UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COLLEEN TILLION,	)	
RICK RICHARDS, and	)	**DOCKET NO. CWA-10-2004-0067**
PATRICIA RICHARDS,	)	
	)	
RESPONDENTS	)	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

This civil administrative penalty proceeding arises under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g). 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 ("Rules of Practice" or "CROP"), 40 C.F.R. §§ 22.1-.32.

The United States Environmental Protection Agency, Region X ("Complainant" or "the EPA") on April 30, 2004, filed and served a Complaint on Colleen Tillion, Rick Richards, and Patricia Richards ("Respondents"), under Docket No. CWA-10-2004-0067. Respondents are *pro se* litigants in this matter. Pursuant to Section 309(g)(2)(B) of the Clean Water Act and the Rules of Practice, the EPA proposes the assessment of a civil administrative penalty against the Respondents for the unlawful discharge of dredged or fill material into waters of the United States without authorization by a U.S. Army Corps of Engineers ("Corps") permit, as required by Sections 402 or 404 of the Clean Water Act, 33 U.S.C. §§ 1342, 1344, in violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). Complaint §§ 1.2, 3.6.

The Parties' Arguments

On February 16, 2005, Respondents submitted a Motion to Dismiss. Respondents assert that this case commenced on March 20, 2000 with a Request for Information from the EPA. Motion to Dismiss at 1 (referring to CX-11). At the heart of Respondents' Motion to Dismiss, Respondents contest the Compliance Order dated December 20, 2002, that the EPA issued to Colleen Tillion ("Ms. Tillion") under Docket No. CWA-10-2003-0020. Motion to Dismiss at 1 (referring to CX-13). Respondents argue, "This order does not comply with crop 21.1(a)(6) nor

does it comply with 21.13(a)(b)."[1] *Id.* Respondents further argue, "Nor does Part 22.3(1)(2)(3) concerning final orders describe the order issued to [Ms. Tillion]." *Id.* Respondents assert that Ms. Tillion questioned the legality of the Compliance Order, but the EPA was unresponsive, and that the EPA has the responsibility to comply with its own Rules of Practice, but has failed to do so in several instances of this case. *Id.* According to the Respondents, the Compliance Order is a direct denial of Ms. Tillion's constitutional rights, and also of Patricia Richards' ("Mrs. Richards") rights, because it orders Ms. Tillion to perform certain acts to Mrs. Richards' property, which Respondents assert that no Agency has the right to do. *Id.* at 1-2.

Respondents contend that CWA-10-2004-0067, which is the docket number under which the Complaint was filed, is a direct result and a continuance of CWA-10-2003-0020. *Id.* at 2. Respondents argue that with information obtained from CWA-10-2003-0020, CWA-10-2004-0067 was initiated with no public notice as per 22.44(b), no official notice as per 22.37(b), and without due process. *Id.* Moreover, Respondents argue that if CWA-10-2003-0020 is not a legal order, then the information collected for CWA-10-2004-0067 was illegally obtained and should be grounds for dismissal. *Id.* Respondents also contend that the Rules of Practice were "withheld" from their knowledge for the purpose of gathering information for CWA-10-2004-0067, that they were not made aware of these rules until 2004, and that the rules suggest wrongdoing on EPA's part for such conduct.[2] *Id.* Respondents conclude their motion by asserting their rights under the 7th and 14th Amendments to the U.S. Constitution.[3] *Id.*

In Complainant's Response to Respondents' Motion to Dismiss ("Response to Motion to Dismiss"), the EPA argues that the Motion to Dismiss should be denied on the grounds that the Rules of Practice do not apply to issuance of a Compliance Order and because the EPA has complied with the Rules of Practice in the current action (CWA-10-2004-0067). Response to Motion to Dismiss at 1. With regards to the Compliance Order, the EPA points out that the

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[1] It is clear that Respondents actually mean to cite to 40 C.F.R. §§ 22.1(a)(6) and 22.13(a)-(b), and that reference to part 21 rather than part 22 of the Code of Federal Regulations is merely a typographical error.

[2] Respondents also protest EPA's conduct in Alternative Dispute Resolution ("ADR") proceedings, but do not clearly appear to be seeking dismissal with regards to that conduct. Motion to Dismiss at 2. Respondents' comments concerning alleged EPA misconduct during ADR are not considered relevant to the litigated matter before me, because the ADR process is conducted in a confidential manner, in accordance with Section 584 of the Alternative Dispute Resolution Act of 1990, as amended, 5 U.S.C. § 574.

[3] Respondents also make vague, unsupported assertions, attacking the veracity of EPA's witnesses, but Respondents do not appear to be pressing those accusations as a ground for dismissal of the proceeding before me: "At least 2 witnesses for EPA have submitted information which they know not to be true, if this matter is pursued we intend to take issue with these matters as well as pursue our constitutional rights through civil proceedings, and possibly criminal proceedings as well." Motion to Dismiss at 3.

Rules of Practice, at 40 C.F.R. § 22.1, describe the scope of proceedings covered by the Rules of Practice, and that the Rules of Practice specify that proceedings for the assessment of an administrative civil penalty under Section 309(g) of the Clean Water Act, such as the proceeding before me, are subject to the Rules of Practice. Response to Motion to Dismiss at 2 (citing 40 C.F.R. § 22.1(a)(6)). Moreover, the EPA points out that the Compliance Order was not issued pursuant to Section 309(g) and did not seek to assess a penalty, and that the Compliance Order was not an attempt to initiate any of the other types of proceedings listed in Section 22.1 of the Rules of Practice. Response to Motion to Dismiss at 2.

The EPA contends that the Compliance Order was properly issued pursuant to Sections 308 and 309(a) of the Clean Water Act, 33 U.S.C. §§ 1318, 1319(a). Response to Motion to Dismiss at 2. The EPA points out that Section 308 of the Clean Water Act authorizes the EPA to require the owner or operator of any point source to establish and maintain such records, make such reports, and provide such other information as he or she may reasonably require whenever such information is necessary to carry out objectives of the Clean Water Act. *Id.* (citing 33 U.S.C. § 1318(a)). The EPA further points out that Section 309(a) of the Clean Water Act provides, "Whenever on the basis of any information available to [the EPA], the [EPA] finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of [33 U.S.C.] . . . [the EPA] shall issue an order requiring such person to comply with such section or requirement, or [the EPA] shall bring a civil action in accordance with subsection (b) of [CWA § 309, 33 U.S.C. § 1319]."[4] Response to Motion to Dismiss at 2-3 (citing 33 U.S.C. § 1319(a)(3)).

The EPA recounts that the Compliance Order contained EPA's findings that Ms. Tillion had violated Section 301 of the Clean Water Act when she placed fill material on her property without obtaining a permit issued pursuant to Sections 402 or 404 of the Clean Water Act, and it ordered Ms. Tillion to submit a Restoration Work Plan and then to remove the unauthorized fill material. Response to Motion to Dismiss at 3. The EPA contends that issuance of the Compliance Order was fully within EPA's authority under Sections 308 and 309(a) of the Clean Water Act. *Id.* The EPA argues that Respondents' accusations of failure to comply with the Rules of Practice in issuing the Compliance Order are of no consequence, because the EPA was not required to comply with the Rules of Practice in the issuance of the Compliance Order, and moreover, that the Compliance Order was properly issued pursuant to Sections 308 and 309(a)(3) of the Clean Water Act. *Id.*

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[4] Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), entitled "Civil actions," provides, "The [EPA] is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under [33 U.S.C. § 1319(a)]." Section 309(b) further provides, "Any action under [33 U.S.C. § 1319(b)] may be brought in the *district court of the United States . . . , and such court shall have jurisdiction to restrain such violation and to require compliance*." (Emphasis added.)

With regards to the Complaint, under docket number CWA-10-2004-0067, the EPA clarifies that it did not attempt to assess a penalty for violation of the Compliance Order, but rather proposed the assessment of a penalty for the underlying violation: for discharge of fill material without a Section 402 or 404 permit. *Id.* Therefore, argues the EPA, the current action is subject to the Rules of Practice and the EPA has at all times complied with these rules. *Id.* With regards to public notice of the proposed penalty assessment in this matter, the EPA responds that it did in fact provide public notice and has provided this Tribunal with a copy of that public notice. Response to Motion to Dismiss at 4 & Ex. 1 ("Publisher's Affidavit").

Concerning Respondents' charges that the EPA "withheld" the Rules of Practice from the Respondents, the EPA states that it provided the Respondents with a copy of the Rules of Practice when the Complaint in this matter was served in April 2004, and that the Respondents do not dispute that they received the Rules of Practice at that time. *Id.* at 4. As to the period of time prior to April 2004, the EPA points out that there were no proceedings involving the Respondents to which the Rules of Practice applied, and the EPA argues, therefore, that Respondents' lack of knowledge of the Rules of Practice prior to April 2004 is of no consequence. *Id.*

In response to Respondents' allegations concerning deprivation of constitutional rights, the EPA characterizes such allegations as challenges to the constitutionality of Sections 308 and 309(a) of the Clean Water Act, and the EPA argues that Respondents' arguments assert constitutional infringement in the context of an order properly issued under the authority of these sections. Response to Motion to Dismiss at 5. Furthermore, the EPA contends that the Environmental Appeals Board ("EAB") has repeatedly declined to review the constitutionality of the statutes administered by the EPA on the grounds that such review would exceed its jurisdiction.[5] *Id.* (citing *In re City of Irving, Texas*, NPDES Appeal No. 00-18, 10 E.A.D. 111 (EAB 2001), *petition for review denied sub nom City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003); *In re Britton Constr. Co.*, CWA Appeal Nos. 97-5 & 97-8, 8 E.A.D. 261 (EAB 1999) (citing *Johnson v. Robinson*, 415 U.S. 361, 368 (1974)). Thus, the EPA argues that Respondents' constitutional challenges should not be heard in this administrative penalty action. *Id.*

The Respondents filed a reply, entitled Respondents[']s Answer to Complainant[']s Rebuttal To Dismiss ("Respondents' Reply"). The Respondents point out that the Complaint did make reference to the Compliance Order, such as where it alleges that Ms. Tillion was to perform certain work and to provide certain information related to restoration of the Site at issue, that the EPA visited the Site and determined that Ms. Tillion had not taken any action towards restoring the wetlands as directed in the Compliance Order, and that as of the date of the Complaint Ms. Tillion had not responded to the Compliance Order and "is in violation of the [Compliance] Order." Respondents' Reply at 1 (citing Complaint §§ 3.9, 3.10, 3.11).

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[5] Besides being printed in published volumes, the EAB's cases are also available via the internet, such as at: http://www.epa.gov/eab.

Furthermore, Respondents point out that under the proposed penalty for the Complaint, the EPA again refers to the Compliance Order, under degree of culpability, where it states, "The proposed penalty reflects Complainant's determination that Respondents had little or no degree of culpability prior to receipt of the [Compliance] Order. It also, however, reflects Respondent Tillion's unresponsiveness to the [Compliance] Order." *Id.* (quoting Complaint § 4.1(f)).

With regards to constitutional challenges, the Respondents contend that this forum should review the constitutionality of statutes administered by the EPA. Respondents' Reply at 4. Respondents assert that they have a right to a jury trial in this matter. *Id.* Respondents also assert that the EPA has demanded that Respondents render their home uninhabitable, and have engaged in an unconstitutional takings of the right to use their property, without due process of law. *Id.*

Standard for Adjudicating a Motion to Dismiss

The Rules of Practice, at 40 C.F.R. § 22.20(a), provide the standard for adjudicating a motion to dismiss:

> The Presiding Officer,[6] upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he [or she] 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.

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."[7] *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").[8] 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]

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[6] The term "Presiding Officer" here means the Administrative Law Judge ("ALJ") designated by the Chief ALJ to serve as the presiding judge over this matter. 40 C.F.R. § 22.3(a).

[7] 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. ___.

[8] ALJ cases may be found on the internet, such as at: http://www.epa.gov/oalj.

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 Clean Water Act as charged. *Minor Ridge*, 2003 EPA ALJ LEXIS 21, at *4; *Julie's Limousine*, 2002 EPA ALJ LEXIS 74, at *3-4.

DISCUSSION

Given Respondents' arguments and their pro se status, I deem it necessary to explain the scope of the proceedings over which I am presiding in this matter. As with any case decided by an Administrative Law Judge ("ALJ"), such as the instant proceeding, there are two phases to litigation: (1) a liability determination (i.e., a determination of whether the respondents violated the law); and if found liable by the ALJ, (2) a determination of the appropriate penalty amount for the violation. Only if the ALJ determines that the respondents are liable, will there be an assessment of a penalty. As discussed in further detail below, I conclude that the EPA is not attempting to prove liability for failure to comply with the Compliance Order, but rather is attempting to prove liability for violating Section 301 of the Clean Water Act for discharge of dredged or fill material, from a point source, into waters of the United States, without authorization by a Corps permit as required by Sections 402 or 404 of the Clean Water Act.

The Complaint issued against Respondents states, "Under Section 309(g)(2)(B) of the [Clean Water] Act, 33 U.S.C. § 1319(g)(2)(B) . . . Respondents are liable for the administrative assessment of civil penalties . . . for the violations described in the preceding paragraphs." Complaint § 3.12. First, I observe that Section 309(g), 33 U.S.C. § 1319(g), does not cover violation of a compliance order issued pursuant to Section 309(a), 33 U.S.C. § 1319(a).[9] Second, although paragraph 3.11 of the Complaint provides that Respondent Tillion is in violation of the

[9] The proceeding before me was brought pursuant to Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), which concerns administrative penalties, and provides the EPA with the opportunity to bring an enforcement proceeding before an ALJ for violating provisions of the Clean Water Act, including Section 301, 33 U.S.C. § 1311, but does not include any express provision for directly enforcing the violation of a compliance order. In contrast, Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), which concerns civil penalties proceedings brought in a federal district court, does expressly empower the EPA to bring an enforcement action to directly enforce a compliance order: "Any person who violates section 1311 . . . and any person who violates any order issued by the [EPA] under [CWA § 309(a), 33 U.S.C. 1319(a)], shall be subject to a civil penalty not to exceed $25,000 per day for each violation . . . . the court shall consider . . . ."

Compliance Order, the violations identified in the Complaint are the ongoing violations of Section 301, 33 U.S.C. § 1311. The EPA summarizes its allegations in the introduction to the Complaint, § 1.2, as follows:

> Pursuant to Section 309(g)(2)(B) of the [Clean Water] Act and in accordance with 40 C.F.R. Part 22, the [Rules of Practice], Complainant hereby proposes the assessment of a civil penalty against Colleen Tillion, Rick Richards, and Patricia Richards ("Respondents") for the unlawful discharge of dredged or fill material into waters of the United States without authorization by a [Corps] permit, as required by Section 404 of the [Clean Water] Act, 33 U.S.C. § 1344, in violation of Section 301(a) of the [Clean Water] Act, 33 U.S.C. § 1311(a).

Third, in EPA's Prehearing Exchange, in discussing the nature, circumstances, extent, and gravity of the alleged violation, the EPA focuses on the alleged unpermitted discharge into waters of the United States. *See* EPA's Initial Prehearing Exchange at 9-10. Later in its discussion, the EPA mentions failure to comply with the Compliance Order as "compound[ing]" the seriousness of Respondents' alleged violation. *Id.* at 10. Moreover, under the Complaint's discussion of the "Nature and Circumstances of the Violation" and "Extent of the Violation," the EPA only refers to the alleged unpermitted discharge into navigable waters and dredge and fill activities, and makes no mention under that particular discussion of noncompliance with the Compliance Order. *See* Complaint § 4.1(a)-(b).

Nonetheless, as discussed, the Complaint does provide that Respondent Tillion is in violation of the Compliance Order. I read EPA's Response to Motion to Dismiss as a clarification of its Complaint that it is pursuing enforcement not for violation of the Compliance Order but for the alleged underlying violation: discharge of dredged or fill material without a Section 402 or 404 permit. *See* Response to Motion to Dismiss at 3. Therefore, with regards to proving liability in this matter, the issue before this Tribunal is whether Respondents committed the unlawful discharge of dredged or fill material from a point source into waters of the United States without a Section 402 or 404 permit, in violation of Section 301(a) of the Clean Water Act. Accordingly, attempts by the EPA to prove liability based on violation of the Compliance Order rather than violation of Section 301(a) of the Clean Water Act are deemed irrelevant and shall not be used at the hearing for purposes of proving liability.

However, the EPA has considered the alleged violation of the Compliance Order in determining the amount of its proposed penalty assessment. Respondents correctly observe that the EPA proposes an enhanced penalty for noncompliance with the Compliance Order. For instance, in the Complaint's penalty discussion, under "Degree of Culpability," the EPA states, "The proposed penalty reflects Complainant's determination that Respondents had little or no degree of culpability prior to receipt of the [Compliance] Order. It also, however, reflects Respondent Tillion's unresponsiveness to the Order." Complaint § 4.1(f). In the Complaint's discussion of the "Gravity of Violation" penalty factor, the EPA mentions Ms. Tillion's alleged

noncompliance with the Compliance Order. *Id.* § 4.1(c). Moreover, EPA's Prehearing Exchange further discusses the Compliance Order under its discussion of "Degree of Culpability" and "Gravity of Violation." EPA's Initial Prehearing Exchange at 10, 12-13. Accordingly, if the EPA uses the Compliance Order at the hearing for purposes of proving its proposed penalty, then the EPA opens the door to Respondents challenging EPA's reliance on the Compliance Order with regards to the penalty.[10]

As previously discussed, a motion to dismiss depends on failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant, and the determination of a prima facie case, for purposes of a motion to dismiss, depends on whether there is failure to state a claim upon which relief can be granted. Respondents' Motion to Dismiss does not raise an argument as to EPA's prima facie case, which is whether Respondents violated Section 301(a) of the Clean Water Act,[11] but rather Respondents direct their efforts at the Compliance Order, which is not at issue for purposes of liability in this proceeding.[12] Nevertheless, even if Respondents had chosen to raise such an argument, I have reviewed the Complaint and EPA's Prehearing Exchange, and I would conclude that the EPA has provided sufficient support for a prima facie case that Respondents violated Section 301(a) of the Clean Water Act by the unlawful discharge of dredged or fill material from a point source into waters of the United States without a Section 402 or 404 permit.[13]

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[10] As discussed in my Order Denying Respondents' Motion to Strike, 2005 EPA ALJ LEXIS 2 (Jan. 13, 2005), Respondents may object to exhibits at the hearing. If the Respondents make such an objection, the EPA will be required to demonstrate admissibility, and I will consider whether such exhibits are inadmissible. Pursuant to the Rules of Practice, 40 C.F.R. § 22.22(a), all evidence will be admitted that is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except evidence relating to settlement. Moreover, subject to the standards governing admissibility of evidence, Respondents may seek to admit their own exhibits and/or testimony that contradict or rebut evidence presented by the EPA. In other words, Respondents will be allowed to challenge the validity of the Compliance Order within the context of the penalty phase of the hearing, if the EPA uses the Compliance Order at the hearing.

[11] More specifically, a determination of whether a prima facie case exists for a Section 301(a) violation of the Clean Water Act depends on whether Respondents (1) discharged a pollutant, (2) from a point source, (3) into waters of the United States, (4) without a permit or other authorization under the Clean Water Act. 33 U.S.C. § 1311(a); *see also In re Richner*, CWA Appeal No. 01-01, 10 E.A.D. 617, 620 (EAB 2002).

[12] A party has the burden to raise its own arguments. *In re Pyramid Chem. Co.*, Docket No. RCRA-HQ-2003-0001, 2004 EPA App. LEXIS 32, slip op. at 33 n.32 (EAB, Sept. 16, 2004), 11 E.A.D. ___; *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, 10 E.A.D. 460, 507 n.39 (EAB 2002).

[13] For instance, the EPA alleges the following: Respondents own, possess, and/or control property containing wetlands adjacent to Stariski Creek, which is a tributary of Cook Inlet,

As to the remaining question of whether there are "other grounds which show no right to relief on the part of the complainant," Respondents' arguments are unpersuasive. Generally, instances in which such other grounds are considered are those in which there exists a valid affirmative defense. *See, e.g., Minor Ridge, supra*, 2003 EPA ALJ LEXIS 21, at *15-20; *Julie's Limousine, supra*, 2002 EPA ALJ LEXIS 74, at *4-9; *In re Church & Dwight Co.*, Docket No. FIFRA-02-2001-5109, 2001 EPA ALJ LEXIS 179, at *15-25 (ALJ, Nov. 16, 2001). An affirmative defense, in some instances, can defeat the cause of action, but the Respondents bear the burden of establishing such a defense. 40 C.F.R. § 22.24(a).

As discussed, Respondents' allegations concerning the Compliance Order do not address whether the EPA failed to state a claim on which relief may be granted; the EPA has provided sufficient support to support its prima facie case that Respondents discharged pollutants into waters of the United States with a point source, and without a Section 402 or 404 permit. The proceeding before me is simply to adjudicate whether Respondent violated Section 301(a) of the Clean Water Act, and if so, what the appropriate penalty should be. *See* CWA § 319(g), 33 U.S.C. § 1319(g); 40 C.F.R. § 22.1(a)(6). Therefore, other than considering the Compliance Order for purposes of determining an appropriate penalty amount, assuming the EPA submits such Compliance Order for admission into evidence at the hearing, an evaluation of the Compliance Order's validity is outside the scope of this proceeding.[14]

Respondents contend that the Compliance Order does not comply with the Rules of Practice, such as 40 C.F.R. §§ 22.1(a)(6), 22.13(a)-(b), and that 40 C.F.R. § 22.3(1)-(3), concerning final orders, does not describe the Compliance Order. Motion to Dismiss at 1. Section 22.1(a)(6) provides that the Rules of Practice govern all administrative adjudicatory

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which is subject to the ebb and flow of the tide, and that the wetlands are "waters of the United States"; Respondents used or authorized the use of a backhoe or other heavy earthmoving equipment to place gravel, sand, soil, or other materials for the purpose of constructing a house pad and saw mill pad; Respondents excavated a ditch approximately 4,200 feet long and sidecast the excavated materials into wetlands; Respondents placed fill materials into wetlands for the purpose of constructing a driveway at the Site; the gravel, sand, soil, and excavated sidecast materials are "fill material" and/or "dredged material" and are "pollutants"; the heavy backhoe and heavy earthmoving equipment are "point sources," and; Respondents' discharge of pollutants was not authorized by any permit issued pursuant to Sections 402 or 404 of the Clean Water Act. Complaint §§ 2.3-2.6, 3.1-3.7; *see also* Complainant's Prehearing Exchanges. I emphasize, however, that such determination does not decide the ultimate truth of the matter, but rather would represent a threshold determination that an evidentiary hearing is necessary, and that dismissal is not warranted.

[14] The EAB has not addressed the issue of what degree, if any, a presiding judge may consider the validity of a Clean Water Act compliance order issued by an enforcement office of the EPA. *See In re Bricks, Inc.,* CWA Appeal No. 02-09, 2003 EPA App. LEXIS 7, slip op. at 9 n.11 (EAB, Oct. 28, 2003), 11 E.A.D. ___.

proceedings for the assessment of any Class II penalty under section 309(g) of the Clean Water Act, which is the basis for the Complaint in the instant matter, as well as section 311(b)(6), which concerns oil and hazardous substance liability, and governs the termination of any permit issued pursuant to section 402(a) of the Clean Water Act. Section 22.13(a)-(b) provides that any proceeding subject to the Rules of Practice is to be commenced by filing a complaint with the Regional Hearing Clerk conforming with § 22.14, and further provides that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3). Section 22.3 defines "Final order" as an order issued by the EAB or the EPA Administrator after an appeal disposing of the matter in controversy between the parties, or an initial decision that becomes a final order under § 22.27(c), or a final order issued in accordance with § 22.18, regarding settlement and consent agreements. EPA's issuance of the Compliance Order is outside the scope of whether Respondents violated Section 301(a) of the Clean Water Act.[15] Moreover, the rules Respondents cite only confirm the limited scope of the liability inquiry in the matter before me. Accordingly, the issues Respondents raise with regards to §§ 22.1(a)(6), 22.13(a)-(b), and 22.3 are not grounds for dismissal of the Complaint in the matter before me.

Respondents contend that the Compliance Order is a direct denial of Ms. Tillion's constitutional rights, and also of Mrs. Richards' rights, because it allegedly orders Ms. Tillion to perform certain acts to Mrs. Richards' property, which Respondents assert that no Agency has the right to do. Motion to Dismiss at 1-2. Respondents' grievances with the terms of the Compliance Order are not recognized as a valid defense, affirmative or otherwise, to Respondents' alleged Section 301(a) violation.

Respondents further contend that CWA-10-2004-0067, which is the docket number of the matter before me, is a direct result and a continuance of CWA-10-2003-0020, the latter of which is the docket number for the Compliance Order. Motion to Dismiss at 2. Respondents argue that with information obtained from CWA-10-2003-0020, CWA-10-2004-0067 was initiated with no public notice as per 22.44(b), no official notice as per 22.37(b), and without due process. *Id.* Moreover, Respondents argue that if CWA-10-2003-0020 is not a legal order, then the information collected for CWA-10-2004-0067 was illegally obtained and should be grounds for dismissal. *Id.* Respondents also contend that the Rules of Practice were "withheld" from their knowledge for the purpose of gathering information for CWA-10-2004-0067, that they were not made aware of them until 2004, and they suggest wrongdoing on EPA's part for such conduct. *Id.*

With regards to EPA's compliance with the Rules of Practice concerning the Complaint, filed under docket number CWA-10-2004-0067, the EPA has provided a copy of a Publisher's Affidavit to show that the EPA publicly announced the proposed penalty amount for the

[15] Moreover, the Complainant correctly observes that its issuance of a compliance order is not governed by the Rules of Practice.

Complaint, pursuant to 40 C.F.R. § 22.45(b). Response to Motion to Dismiss, Ex. 1 (May 18, 2004). The EPA correctly observes that other provisions cited by the Respondents are inapplicable; namely 40 C.F.R. § 22.37(b), which concerns proceedings under the Solid Waste Disposal Act, and 40 C.F.R. §22.44(b), which concerns proceedings to terminate a permit under the Clean Water Act or the Resource Conservation and Recovery Act. Respondents have not provided an affidavit of their own to contradict the Publisher's Affidavit, and Respondents' Reply does not dispute the veracity of the Publisher's Affidavit. Accordingly, the Publisher's Affidavit indicates EPA compliance with the Rules of Practice for purposes of the Complaint in the matter before me. As for EPA's alleged withholding of the Rules of Practice from the Respondents, although the Rules of Practice apply to the assessment of a penalty under Section 309(g) of the Clean Water Act, such as the instant matter, these Rules do not apply to Complainant's issuance of a Clean Water Act compliance order. *See* 40 C.F.R. 22.1 (describing the scope of the Rules of Practice). Respondents' Reply does not dispute that, with regards to the Complaint in the matter before me, they were served with the Rules of Practice. Accordingly, the EPA did not withhold the Rules of Practice with regards to the Complaint in this matter.

Respondents raise an issue as to whether the information that forms the basis of the matter before me, under docket number CWA-10-2004-0067, was obtained through an unconstitutional search and seizure. The EPA, on the other hand, contends that the Compliance Order was properly issued "pursuant to Sections 308 and 309(a) of the [Clean Water] Act, 33 U.S.C. §§ 1318 and 1319(a)." Response to Motion to Dismiss at 2 (quoting Compliance Order ¶ 2.1). Most affirmative defenses require the production of evidence to support the defense. 40 C.F.R. § 22.24(a); *In re Mayes,* RCRA (9006) Appeal No. 04-01, 2005 EPA App. LEXIS 5, slip op. at 48 & n.28 (EAB, Mar. 3, 2005), 12 E.A.D. ___ ("'A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case.'"). Assuming *arguendo* that an unconstitutional search and seizure constitutes a defense to an enforcement action, Respondents would bear the burden of proving that there was an illegal search and seizure and that the only evidence supporting the enforcement action was the fruit of such illegal search and seizure. Here, Respondents' conclusory assertions concerning the unconstitutionality of the search and seizure of their property does not command dismissal, as Respondents have not met their evidentiary burden of proving such claim. As such, dismissal is not appropriate but Respondents may renew their challenge at the evidentiary hearing.[16]

[16] A recent EAB case indicates that I may entertain a challenge to evidence and exclude such evidence on the ground that the EPA obtained the evidence through an unreasonable search or seizure in violation of the Fourth Amendment to the U.S. Constitution. *See Mayes*, 2005 EPA App. LEXIS 5, slip op. at 28 & n.16 (EAB, Mar. 3, 2005), 12 E.A.D. ___ (considering the validity of warrantless searches and seizures). This Tribunal lacks authority to rule on a facial challenge to the constitutionality of a statute. *In re City of Irving,* 10 E.A.D. 111, 124 (EAB 2001), *petition for review denied sub nom City of Abilene v. EPA,* 325 F.3d 657 (5th Cir. 2003); *In re Britton Constr. Co.,* 8 E.A.D. 261, 279 n.6 (EAB 1999). But where the constitutionality of the statute is not at issue, but instead where the issue is whether the statute is being applied in a

Contrary to Respondents' contentions, they are not entitled to a jury trial in the matter before me. The Seventh Amendment to the U.S. Constitution provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." The U.S. Supreme Court construes the Seventh Amendment's phrase "Suits at common law" as referring to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 449 (1977). More specifically, the Court rejected an argument that Congress cannot assign the function of adjudicating the Government's rights to civil penalties for statutory violations to an administrative agency in which no jury would be available. *Id.* at 450. The Court concluded, "At least in cases in which 'public rights' are being litigated, e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* (footnote omitted). More specifically, a federal circuit court of appeals has held that there is no constitutional right to a jury trial in an EPA civil administrative penalty proceeding brought pursuant to Section 309(g) of the Clean Water Act for violating Section 301(a), which is the same type of proceeding before me in the instant matter. *Sasser v. EPA,* 990 F.2d 127, 130 (4th Cir. 1993), *aff'g,* CWA Appeal No. 91-1, 3 E.A.D. 703, 710-11 (CJO 1991).

Finally, Respondents contend that the EPA committed an unconstitutional takings of the right to use their property without due process of law, and contend that the EPA has demanded

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manner that satisfies constitutional requirements, such challenges can be entertained. *See In re General Electric Co.*, RCRA Appeal No. 91-7, 4 E.A.D. 615, 627, 632-33, 639 (EAB 1993) (fair notice) (cited by *In re Ocean State Asbestos Removal, Inc.*, CAA Appeal Nos. 97-2 and 97-5, 7 E.A.D. 522, 558 (EAB 1998)). Nevertheless, at this stage of the proceedings, it is premature to make a ruling on the reasonableness of EPA's information gathering, as the facts are not fully developed and resolution of such an issue is more appropriate at the hearing stage of this litigation. *Accord In re General Motors Auto. – North America,* Docket No. RCRA-05-2004-0001, at 5 (ALJ, May 19, 2005). Moreover, Respondents do not make a direct challenge to the information's admissibility, but argue instead that the alleged constitutional violation qualifies as grounds for dismissal.

that Respondents render their home uninhabitable.[17, 18] Respondents' Reply at 4. The takings clause of the U.S. Constitution's Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." The EAB has determined that this Tribunal is not the proper forum for a takings claim, but instead such claims must be brought in the U.S. Court of Federal Claims (formerly known as the U.S. Claims Court) or in certain cases the U.S. district courts. *In re Miners Advocacy Council*, NPDES Appeal No. 91-23, 4 E.A.D. 40, 44 (EAB 1992); *see also* 28 U.S.C. §§ 1491, 1346(a)(2). Similarly, the U.S. Supreme Court concluded, in a Clean Water Act enforcement case involving the Corps' alleged taking of wetlands property, "[i]f the Corps has indeed effectively taken respondent's property, respondent's proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985); *accord Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (holding that takings claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act). Furthermore, other ALJs have persuasively held that a takings claim is not grounds for dismissal of a Clean Water Act civil administrative penalty proceeding, such as the instant proceeding. *In re C.W. Smith, Grady Smith, and Smith's Lake Corp.*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7, at *29-30, 2003 EPA ALJ LEXIS 8, at *6-7 (ALJ, Feb. 6, 2002; Mar. 11, 2003). Accordingly, the takings issue raised by Respondents is not grounds for dismissal of the instant proceeding.

For the reasons stated herein, Respondents' Motion to Dismiss is DENIED.[19]

Dated: May 26, 2005
Washington, D.C.

Barbara A. Gunning
Administrative Law Judge

[17] I note that Respondents did not raise the takings argument in its original filing on the Motion to Dismiss, but rather waited until its reply brief to raise the argument. Respondents should be advised that, in motion practice, reply briefs are reserved for responding to the arguments in the opponent's response brief. 40 C.F.R. § 22.16(b) (reply shall be limited to issues raised in the response to a motion).

[18] Presumably the Compliance Order was the source of the alleged takings.

[19] I wish to emphasize, however, that Respondents are guaranteed due process over matters that properly fall within the scope of the proceedings before me.