

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
RICHMOND AMERICAN HOMES ) DOCKET NO. CWA-08-2003-0080  
OF COLORADO, INC., )  
 )  
RESPONDENT )

ORDER GRANTING MOTION TO WITHDRAW PENALTY COMPLAINT  
AND NOTICE OF OPPORTUNITY FOR HEARING

Complainant has filed a Motion to Withdraw Penalty Complaint and Notice of Opportunity for Hearing ("Motion"). Complainant moves to withdraw the Complaint without prejudice pursuant to 40 C.F.R. § 22.14(d).<sup>1</sup> According to Complainant, after filing the original Complaint it discovered additional violations against Respondent at two other locations, and it now intends to pursue this matter as part of a civil action in Federal district court pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b).

Respondent opposes the Motion. Respondent maintains that contrary to Complainant's assertions, Complainant knew of the alleged violations at these two additional sites prior to the filing of the Complaint. Respondent objects to Complainant's Motion because it already has invested a considerable amount of time and money responding to the allegations contained in the Complaint. Respondent asserts that it will be forced to duplicate its efforts in response to this new action. Thus, Respondent requests that Complainant's

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<sup>1</sup> Complainant may withdraw the complaint without prejudice after the filing of an answer only upon motion granted by the Administrative Law Judge. Section 22.14(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. § 22.14(d).

Motion be denied or, in the alternative, grant the Motion only upon the condition that Complainant reimburse Respondent for its costs and attorneys' and consultant's fees. See *United States v. Rockwell International Corp.*, 282 F.3d 787, 810 (10<sup>th</sup> Cir. 2002).

In response, Complainant contends that during the course of settlement negotiations Respondent submitted documentation that more accurately identified the extent of the alleged violations thereby elevating this matter from the administrative forum to the civil judicial arena. Complainant argues that withdrawal of the Complaint without prejudice should be granted on account of judicial economy and that the amount of the proposed penalty now exceeds the statutory maximum allowed to be adjudicated administratively.

Complainant argues that the governing Rules of Practice do not provide for the award of attorney's fees and costs and thus should not be considered. See 40 C.F.R. § 22.14(d). Further, Complainant contends that under the Equal Access to Justice Act, 40 C.F.R. part 17, an award of attorney's fees or other costs is not warranted because Respondent does not meet the criteria for eligibility for such award. Specifically, Complainant maintains that there has not been an "adversary adjudication" and that Respondent is not a "prevailing party." 40 C.F.R. § 17.2(c), 17.5.

Assuming *arguendo*, that Rule 41 of the Federal Rules of Civil Procedure is found applicable, Complainant submits that attorney's fees and costs are not warranted because it brought the administrative complaint against Respondent with the good faith belief that the alleged violations came within the administrative penalties provision of Section 309(g)(2)(b) of the Clean Water Act, 33 U.S.C. § 1319(g)(2)(b). Complainant also contends that most, if not all, the preparation for the instant administrative case may be used in the federal action. See *American Water Dev., Inc., v. City of Alamosa*, 874 P.2d 352, 381 (CO. 1994). As such, Complainant contends that the instant case is distinguishable from *United States v. Rockwell International Corp.*, *supra*.

Complainant's arguments with regard to the granting of its Motion without an award of attorney's fees or costs are persuasive. See *Koch v. Hankins*, 8 F.3d 650, 652 (9<sup>th</sup> Cir. 1992); see also *Best Indus. v. CIS BIO Int'l*, Nos. 97-1217,1412, 1998 U.S. App. LEXIS 1409, at \*7, 8 (4<sup>th</sup> Cir. 1998); *GAF Corporation v. Transamerica Insurance Co.*, 665 F.2d 364, 369

(D.C. Cir. 1981). Accordingly, It Is Ordered that the Complaint in this matter is Withdrawn without prejudice. Respondent's request for attorneys' fees and other costs is denied.

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Barbara A. Gunning  
Administrative Law Judge

Dated: February 9, 2004  
Washington, DC

In the Matter of Richmond American Homes of Colorado, Inc.,  
Respondent  
Docket No. CWA-08-2003-0080

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Motion To Withdraw Penalty Complaint And Notice Of Opportunity For Hearing**, dated February 9, 2004, was sent this day in the following manner to the addressees listed below:

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Maria Whiting-Beale  
Legal Staff Assistant

Dated: February 9, 2004

Original and Copy by Pouch Mail to:

Tina Artemis  
Regional Hearing Clerk  
U. S. EPA  
999 18<sup>th</sup> Street, Suite 500  
Denver, CO 80202-2466

Copy by Pouch Mail to:

Elyana R. Sutton, Esquire  
Enforcement Attorney (8ENF-L)  
U. S. EPA  
999 18<sup>th</sup> Street, Suite 300  
Denver, CO 80202-2466

Copy by Certified Mail Return Receipt to:

Wayne F. Forman, Esquire  
Brownstein Hyatt & Farber, P.C.  
410 Seventeenth Street, 23<sup>rd</sup> Floor  
Denver, CO 80202-4437