are considered "navigable waters" under the statute; the earthen fill material constitutes a pollutant as defined by the CWA; and this discharge was not in compliance with Section 404 of the CWA, 33 U.S.C. § 1344. Assuming the Complaint's well-pleaded facts and inferences are true, the Complaint satisfies the elements of a Section 301 CWA violation and establishes a prima facie case.

Moreover, Respondents do not directly challenge the sufficiency of the Complaint in their Motion to Dismiss; they do not claim that the Complaint fails to establish the required elements of a Section 301 violation. One of the grounds for dismissal alleged by the Respondents is that the Town of Lenox approved the Respondents' work prior to commencement. Without citing authority, the Motion suggests that EPA cannot hold Respondents liable because Respondents believed that their activities complied with the law. This claim, however, does not address any specific element of the CWA violation alleged in the Complaint or EPA's prima facie case as required under Part 22 of the CROP. See Order on Respondent's Motion to Dismiss, In the Matter of Minor Ridge, L.P., d/b/a Minor Ridge Apartments, Docket No. TSCA-07-2003-0019 (2003) (concluding that respondent's claim that it qualifies for a lead-based paint exemption is an affirmative defense and not an element of the prima facie case). Even if Respondents did not intend to violate the CWA, the Act is a strict liability statute and does not restrict violations to solely intentional acts. United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979). Therefore, as stated above, assuming EPA's allegations are true, the Complaint establishes a prima facie case.

If the Complaint establishes a prima facie case, the Presiding Officer may nonetheless grant the Motion if there are other grounds showing that the Complainant has no right to relief. EPA, in their Complaint, cites Section 309(g) of the CWA, 33 U.S.C. § 1319(g), for authority to assess an administrative penalty for a CWA violation and proposes a Class I civil penalty for a Section 301 violation.[4]

In the Motion to Dismiss, Respondents do not allege that the Complainant has no right

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[4] Section 309(g) authorizes the Administrator to assess Class I and Class II civil penalties for violations of, *inter alia*, Section 301 of the CWA, 33 U.S.C. § 1311.

to relief. Instead, Respondents claim that they have been deprived of due process because EPA did not satisfy their FOIA request.[5] Respondents, however, cite no authority supporting their claim that EPA is not entitled to relief for Respondents' alleged CWA violation if EPA did not comply with FOIA. In relying on this argument, Respondents have entirely failed to address the prima facie CWA case described in EPA's Complaint, or otherwise argue that there are no grounds upon which relief can be granted under the law. Even if EPA violated FOIA, the alleged FOIA violation does not address the elements of CWA claim asserted in the Complaint. FOIA is separate and distinct from the CWA; a complainant's failure to comply with FOIA does not nullify a CWA violation. Therefore, assuming the well-pleaded facts in the Complaint are true, because the Complaint cites Section 309(g) of the Act for authority to assess a civil penalty for a CWA violation, there are grounds showing that EPA is entitled to relief. See, e.g., Order to Respondent's Motion to Dismiss, In the Matter of DMB North Carolina 2, LLC, Docket No. CWA-04-2002-5005 (2003).

Although the analysis of the standard governing motions to dismiss and application of these standards to the present case alone justify dismissal of Respondents' Motion to Dismiss, in the interest of providing as much information as possible to the parties, I will briefly address the accuracy or relevance of facts asserted by Respondents in support of their Motion to Dismiss.

As described in the Background section, above, Respondents' failure to promptly obtain the requested FOIA documents appears to be due solely to Respondents' delay in submitting financial assurance in accordance with the provisions of FOIA. The Region 2 FOIA Office closed Respondents' request in November 2012 due to Respondents' failure to respond to a request for assurance of payment. Respondents waited until EPA commenced this proceeding to submit its financial assurance. EPA mailed (via UPS overnight service) all requested FOIA documents to Respondents on July 2, 2013, the same day it received notice that Respondents paid their FOIA invoice. For these reasons, Respondents cannot now fault EPA for the delay in obtaining FOIA documents.

Assuming *arguendo* that Respondents' due process argument had merit, any such claim has been rendered moot by EPA's July 2, 2013, production of documents. A claim may be rendered moot where intervening events prevent the court from granting any effective relief,

[5] As discussed in more detail below, EPA's Response asserts that Respondents' FOIA request was not satisfied because Respondents failed to fulfill FOIA's statutory requirements.

even assuming that the plaintiff were to prevail on its underlying claim. See, e.g., Burlington Northern R.R. Co. v. Surface Transp. Bd., 75 F.3d 685, 688 (D.C. Cir. 1996) (holding that a claim becomes moot when "intervening events make it impossible to grant the prevailing party effective relief"). Courts should not devote judicial time and resources to rendering advisory opinions that have no effect on the actual parties. See, e.g., North Carolina v. Rice, 404 U.S. 244, 246 (1971). The federal principles of judicial review, including mootness, may guide the Presiding Officer in the same way that administrative tribunals look to the FRCP for guidance in procedural matters.

While Respondents summarily allege that EPA deprived them of "due process rights," they notably fail to cite any authority that supports their argument. Respondents thus fail to satisfy Part 22's requirement that a movant state the grounds for their motion with particularity. See CROP § 22.16. Moreover, to the extent any "rights" are at issue in Respondents' Motion, they are prescribed by FOIA, 5 U.S.C. § 552, which provides Respondents with the "right" to obtain public information from an agency under FOIA. However, in order to be entitled to such a "right" under FOIA, Respondents must comply with the requirements of the FOIA statute, which includes payment of a processing fee. See 40 C.F.R. § 2.107.

Finally, the Motion alleges that EPA's proposed penalty would be "ruinous" for the Respondents. Because equitable factors are not included in the Part 22 standard and Respondents cite no authority supporting equitable considerations in a motion to dismiss, this allegation is not a basis on which to grant a motion to dismiss.

Order:

Part 22 of the CROP provides the standard for a motion to dismiss. Respondents' motion does not satisfy this standard because it does not address, much less successfully challenge, the elements of the prima facie case of a CWA violation established by Complainant. In addition, the Motion to Dismiss does not demonstrate that there are no grounds upon which EPA is entitled to relief under the CWA Act. As stated above, the evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the CROP, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In this matter, Complainant has stated a claim for relief that is plausible

based on a preponderance of the evidence.

Respondents' Motion to Dismiss is DENIED. Please note that a prehearing teleconference is hereby scheduled for Tuesday, October 15, 2013 at 10:00 AM, with details and instructions regarding this teleconference to follow in a letter to the parties' attorneys.

SO ORDERED, this 19th day of September, 2013.

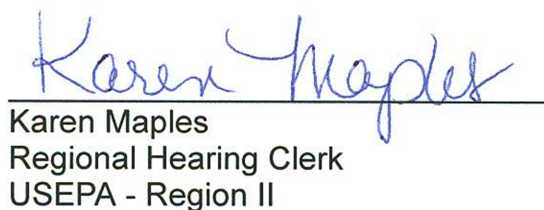
Helen S. Ferrara
Regional Judicial Officer
Region 2

CERTIFICATE OF SERVICE

I hereby certify that the **Order On Respondents' Motion To Dismiss** by Regional Judicial Officer Helen Ferrara in the matter of **Michael B. Rapasadi and Thomas Rapasadi, Docket No. CWA-02-2013-3601,** was served on the parties as indicated below:

First Class Mail - John Benjamin Carroll, P.C.
Carroll and Carroll Lawyers, P.C.
440 South Warren Street
Syracuse, New York 13202

Inter Office Mail - Lauren Fischer, Esq.
Office of Regional Counsel
USEPA - Region II
290 Broadway 16th Floor
New York, New York 10007-1866



Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: September 20, 2013