

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue  
Seattle, Washington 98101

IN THE MATTER OF: )  
 ) Docket No. 10-95-038-CWA(g)  
Pete Wiersma )  
dba Fairview Dairy )  
Bul, Idaho )

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RULING ON RESPONDENT'S MOTION TO DISMISS  
SUMMARY DETERMINATION

This is an action 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. 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").

On April 23, 1996, John T. Lezamiz, Esq., filed a Notice of Appearance in this action. Prior to this date Pete Wiersma, the respondent, acted pro se. On the same date, the respondent's attorney filed a Motion to Dismiss and/or for Summary Determination. As provided for by §28.25(b) of the Part 28 Rules, on May 13, 1996, the complainant filed a Response to Motion to Dismiss and/or for Summary Determination. For the reasons stated below, I am denying the respondent's motion to dismiss and motion for summary determination.

MOTION TO DISMISS

The Part 28 Rules specifically prohibit the Presiding Officer from dismissing the administrative complaint.<sup>1</sup> Therefore, without any further consideration of the respondent's or complainant's arguments, I deny the motion to dismiss on the basis of §28.4(c)(7) of the Part 28 Rules.

MOTION FOR SUMMARY DETERMINATION

Section 28.25(a)(1) of the Part 28 Rules provides that a motion for summary determination will lie where ... "there is no genuine issue of material fact for determination presented by the administrative record and any exchange of information."

In the instant case, the critical issue is whether Pete Wiersma is a proper respondent. Mr. Wiersma alleges, in his affidavit, that he has no financial interest in Fairview Dairy, nor has he operated, leased, or otherwise done business as Fairview Dairy.<sup>2</sup> He claims only to be an employee. On the other hand, the complainant introduced evidence of numerous meetings between Mr. Wiersma and State inspectors during their investigations of discharges from the Dairy, into waters of the United States.<sup>3</sup> In

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<sup>1</sup> Section 28.4(c)(7) of the Rules provides that "[the Presiding Officer shall not:]...[d]ismiss the administrative complaint."

<sup>2</sup>Respondent's Motion to Dismiss and/or for Summary Determination, Affidavit of Pete Wiersma, April 23, 1996.

<sup>3</sup> Complainant's response to Motion to Dismiss and/or for Summary Determination (Exhibit A), May 10, 1996.

these meetings Mr. Wiersma acted like more than an employee.

The respondent misunderstands who is a responsible person under the Act, by looking at criteria like ownership, financial interest, etc. The language of the Act clearly focuses on "person" as defined by §502(5) of the Act.

"the term 'person' means an individual (emphasis mine), corporation, partnership, association, State, municipality, commission or political subdivision of a State, or interstate body."<sup>4</sup>

Mr. Wiersma may not own the Dairy, he may not operate the Dairy, he may not have a financial interest in the Dairy, but he is certainly an individual within the meaning of the Act. A genuine issue of material fact exists as to whether he is an individual who bears some responsibility for the discharge of pollutants from the Dairy, into waters of the United States? Therefore, I find there is a genuine issue of material fact for determination. The Motion for Summary Determination is denied.

ADMINISTRATIVE RECORD CORRECTION

At this time, I find it is necessary to address another matter, to preserve the integrity of the administrative record. In the complainant's Response to Motion to Dismiss and/or for Summary Determination (page 1, under Statement of Facts), the attorney of record cites his own declaration to support the fact that Pete Wiersma has managed the Fairview Dairy for approximately five years. This declaration is based on discussions between, Mr. Ryan,

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<sup>4</sup> Section 502(5) of the CWA, 33 U.S.C., § 1362(5)

the attorney of record, and Mr. Wiersma, at a time when Mr. Wiersma was acting for himself - pro se. I find that these discussions clearly come within the scope of settlement negotiations. Having thus determined that the declaration relates to settlement of this matter, I cannot allow its introduction into the administrative record.<sup>5</sup> I therefore order Mr. Ryan to withdraw his declaration from the administrative record. He may refile any re-dacted documents which reference his declaration, that are relevant in this matter.

Further, I find no prejudice to the respondent, since I have not acted upon the subject declaration, which shall be stricken from the administrative record. Any decision made in this matter will be based strictly on the administrative record.

CONCLUSIONS

- (1) The respondent's Motion to Dismiss is denied.
- (2) The respondent's Motion for Summary Determination is denied.
- (3) The discussions between Mr. Wiersma and the complainant's attorney of record, when Mr. Wiersma was acting pro se, related to settlement of this matter.
- (4) The Part 28 Rules bar documents or testimony relating to settlement from being introduced into the administrative record.

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<sup>5</sup> Section 28.4(c)(5) of the Part 28 Rules provides that the Presiding Officer shall not ... "[a]llow the introduction of any document or testimony into the administrative record relating to settlement of the instant action or any other action."

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(5) The complainant is ordered to withdraw the declaration of its attorney of record, and all evidence pertaining thereto, from the administrative record.

SO ORDERED this 6<sup>th</sup> day of June, 1996.

Alfred C. Smith  
Alfred C. Smith  
Regional Presiding Officer