

I. INTRODUCTION.

This is an action by the complainant ("EPA", or "the Agency"), under Section 309(g)(2)(A) of the Clean Water Act ("CWA", or "the Act"), 33 U.S.C. §1319(g)(2)(A), to assess a Class I Administrative Penalty against the respondent, Pete Wiersma dba Fairview Dairy ("the Dairy" or "the facility"), for violations of the Act and regulations promulgated pursuant thereto. This action is governed by the proposed "Consolidated Rules of Practice Governing Class I Civil Penalties Under the Clean Water Act", 56 Fed Reg. 29,996 (July 1, 1991) ("the Part 28 Rules").

II. PROCEDURAL HISTORY AND BACKGROUND.

The complainant began this action by filing an administrative complaint ("Complaint") to assess a penalty against the respondent on April 24, 1995. The caption of the complaint cited the respondent as Pete Wiersma dba Fairview Dairy¹ (emphasis mine). The complaint alleged that Mr. Wiersma operated a dairy located in Buhl, Idaho. It was further alleged that on three separate occasions, discharges from the facility's storage lagoons entered waters of the United States. These violations were never disputed.

On July 3, 1995, the respondent filed a response to the complaint. The response was in the form of a letter signed by Pete Wiersma (emphasis mine). I subsequently accepted this letter as an appropriate response to the complaint.

¹ Administrative Complaint, Docket No. 10-95-0038-CWA(g), filed with the Region 10 Hearing Clerk, April 24, 1995

On March 26, 1996, I conducted a pre-hearing telephone conference with Mr. Wiersma and counsel for the complainant.² At that time Mr. Wiersma was still acting pro se. At the conclusion of the telephone conference I scheduled a hearing, under §28.26 of the Part 28 Rules, for June 28, 1996.

On April 23, 1996, John Lezamiz, Esq. filed a notice of appearance, as counsel for the respondent. On the same date Mr. Lezamiz filed a Motion to Dismiss and/or for Summary Determination. The Motion stated that ... "Mr Wiersma's only connection with Fairview Dairy is that he is employed by the dairy, which is owned by his sister, Barbara Bothoff".³ This was the first time that Mr. Wiersma's limited involvement in the operation of the dairy was alleged.

On May 13, 1996, EPA filed a response to the Motion to Dismiss and/or for Summary Determination. In its motion EPA argued that it will be prejudiced [by] any motion, by the respondent, to amend its response at this late date. Referring to a telephone conversation with Mr. Wiersma on April 21, 1995, EPA noted that the respondent rejected EPA's offer to withdraw the complaint against [Mr. Wiersma] and refile against his sister [Ms. Bothoff].

On May 23, 1996, the respondent filed a brief in support of its Motion to Dismiss and/or for Summary Determination. In the

² Prehearing Conference Report and Order, April 8, 1996.

³ Respondent's Notice and Motion to Dismiss and/or for Summary Determination, April 23, 1996.

Introduction, the brief stated that Fairview Dairy is owned and operated by Barbara Bothoff.

On May 28, 1996, complainant filed a motion to amend the complaint to add Ms. Barbara Bothoff as a respondent. The hearing in this matter had been previously set for June 28, 1996, just 30 days from the date of this filing.⁴

On or about May 30, 1996, the respondent filed a brief in opposition to EPA's Motion to Amend Complaint and Add Defendant. The respondent argues that it will be extremely prejudiced if EPA is allowed to amend its complaint, to add a new party respondent on the eve of the hearing.⁵

On June 6, 1996, I ruled on Respondent's Motion to Dismiss and/or for Summary Determination. I denied both the Motion to Dismiss and the Motion for Summary Determination on procedural grounds.⁶

On June 10, 1996, EPA filed a Reply Brief Re Motion to Amend Complaint to Add Defendant.

For the following reasons I am vacating the hearing scheduled for June 28, 1996; dismissing Pete Wiersma as a respondent; and

⁴ Section 28.18, of the Part 28 Rules provides that ... "[t]he complainant may amend the administrative complaint: ... (2) By stipulation with the respondent or by permission of the Presiding Officer at any time after the [respondent's deadline for filing a response]...."

⁵ See respondent's Brief in Opposition, p.5, paragraph 2.

⁶ Ruling on respondent's Motion to Dismiss and/or for Summary Determination, June 6, 1996.

granting EPA's motion to amend the complaint to add Barbara Bothoff as respondent.

III. DISCUSSION

A. Pete Wiersma as a Respondent.

When the complainant first filed this action, Pete Wiersma dba Fairview Dairy was listed as the sole respondent in this matter. Throughout, even in the last document filed, EPA has continued to list Pete Wiersma dba as Fairview Dairy as the only respondent. The initial complaint alleges that Mr. Wiersma is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. §1362(5). Section 301(a) of the Clean Water Act, 33 U.S.C. §1311(a), prohibits the discharge of pollutants into water of the United States by any "person" except in accordance with other specified sections of the Act, including Section 402, 33 U.S.C. §1342. A review of the administrative record fails to reveal any connection between Mr. Wiersma ("the person") and the discharge of any pollutants into waters of the United States.

The record review did reveal that: Mr. Wiersma signed the letter requesting a hearing in response to the proposed Administrative Complaint. The Record also confirms that Mr. Wiersma talked to the State inspectors investigating discharges into waters of the U.S on February 16, 1994; October 25 and October 26, 1994; however, the inspector's reports identified Barbara Bothoff, not Mr. Wiersma, as the owner/operator of Fairview Dairy.

On May 23, 1996, Mr. John Lezamiz, Esq. entered an appearance as Mr. Wiersma's attorney. Prior to that date Mr. Wiersma represented himself. Since being represented by counsel, Mr. Wiersma has consistently alleged that he is only an employee; that he has never been a partner, shareholder, director nor officer of Fairview Dairy; and that at no time has he ... operated, leased or otherwise done business as Fairview Dairy.⁷

EPA moved to amend the complaint, to add Barbara Bothoff as a respondent, on the grounds that she is the owner of the Fairview Dairy and is responsible for all discharges by her employees, under the doctrine of ~~respondeat superior~~ (emphasis mine).⁸ The maxim, respondeat superior, means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent.⁹ In such cases liability is vicariously placed on the principal, as the "person" responsible for the wrong. The agent/servant is not personally liable, unless he/she personally had a hand in committing the wrong.

In summary I find that: Ms Bothoff, not Mr. Wiersma, is doing business as Fairview Dairy; Ms. Bothoff, not Mr. Wiersma, owns/operates the dairy; Mr. Wiersma was not personally involved in the discharge of pollutants; and; that, as an employee, the

⁷. Affidavit of Pete Wiersma, Attachment 1 to Respondent's Motion to Dismiss and/or for Summary Determination, May 23, 1996.

⁸ EPA's Motion to Amend Complaint to add Defendant, p.4., Paragraph 2.

⁹. Black's Law Dictionary, 4th Ed., West Publishing Co. 1968.

doctrine of respondeat superior relieves Mr. Wiersma of responsibility for the discharges of pollutants that are the subject of this action.

B. Ms. Bothoff.

A review of the administrative record revealed the complainant based its complaint on the incident reports of State inspectors. These reports repeatedly referred to the existence and status of Ms. Bothoff.^{10, 11} It is obvious that, from the beginning, the complainant was aware of Ms. Bothoff existence and association with the dairy. There are numerous other documents in the administrative record indicating that Ms. Bothoff is the owner/operator of Fairview Dairy. I therefore find that Ms. Bothoff, as the owner of the facility, is the appropriate "person" within the meaning of Section 502(5) of the Act, 33 U.S.C., §1362(5), responsible for the discharge of pollutants from the Dairy into waters of the United States.

C. Amendment of the Administrative Complaint.

The complainant argues that it relied on respondent's representations that his sister was fully involved in negotiations

¹⁰ Incident Report of Steve Kolar (State Inspector) investigating an October 25, 1994 discharge of pollutants. His report stated ... "[m]r. Zagatas house is directly west of the Fairview Dairy which is owned by Barbara Bothoff...."

¹¹ Incident Report of Steve Kolar (State Inspector) investigating an October 26, 1994, discharge of pollutants, wherein Mr. Kolar stated ... "We arrived at the Bothoff (Fairview) Dairy ..."

to settle this action.¹² However, Ms. Bothoff was not a party to this action. As she was not a party to this action, she cannot surreptitiously be held liable for any of the violations. Although there is no comparable provision in the Part 28 Rules, Rule 19 of the Federal Rules of Civil Procedure ("F.R.C.P.") offers some guidance. Rule 19 provides for the joinder of parties needed for just adjudication. It is obvious that Ms. Bothoff is a necessary party to this action. Therefore, I find that the complaint in this matter must be amended to include Ms. Bothoff as a respondent. The complainant may amend the administrative complaint by permission of the Presiding Officer.¹³ In accordance with this provision, I am granting the complainant's motion to amend the administrative complaint to add Ms. Barbara Bothoff as respondent. Further, there is a substantial question as to whether Mr. Wiersma should be retained as a respondent; especially considering the maxim of respondeat superior, that the complainant proposes to invoke. Therefore, I am dismissing Mr. Wiersma as a respondent in this matter.

D. June 28, 1996, Hearing.

Based on the above, at the conclusion of the Friday, June 21, 1996, telephone hearing, I vacated the hearing in this matter

¹² Hearing Transcript pp.7-8, Statement by counsel for complainant.

¹³ See §28.18(b)(2) of the Part 28 Rules.

scheduled for Friday, June 28, 1996.

IV. CONCLUSION.

This ruling and order is based on the complete Administrative Record including a transcript of the telephone hearing and the parties' post-hearing briefs. Any arguments of the parties not specifically addressed herein are rejected, as either unsupported by the evidence or not sufficiently persuasive to warrant comment. It is specifically ordered that:

- * As of Friday, June 21, 1996, the hearing scheduled for Friday, June 28, 1996 is vacated;
- * Mr. Wiersma is dismissed as a respondent in this matter; and
- * The complainant's motion to amend the Administrative Complaint to add Ms. Barbara Bothoff is granted.

SO ORDERED, this 10th day of July, 1996.

Alfred C. Smith
Alfred C. Smith
Presiding Officer

CERTIFICATE OF SERVICE

In the matter of PETE WIERSMA DBA FAIRVIEW DAIRY Docket #10-95-0038-CWA, I hereby certify that the forgoing instrument was mailed this date by the United States Mail, Certified/Return Receipt Requested, postage prepaid thereon, to the persons addressed as follows:

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July 10, 1996
date

Tina Artemis
Tina Artemis
Regional Hearing Clerk
U. S. EPA Region VIII