UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Camp Pubie Hunting Club Partnership,	)	**Docket No. CWA-05-2005-0011**
Gerald A. Blomberg, Jr., David A. Braatz,	)	
Roger G. Schnieder, Allen W. Blomberg,	)	
& Randy A. Bender, Partners	)	
	)	
Respondents	)	

Order Granting Complainant's Motion to Withdraw Complaint Without Prejudice

This proceeding under Section 309(g) of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1319(g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") found at 40 C.F.R. Part 22, was commenced on September 29, 2005, by a complaint issued by the Director of the Water Division, U.S. Environmental Protection Agency, Region 5 ("Complainant" or "EPA"), charging Respondents, Camp Pubie Hunting Club Partnership and partners Gerald A. Blomberg, Jr., David A. Braatz, Roger G. Schnieder, Allen W. Blomberg, and Randy A. Bender, with violations of Section 301 of the Act, 33 U.S.C. § 1311. Specifically, the complaint alleges that Respondents violated Section 301 by filling in wetlands with dredged material and organic debris from excavators into waters of the United States without obtaining a permit under Section 404 of the Act, 33 U.S.C. § 1344. Complainant proposed to assess a civil penalty of $30,000.

Respondents, through counsel, mailed a copy of their answer on October 21, 2005. The Administrative Law Judge ("ALJ") issued a Prehearing Order on December 5, 2005 requiring the parties to file their initial prehearing exchanges by January 9, 2006. Upon the completion of the prehearing procedures, a Notice of Hearing was issued setting August 23, 2006 for the commencement of a hearing in Waupaca, Wisconsin.

On July 3, 2006, the parties filed a Joint Motion to Re-Schedule Date of Hearing pursuant to Rule 22.21(c)[1] agreeing that the recent Supreme Court decision, *Rapanos et ux., et al. v. United States*, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (June 19, 2006), has direct relevance in the case and as a result the EPA along with the United States Army Corp of Engineers and other federal agencies were in the process of evaluating the decision which directly relates to Complainant's jurisdictional authority to prosecute the instant proceeding. The ALJ, finding good cause, granted the Joint Motion by Order, dated July

[1] "[n]o request for postponement of a hearing shall be granted except upon motion and for good cause shown." 40 C.F.R. § 22.21(c).

7, 2006 requiring Complainant to inform Respondents and the ALJ how it will proceed as soon as a determination is made by the federal agencies.

During a November 29, 2006 status conference call with the parties, Complainant requested time to conduct additional fact-finding based on the legal theories advanced in *Rapanos* and requested the hearing be rescheduled for September. Upon the denial of the request, Complainant filed a Motion to Withdraw the Complaint without Prejudice ("Complainant's Motion") on December 28, 2006 pursuant to Consolidated Rules 22.16(a) and 22.14(d).[2]

On January 26, 2007, the ALJ received a copy of Respondents' Response to Complainant's Motion to Withdraw Without Prejudice ("Response"). While Respondents' Response was filed out of time[3] and, therefore, the objection could be considered waived, the Response will be considered. Respondents state that they "do not object to the plaintiff's request to dismiss these proceedings without prejudice." (Response at 2). Respondents also request that the ALJ condition the dismissal upon the United States paying a portion of the attorney's fees incurred by Respondents (id). In a Reply Motion to Withdraw Without Prejudice and a Memorandum in Support of Complainant's Reply Motion ("Complainant's Reply"), dated February 7, 2007, Complainant emphasized that Respondents did not object to the Motion and argued that the ALJ is without the authority to assess attorney's fees against the United States due to the doctrine of sovereign immunity and that the recovery of fees is governed by the Equal Access to Justice Act ("EAJA"), found at 5 U.S.C. § 504, which Respondents did not cite.

The ALJ's only authority to consider whether Respondents are entitled to attorney's fees is under the EAJA, which would require, inter alia, a claim thereunder and a finding that Respondents were the prevailing parties (*see* 40 C.F.R. Part 17). Be that as it may, Respondents have not conditioned their acceptance of the Motion upon the payment of attorney's fees. It follows that Complainant's Motion will be granted.

Order

[2] Withdrawal of a complaint is governed by Consolidated Rule 22.14(d). The Rule indicates, inter alia, that "after the filing of the answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." *See* 40 C.F.R. § 22.14(d).

[3] Respondents made two procedural errors when mailing out their Response. A party's response to a motion must be filed within 15 days after service of such motion (40 C.F.R. 22.16(b)). Complainant's Motion was filed December 28, 2006, thereby giving Respondents until January 12, 2007 to file their response. Secondly, Respondents did not file their Response with the appropriate Regional Hearing Clerk as required under Consolidated Rule 22.5(a)(1), which in this case is the Regional Hearing Clerk for Region 5. Consolidated Rule 22.16(b) further states that "[a]ny party who fails to respond within the designated period waves any objection to the granting of the motion.

Complainant's Motion to Withdraw the Complaint Without Prejudice is granted.

Dated this 27th day of February, 2007.

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Spencer T. Nissen
Administrative Law Judge