

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of)
)
Bricks, Incorporated,) Docket No. CWA-5-2000-012
)
Respondent)

ORDER

On January 10, 2001, Bricks, Incorporated (“Bricks”), filed a Motion To Reschedule Hearing. The U.S. Environmental Protection Agency (“EPA”) filed an opposition to this motion. For the reasons set forth below, the motion to reschedule is *denied*.

In seeking a postponement of the hearing, Bricks substantially relies upon the January 9, 2001, decision by the United States Supreme Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 2001 U.S. Lexis 640 (“*SWANCC*”). According to respondent, the “Supreme Court’s precise holding in *SWANCC* was that the U.S. Army Corps of Engineers had exceeded its authority by interpreting Section 404(a), which grants the Corps authority to issue permits ‘for the discharge of dredged or fill material into the navigable waters at specified disposal sites,’ to isolated, some only seasonal, intrastate ponds.” Mot. at 2.

While acknowledging that the facts of *SWANCC* are “limited,” Bricks suggests, in a very general way, that “the scope of the decision and impact of the ruling can be expected to be much broader because of the Court’s general discussion of the scope of the Clean Water Act and the requirement of navigability under the Act.” Mot. at 2. Even if Bricks’ prediction is true, however, it has offered no persuasive reason why the hearing scheduled in this case should be postponed. Indeed, if anything, respondent’s reliance upon the *SWANCC* decision cries out for a complete presentation of the facts involved in this Clean Water Act case. It is only then that this tribunal can fully understand the jurisdictional argument that Bricks apparently intends to raise as a defense.

In addition, Bricks’ argument that it needs more time to digest the Court’s holding in *SWANCC* is not a sufficient reason to postpone the hearing in this case. It is this tribunal’s view that both parties to this case will have had adequate time to review *SWANCC* and assess its impact prior to hearing.

Also unpersuasive is Bricks’ argument that it needs more time to contemplate and conduct discovery regarding jurisdictional issues, as well as to amend its prehearing exchange to include more factual evidence on the nature of the alleged wetlands which are the focus of the present case. By its own admission, respondent acknowledges that in its answer to EPA’s

complaint, it had raised jurisdiction as a defense. Mot. at 3. There has been no showing by respondent that it did not have a sufficient opportunity to prepare this, or any other, defense. The fact that the holding in *SWANCC*, at least in respondent's eyes, enhances a jurisdictional defense is no reason to postpone the hearing.

In a related argument, Bricks submits: "In addition, a witness for Bricks whose testimony will involve facts that go to jurisdiction has indicated he is unavailable to appear at the hearing on the scheduled date, and this Court ruled on January 10, 2001, that written testimony would not be permitted." Mot. at 3.¹ Given the fact that the agency procedural rules applicable to the hearing in this case contemplate that the witness offering the written testimony *will be present at the hearing, and subject to cross-examination*, respondent's argument in this regard must fail. 40 C.F.R. 22.22(c).

Finally, in light of the January 9, 2001, order issued in this case denying respondent's motion for accelerated decision, Bricks requests a postponement of the hearing on the ground that it is "considering the possibility of seeking an interlocutory appeal of this issue." Mot. at 3. This also is not a sufficient reason to justify a rescheduling of the hearing in this matter.

Carl C. Charneski
Administrative Law Judge

Issued: January 16, 2001
Washington, D.C.

¹ This tribunal had not previously been informed that a witness for respondent would be unavailable for hearing.