

**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’ MOTIONS FOR ADDITIONAL DISCOVERY

I. Introduction and Procedural Background

In this proceeding under the Clean Water Act (“CWA” or “the Act”), the United States Environmental Protection Agency, Region V (“Complainant” or “EPA”) alleges violations of Section 301 of the Act, 33 U.S.C. § 1344, against Robert J. Heser, Heser Farms, and Andrew Heser (“Respondents”). Presently before the Court are Respondents’ Motions for Additional Discovery. The first motion was filed on January 11, 2007 (hereinafter cited as “Respondents’ First Motion”) and the second was filed on January 24, 2007 (hereinafter cited as “Respondents’ Second Motion”). For the reasons that follow, the Court finds that granting these motions would be inconsistent with EPA’s Rules of Practice and are not warranted in this instance. Accordingly, Respondents’ motions are **DENIED**.

II. Respondents’ Motions for Additional Discovery

Respondents’ first motion seeks “the production of documentary evidence via subpoena.” Respondents’ First Motion at 1. Respondents seek information relating to “upstream work performed on the channel at issue” that was “funded, in part, by agencies of the National, State, and local government,” as well as “the existence of any pre-existing timber in the area of alleged wetlands.” at ¶2. Respondents believe the “upstream work” took place on the property of an estranged relative and that the work was funded by an agency of the U.S. Department of Agriculture as well as the Marion County Soil and Water Conservation District. *Id.* at ¶3. Both agencies denied Respondents’ request for information. *Id.* Respondents have also sought, unsuccessfully, “documentation concerning logging on the property at issue” from a timber company. *Id.* at ¶4. Therefore, Respondents request that the Court issue discovery subpoenas to the four individuals or organizations which did not voluntarily provide the information it sought. *Id.* at ¶5.

Respondents' second motion was prompted by "the uncertainty of the law post *Rapanos*," referring to the United States Supreme Court's decision in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Respondents' Second Motion at ¶2. Respondents assert that *Rapanos* establishes a "fact-intensive nexus between the alleged waters at issue and navigable waters," which requires "additional and in-depth information" from government witnesses. *Id.* Specifically, Respondents wish to depose, via subpoena if necessary, a number of witnesses Complainant has listed as potential witnesses at trial. *Id.* at ¶4. These witnesses include employees of EPA, the U.S. Department of Agriculture, the U.S. Army Corps of Engineers, the Illinois Environmental Protection Agency, the Marion County Soil & Water Conservation District, as well as an adjacent property owner. *Id.*

III. Discussion and Determination

40 C.F.R. §22.19(e) states that after the prehearing exchange, a party may move for additional discovery. Additionally, subpoenas are available in this proceeding. 33 U.S.C. § 1319(g)(10). However, while the Court may order such discovery, this can occur *only if* it "[w]ill neither unreasonably delay nor unreasonably burden the non-moving party; . . . [s]eeks information that is most reasonably obtained from the non-moving party, *and* which the non-moving party has refused to provide voluntarily; *and* . . . [s]eeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." (emphasis added). 40 C.F.R. §22.19(e)(1) (emphasis added). Although the Court may order depositions and issue subpoenas for documentary evidence, this authority is subject to the same limitations listed in Section 22.19(e)(1) and upon an additional finding. 40 C.F.R. §22.19(e)(3)-(4). The additional finding is that the Court must determine that the information cannot reasonably be obtained by alternative methods of discovery or that there "is a substantial reason to believe that relevant and probative evidence may not be preserved for presentation by a witness at hearing." 40 C.F.R. §22.19(e)(3). Applying the Rules, the Court denies both motions because they do not meet the criteria set forth in 40 C.F.R. §22.19(e).

This Court has previously noted that "depositions are not a routine part of these administrative adjudicatory proceedings and consequently the showing required to justify depositions is substantial." *In re Nova Chemicals, Inc.*, Docket No. CERCLA-01-2005-0051 (ALJ, August 2, 2006). With respect to that, Respondents argue that depositions are necessary because "Respondents have insufficient information to determine if evidence may or may not be preserved for presentation at hearing." Respondents' Second Motion at ¶8. This reasoning is insufficient to meet Respondents' substantial burden. The Court also notes that if Complainant calls these witnesses, Respondents will have the opportunity to cross examine them. Respondents will also have the opportunity to present its own rebuttal witnesses assuming that they were properly identified in its prehearing exchange.

Although Respondents have shown efforts at acquiring the information through other means, they have not met their burden of showing that any of this additional discovery, either the documentary evidence or depositions sought, will have any significant probative value. Conclusory statements such as "[t]he information sought has significant probative value on disputed issues relating to liability and relief sought" does not meet Respondents' burden. Thus, Respondents have not made any connections between the information sought and establishing that the information sought "has significant probative value on a disputed issue of material fact relevant to liability or the relief sought." 40 C.F.R. §22.19(e).

In short, Respondents have failed to set forth how any alleged “upstream work” bears on the issue of its liability nor, if liability is established at the hearing, how such work would be probative on the issue of determining an appropriate civil penalty. Similarly, Respondents have not explained the significant probative value regarding “the existence of any pre-existing timber in the area of alleged wetlands.” Regarding the Second Motion, seeking oral depositions of witnesses identified by the government, the information sought can be reasonably obtained through cross-examination at the hearing. The Respondents are entitled to and will have a full and robust opportunity to cross-examine witnesses.

Accordingly, for the reasons set forth above, the Court **DENIES** Respondents’ Motions for Additional Discovery.

SO ORDERED.

William B. Moran
United States Administrative Law Judge

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

I hereby certify that the following, Order on Respondents' Motions for Additional Discovery, dated, February 23, 2007 was sent in the following manner to the addressees listed below.

Knolyn R. Jones
Legal Staff Assistant

Dated: February 23, 2007

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