

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF:** )  
 )  
**Robert J. Heser, Heser Farms,** )  
**and Andrew Heser** )  
 ) **Docket No. CWA-05-2006-0002**  
**Respondents** )  
 )

**ORDER ON RESPONDENTS’ MOTION TO DISMISS FOR LACK OF JURISDICTION**

I. Introduction

In this Clean Water Act Complaint <sup>1</sup> brought by the United States Environmental Protection Agency, the Respondents, Robert J. Heser, Heser Farms, and Andrew Heser, have filed a Motion to Dismiss the proceeding for lack of jurisdiction. Respondents contend that, in light of the United States Supreme Court’s recent decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006), EPA does not have jurisdiction in this matter. For the reasons that follow, the Court finds that Respondents misinterpret the appropriate legal standard, as well as the position articulated by the U.S. Supreme Court in *Rapanos* . Accordingly, Respondents’ motion is **DENIED**.

II. Background

As related by the Respondents, the Complaint alleges that the Respondents discharged “spoil and organic debris into a tributary of Martin Branch and . . . associated wetlands.” Respondent’s Motion (“Motion”) at 1. It describes the disputed area as “an approximate 2 acre portion of land owned by the Respondents . . . [which is] an intermittent channel that runs through [a] formerly wooded area . . . [but for which] the 1987 National Wetlands Inventory Map . . . does not indicate the presence of wetlands.” Respondents acknowledge that around “September, 1999, the [Respondents] re-directed the intermittent channel to prevent washouts and erosion problems [and by doing this created] a straight line channel.” This “redirecting [of] the intermittent channel resulted [according to the government] in the ‘discharge of approximately 3,000 cubic yards of dredged spoil and organic debris into approximately 13,195 square feet of Martin Branch, its tributaries and approximately 2.1 acres of adjacent forested wetlands.’” Motion at 2, 3. The Complaint alleges that the wetlands in issue are “adjacent to

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<sup>1</sup>The Complaint, filed on April 28, 2006, arises under the authority of Section 309(g) of the Clean Water Act. (“CWA” or “the Act”) 33. U.S.C. § 1319(g). EPA Region V (“Complainant” or “EPA”) filed the Complaint, which alleges violations of Section 301 of the CWA, and seeks a total proposed penalty of \$120,000. The action was also instituted pursuant to Sections 22.1(a)(4), 22.13, and 22.37 of the Environmental Protection Agency Rules of Practice, (“Rules”) which are applicable in this administrative enforcement proceeding, as set forth in 40 C.F.R. Part 22.

Martin Branch, an intermittent stream which flows into Lake Centralia, [then to] Crooked Creek, [then to] the Kaskaskia River, [and finally to] the Mississippi River.” *Id.* at 3.

### III. Respondents’ Motion to Dismiss, EPA’s Response, and Respondents’ Reply.

Respondents assert that the proceeding should be dismissed pursuant 40 C.F.R. 22.20, which allows the Presiding officer to dismiss a proceeding “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.” Motion at 3. Respondent contends that Complainant has no jurisdiction over the channel at issue and accordingly that Complainant’s allegations, even if true, do not prove a violation of the Clean Water Act as charged. *Id.*

In support of this contention, Respondents look to the Supreme Court’s decision in *Rapanos*, asserting that “a plurality of Justices [*in Rapanos*] interpreted the phrase ‘waters of the United States’ as including only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes . . . [and which phrase] does not include ‘channels containing merely intermittent or ephemeral flow, [and that] *only* those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’” are covered by the Clean Water Act. *Id.* at 4. Applying this, Respondents assert that EPA “failed to allege that the waters at issue involved anything more than an intermittent waterway or that there is any kind of ‘significant nexus’ between any wetland and waters of the United States.” *Id.*

Respondents also cite to this Court’s initial decision *In the Matter of Adams*, CWA 10-2004-0156 (2006) for the proposition that Justice Kennedy’s opinion “is, for now, the only opinion that matters.”<sup>2</sup> Last, Respondents take note of *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006), and the Seventh Circuit’s reference therein to *Rapanos*. That court described the *proposed* test by Justice Kennedy “that ‘wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’” Motion at 5, quoting *Gerke* at 724.

With this in mind, Respondents contend that even EPA’s amended Complaint<sup>3</sup> fails to allege “such chemical, physical or biological affects (*sic*) (significant or otherwise) on the specifically identified navigable waters [and that merely alleging] some ‘connect the dots’

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<sup>2</sup>Respondents quote from this Court’s decision in *Adams* states: “The effect of that outcome [the plurality opinion of *Rapanos*], with four justices reading a more restrictive view of the breadth of the Clean Water Act and four justices holding a less restrictive view, is that the swing vote, that of Associate Justice Kennedy is, for now, the only opinion that matters.” Motion at 4, quoting *In the Matter of Adams* at 26. The problem with this quotation by the Respondents is that it is misleading. At footnote 62, this Court stated: “While Justice Kennedy concurred with the plurality’s judgment, it could not have been a more limited concurrence, as it concurred only with the conclusion that the cases should be remanded for further proceedings. If there was any doubt about this, one only need consult Justice Kennedy’s statement that “[i]n sum, the plurality’s opinion is *inconsistent with the Act’s text, structure and purpose.*” quoting *Rapanos* at 2246.

<sup>3</sup>The Court today also issues its Order granting EPA’s motion to amend the complaint, described as its “Motion to Amend Administrative Penalty Order.”

connection to an intermittent channel is not sufficient to characterize that intermittent channel as a navigable water itself.” Motion at 5. Respondent then adds: “[p]erhaps more importantly, the affidavit of [Respondents’] expert . . . presents evidence that the integrity of the navigable waters identified in the Amended Complaint are not in any way chemically, physically or biologically affected by the channel and wetlands in issue in this proceeding.” *Id.* at 5 - 6.

In its Response,<sup>4</sup> EPA contends that in fact it has adequately pled a *prima facie* case and that the Complaint states a federal question under the Clean Water Act, because there is a question whether the conduct occurred in federally regulated waters. EPA adds that its obligation to show that the wetlands in issue are part of “waters of the United States” is more accurately characterized as an element of the violation, not one of jurisdiction.<sup>5</sup> Response at 3. In terms of pleading a *prima facie* case, EPA maintains that it has alleged the “hydrologic connection” between the wetlands adjacent to Martin Branch and the navigable waters and that, in terms of the Complaint, no more is required for its factual allegations, as it constitutes the “concise statement of the factual basis for [the violation]” required by 40 C.F.R. § 22.14 to put the Respondent on notice of the nature of the claim.

EPA also contends that the *Rapanos* decision “left too much grey area” to expect that the pleadings alone would resolve this matter. Response at 6-7. The Court notes that EPA also included the declaration of an EPA life scientist and enforcement officer in order to demonstrate “the existence of factual disputes in [the] case.” *Id.* at 7.

In its Reply, Respondents take issue with Complainant’s arguments on the issue of jurisdiction as well as the issue of whether Complainant stated a *prima facie* claim. Regarding jurisdiction, Respondents argue that the *Rapanos* decision makes it clear that the CWA only authorizes federal jurisdiction over “waters of the United States” and thus the central issue is whether the areas identified in the Complaint are part of such waters. Respondent’s Reply at 2. Respondents contend that EPA’s allegations, even if assumed to be true, do not involve such waters. As for the question of whether the Complaint has properly set forth the necessary elements to make out a violation, Respondents, citing *Port Authority of New York and New Jersey v. Arcadian Corp., et al.*, 189 F.3d 305 (3<sup>rd</sup> Cir. 1999), argue that a Court must consider more than a check list for elements of a claim when considering a motion to dismiss. *Id.* at 2, 3. They contend that undertaking such a review inevitably leads to “the issue of ‘significant nexus’ and whether the ‘water[s]’ at issue are regulated waters.” *Id.* at 3.

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<sup>4</sup>EPA filed a Response to Respondent’s Motion to Dismiss (hereinafter “Complainant’s Response”) on January 18, 2007 and Respondent filed a Reply to the Response on January 26, 2007. The Court notes that Complainant was late in filing its Response to Respondent’s Motion to Dismiss. 40 C.F.R. § 22.7(b) states that the Presiding Officer “may grant and extension of time for filing any document...upon its own initiative.” See also, *In re Lackland Training Annex, San Antonio, Texas*, Docket No. RCRA VI-311-H, 1995 EPA ALJ LEXIS 47 (A.L.J. Oct. 25, 1995)(citing *In re Michael C. Sadd, d/b/a Sadd Laundry and Dry Cleaning Service*, Docket No. RCRA-09-90-002 (August 29, 1991)(late filing accepted, notwithstanding failure to move for an extension, pursuant to Rule 22.7(b)); *In re Alaska Pulp Corporation*, Docket No. 10-97-0042-CAA, 1998 EPA ALJ LEXIS 140, notes 10-11 (A.L.J. Jan. 26, 1998)(noting that a party may be found in default *sua sponte* by the Court, but also stating that such action is only warranted in cases of egregious conduct). Complainant did not file a Motion for Extension nor did it offer any explanation for its delay. Respondent never objected to the late filing in its subsequent Reply. The Court will consider Complainant’s Response because Respondent did not object and, in any event, there is no resulting prejudice to the Respondent. The delay had no adverse effect on the Respondent’s rights. Accordingly, while observance of filing requirements is important, in this instance the effect is *de minimus*. **However, EPA is advised to avoid any future transgressions of the procedural rules.**

<sup>5</sup>EPA cites to *United States v. Krilich*, 209 F.3d 968 (7<sup>th</sup> Cir. 2000) in support of this contention. There, the Seventh Circuit agreed that the issue of whether “waters of the United States” were involved was an element of the government’s case. Thus, charging a violation of a federal statute creates federal question jurisdiction.

### III. Discussion and Determination

In bringing its Motion to Dismiss for Lack of Jurisdiction, Respondents use of the term “Jurisdiction” is not a challenge to the authority of this Court to hear this matter.<sup>6</sup> Rather, being based solely on Respondents’ interpretation of the *Rapanos* decision, it is a challenge that the Complaint lacks an essential factual allegation to establish an offense, namely that the waters involved are not navigable waters. A decision cited by EPA, *U.S. v. Krilich*, 209 F.3d 968 (7<sup>th</sup> Cir. 2000), (“*Krilich*”), is particularly instructive to Respondents’ motion. There it was contended that there was no subject matter jurisdiction as “an ‘isolated intrastate wetland’ [was involved] which was beyond the federal government’s commerce power to regulate.” *Krilich* at 971. The Seventh Circuit noted that the term “jurisdiction” is misapplied when it is actually referring to one of the essential elements of the offense, not to a court’s subject matter jurisdiction over the case. *Id.* at 971-972. Thus, the court emphasized the that “the existence of regulatory power differs from the subject-matter jurisdiction of the courts.” *Id.* at 972.

Regarding the contention that EPA’s Amended Complaint fails to state an adequate claim, 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.” *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819,827 (EAB 1993). However, 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] 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). The purpose of notice pleading is to give general notice to the defendant of the nature of plaintiff’s claim. *See, In re Puerto Rico Aqueduct and Sewer Authority*, Docket No. EPCRA-02-99-4003 (A.L.J. Oct. 4, 1999)(citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). To prevail Respondents must show that EPA’s allegations, assumed to be true, do not prove a violation of the Clean Water Act.

The Court notes that the Respondents have cited *Port Authority of New York and New Jersey v. Arcadian Corp, et al.*, 189 F.3d 305 (3<sup>rd</sup> Cir. 1999). In that case the Third Circuit noted with approval that the district court had “assumed that the facts alleged in the Amended Complaint were true but determined that the facts, even if true, could not legally support plaintiff’s claims.” 189 F.3d at 311. While it is true that the Third Circuit rejected the idea that, in reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the court’s task involves merely “go[ing] through a check list for the elements a [ ] claim,” the Court’s ruling here does not simply involve such a mechanical procedure. Rather, it is based on the conclusion that it cannot find that “there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted.” *Id.* at 312. On the contrary, taking all the allegations in the amended Complaint “as true and making every favorable inference in favor of [the Complainant],” the Court finds it possible that relief *could* be granted. This is because the plurality holding in *Rapanos* was limited to remanding the cases for further proceedings. Restated, beyond the Supreme Court’s determination to remand the matter, there was no other plurality holding regarding the scope of the Clean Water Act. *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006), cited by the Respondents, does not alter this

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<sup>6</sup>The authority for the this Court to preside over an administrative enforcement proceeding under the CWA is granted through Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, Section 309(g) of the CWA, 33 U.S.C. 1319 (g), and the Consolidated Rules of Practice as set forth in 40 C.F.R. Part 22. As mentioned, Respondents do not challenge this authority.

conclusion. As the court in *Gerke* also noted, “[t]here was, however, no majority opinion in *Rapanos*.” *Id.* at 724. While the case was remanded to the district court, the remand was prompted by the lower court’s *granting* summary judgment. The Seventh Circuit reversed the summary judgment, determining that factfinding was required. This is exactly the approach this Court has taken here by determining that factfinding is needed here as well.

Here, in the Amended Complaint, EPA has set forth the relevant law and facts in support of its allegation that Respondent has violated the CWA. The statute provides that the discharge of any pollutant from a point source into navigable waters by any person, absent a permit issued under Section 404 of the Act, is unlawful. 33 U.S.C. § 1311. The Complaint identifies the applicable statutory provisions, the dates, nature, source, and location of the discharge as well as the type and quantity of the pollutant discharged. The Complaint also describes the receiving area of the discharge, asserts that the water bodies that are hydrologically connected to the receiving area, and the nature and characteristics of these water bodies. This information is sufficient to put Respondent on notice as to the nature of Complainant’s claim. Complainant need not prove its case in the complaint itself.

Finally, relying upon its (incorrect) interpretation of the holding in *Rapanos*, it may also be construed that Respondents here are essentially claiming that a motion for summary judgment, or as described by the EPA Procedural Rules, a motion for “accelerated decision,” is appropriate. Both parties submitted affidavits from experts in support of their respective positions. Respondent’s expert concludes that Respondents have “done nothing observable to chemically, biologically, or physically affect any navigable waterway.” Lendy Affidavit, Attachment to Respondent’s Motion, at ¶ 11. On the other hand, Complainant’s expert concludes that Respondent’s actions will result in “further diminishment or [a navigable water body] water quality and an increased risk of flooding for downstream riparian land owners.” Carlson Declaration, Attachment to Complainant’s Response, at ¶ 16. Viewing Respondents’ motion as seeking summary judgment, it is obvious that there are factual issues to be resolved in this matter, a determination that is a deathblow to a claim for accelerated decision.

Accordingly, for the reasons set forth above, the Court **DENIES** Respondent’s Motion to Dismiss for Lack of Jurisdiction.

**SO ORDERED.**

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William B. Moran  
U.S. Administrative Law Judge

Dated: February 23, 2007  
Washington, D.C.

In the Matter of Robert J. Heser, Heser Farms and Andrew Heser, Respondents  
Docket No. CWA-05-2006-0002

I hereby certify that the following Order on Respondents' Motion to Dismiss for Lack of Jurisdiction, dated February 23, 2007 was sent in the following manner to the addressees listed below.

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Knolyn R. Jones  
Legal Staff Assistant

Dated: February 23, 2007

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