

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2008 NOV 13 PM 3:39

IN THE MATTER OF:)	
)	
Bristlecone Water Improvement District)	Docket No. SDWA-08-2007-0095
Pauguitch, Utah)	Proceeding under Section 1414(g)(3)
PWS ID # UT4914191/09077)	of the Safe Drinking Water Act,
)	42 U.S.C. § 300g-3(g)(3)
Respondent.)	
)	

DEFAULT INITIAL DECISION AND ORDER

This proceeding arises under the authority of section 1414(g)(3) of the Safe Drinking Water Act, 42 U.S.C. § 300g-3(g)(3), also known as the Public Water Supply Program. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation or Suspension of Permits (“ Consolidated Rules” or “Part 22”), 40 C.F.R. §§ 22.1-22.32.

I. BACKGROUND

Bristlecone Water Improvement District (“Bristlecone” or “Respondent”) is an association that owns and operates a Public Water System in Garfield County, Utah. The Public Water System (“PWS” or “System”) provides piped water for human consumption from a ground water source via one well to approximately 160 individuals daily through 10 service connections. Three residential and three commercial connections are used year round. The remaining four non-residential connections are used 3 to 4 months of each year.

The Utah Department of Environmental Quality (“UDEQ”) was delegated the Drinking Water Program by the United States Environmental Protection Agency (“EPA”), and therefore, has primary enforcement authority for actions taken under the Safe Drinking Water Act (“Act”), 42 U.S.C. § 300g-3(g)(3).¹ Pursuant to section 1414(a) of the Act, 42 U.S.C. § 300g-3(a), EPA issued a Notice of Violation on March 2, 2004, to the UDEQ requesting that it pursue enforcement against Bristlecone for violations of the Act. UDEQ elected not to commence an enforcement action against Respondent and referred the matter to EPA for enforcement for approximately 24 failure to monitor violations.

On May 7, 2004, EPA issued an Administrative Order (“AO”), Docket No. SDWA-08-2004-0022, to Bristlecone pursuant to section 1414(g)(1) of the Act, 42

¹ The drinking water program was delegated to the State of Utah on February 28, 1980.

U.S.C. § 300g-3(g)(1), for violations of the National Primary Drinking Water Regulations (“NPDWRs”) (40 C.F.R. part 141). The violations included: failure to monitor for coliform bacteria, failure to monitor for nitrate, failure to provide public notice, and failure to report monitoring violations to EPA. The AO contained specific requirements to return the System to compliance with the Act and its implementing regulations.

On August 5, 2004, EPA sent “Violation of Administrative Order” letter notifying Bristlecone of its failure to comply with the AO and the NPDWRs. The AO remains in effect and Bristlecone continues to be in non-compliance.

On March 3, 2005, EPA filed a Complaint and Notice of Opportunity of Hearing (First Complaint) alleging Respondent violated the Act, NPDWRs and the AO pursuant to 42 U.S.C. § 300g-3(g)(3). The parties reached a settlement whereby Respondent paid a penalty and agreed to hire an operator for the System. The parties filed a Consent Agreement and the Regional Judicial Officer issued a Final Order on December 1, 2005.

After the filing of the Consent Agreement, the System continued to have additional violations in 2005 and 2006 prompting EPA to send a second “Violation of Administrative Order” letter on May 11, 2006. In addition, EPA attempted to resolve the new violations prior to filing a second Complaint by sending a settlement offer on June 11, 2006. There was no response from Respondent to EPA’s offer despite the System operator’s attempt to work with EPA on preventing future violations.

On September 27, 2007, EPA filed a Second Complaint and Notice of Opportunity for Hearing (Second Complaint) to address the outstanding issues. Specifically, the Second Complaint alleges violations of the AO and NPDWRs occurring after, and separate from, the violations in the First Complaint. The Second Complaint contains five counts: 1) Failure to Monitor for Total Coliform Bacteria; 2) Failure to Monitor Nitrate; 3) Failure to Notify Public of NPDWR violations; 4) Failure to Report Analytical Results to EPA; and 5) Failure to Report Noncompliance with NPDWRs to EPA.² The Second Complaint proposed a penalty of \$6,050. A review of the record indicates that no Answer has been filed with the Regional Hearing Clerk to date.³

The Second Complaint also iterates Respondent’s obligations with respect to responding to the Second Complaint, including filing an Answer. See, Second Complaint, pp. 9-10. Specifically, the Second Complaint states, “you must file a written Answer in accordance with sections 22.15 and 22.38 of the Consolidated Rules within 30 calendar days after receipt of this Complaint.” (Second Complaint, p. 9). In addition, “[f]ailure to admit, deny, or explain any material factual allegation in this Complaint will

² The Motion for Default presently before this Presiding Officer relates to the Second Complaint and Respondent’s failure to comply with the AO.

³ Based on the certified mail return receipt, Respondent’s registered agent received and accepted the Second Complaint on October 1, 2007. The returned certified mail receipt is proof of service of the Second Complaint. Therefore, Respondent’s Answer needed to be filed no later than November 2, 2007, thirty days after receipt of the Second Complaint.

constitute an admission of the allegation.” (Second Complaint, p. 10). Last, the Second Complaint states:

IF YOU FAIL TO FILE A WRITTEN ANSWER OR
PAY THE PROPOSED PENALTY WITHIN THE 30
CALENDAR DAY LIMIT, A DEFAULT JUDGMENT
MAY BE ENTERED PURSUANT TO 40 C.F.R. §22.17.
THIS JUDGMENT MAY IMPOSE THE PENALTY
PROPOSED IN THE COMPLAINT.

(Second Complaint, p.10). An Answer was not filed thirty days after service of the Second Complaint.

On May 15, 2008, Complainant filed a Motion for Default pursuant to section 22.17(b) of the Consolidated Rules, 40 C.F.R. § 22.17(b), seeking an order finding Respondent in violation for failing to file a timely answer to the Complaint issued pursuant to 42 U.S.C. § 300g-3(g)(3). EPA attempted to address the Second Complaint with Respondent’s authorized representative, the operator of the System, with no success. To date, an Answer has not been filed with the Regional Hearing Clerk.

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following findings of fact:

1. Respondent Bristlecone Water Improvement District is an association that owns and operates a public water system.
2. The Bristlecone Water Improvement District Water System, located in Garfield County, Utah, provides piped water for human consumption to the public.
3. Respondent operates a system that is supplied solely by a ground water source consisting of one well operating year-round, and serves approximately 160 persons through 10 service connections. Three residential and 3 non-residential/commercial connections are used year round. The remaining four non-residential connections are used 3 to 4 months of each year.
4. On March 2, 2004, EPA issued a Notice of Violation pursuant to section 1414(a) of the Act, 42 U.S.C. § 300g-3(a), to the State requesting that it enforce the violations at Respondent’s System within thirty (30) days. The State elected not to commence an enforcement action against the System.

5. On May 7, 2004, EPA issued an Administrative Order (Docket No. SDWA-08-2004-0022) to the Respondent citing the following violations:
 - 1) Failure to monitor for total coliform bacteria pursuant to 40 C.F.R. § 141.21(a).
 - 2) Failure to monitor for nitrate pursuant to 40 C.F.R. § 141.23(d).
 - 3) Failure to notify the public of any NPDWR violations pursuant to 40 C.F.R. § 141.201.
 - 4) Failure to report coliform monitoring violation to the State of Utah pursuant to 40 C.F.R. § 141.21(g)(2).
 - 5) Failure to report to EPA and the State of Utah the nitrate monitoring violation and public notice within 48 hours pursuant to 40 C.F.R. § 141.31(b).
6. The AO required Respondent to achieve compliance with the NPDWRs.
7. On August 4, 2004, and May 11, 2006, EPA sent Respondent "Violation of Administrative Order" letters citing Respondent's failure to comply with the Administrative Order and NPDWRs.
8. On March 3, 2005, EPA filed a Complaint and Notice of Opportunity for Hearing (First Complaint) (Docket No. SDWA-08-2004-0022).
9. On December 1, 2005, Region 8's Regional Judicial Officer issued a Final Order that approved the Consent Agreement resolving the violations alleged in the First Complaint. Respondent paid a penalty per the terms of the Consent Agreement.
10. On June 11, 2007, EPA contacted Respondent to resolve the 2005 and 2006 violations of the Administrative Order prior to filing a new Complaint.
11. On June 27, 2007, Respondent, through its operator, contacted EPA to attempt settlement discussions. The operator was not authorized to discuss settlement for the past violations although he was authorized to address compliance issues to prevent future violations.
12. On September 27, 2007, EPA filed a Second Complaint and Notice of Opportunity for Hearing (Second Complaint) alleging five counts of violating the Act and the NPDWRs and proposed a \$6,050 penalty.
13. Respondent failed to monitor the System's water for total coliform bacteria contamination during the 2nd and 3rd Quarters (April-June).

July-September) of 2005 and 1st Quarter (January-March) of 2006 and failed to report analytical results to EPA within the first 10 days of the monitoring period in violation of the AO and the regulations as set forth in Count 1 of the Second Complaint.

14. Respondent failed to monitor the System's water for nitrate in 2006 and failed to report analytical results to EPA in violation of the AO and regulations as set forth in Count 2 of the Second Complaint.
15. Respondent failed to notice the public of the violations of the AO as set forth in the Consent Agreement and subsequent violations, and failed to submit a copy of the public notice to EPA as set forth in Count 3 of the Second Complaint.
16. Respondent failed to report total coliform analytical results to EPA and the State of Utah within the first 10 days of the end of the monitoring period as required by the AO and the regulations for the following quarters: the first (January-March) and the fourth (October-December) of 2005; the second, third and fourth (April-December) of 2006; and the first (January-March) of 2007 as set forth in Count 4 of the Second Complaint.
17. Respondent failed to Report to EPA and to the State of Utah noncompliance detailed in Counts 1-4 of the Second Complaint in violation of the AO and regulations as set forth in Count 5 of the Second Complaint.
18. Respondent has not filed an Answer to the Second Complaint.
19. Complainant filed a Motion for Default and Memorandum in Support on May 15, 2008. The Motion seeks the assessment of a \$6,050 penalty.
20. Respondent has provided no response to the Motion for Default.

III. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a) of the Consolidated Rules, and based upon the record before me, I make the following conclusions of law:

21. Respondent Bristlecone Water Improvement District is an association and therefore a "person" with the meaning of section 1401(12) of the Act, 42 U.S.C. §300(f)(12) and 40 C.F.R. §141.2.

22. The System has at least 15 service connections or regularly serves an average of at least 25 individuals at least 60 days out of the year and is therefore a "public water system" within the meaning of section 1401(4) of the Act, 42 U.S.C. §300(f)(4), and a "non-community water system" within the meaning of 40 C.F.R. §141.2.
23. Respondent is a "supplier of water" within the meaning of section 1401(5) of the Act, 42 U.S.C. §300(f)(5), and 40 C.F.R. §141.2. Respondent is therefore subject to the requirements of part B of the Act, 42 U.S.C. § 300g, and its implementing regulations, 40 C.F.R. part 141.
24. The Utah Department of Environmental Quality has primary enforcement authority for the Act in the State of Utah. The State elected not to commence an appropriate enforcement action against the System for the violations within the thirty day time frame set forth in section 1414(a), 42 U.S.C. § 300g-3(a).
25. Respondent failed to comply with the NPDWRs and the Administrative Order of May 7, 2004, the First Complaint of March 3, 2005, the Consent Agreement of December 1, 2005 and the Second Complaint of September 27, 2007 in violation of section 1414(g) of the Act, 42 U.S.C. §300g-3(g).
26. Respondent is liable for penalties pursuant to section 1414(g)(3) of the Act, 42 U.S.C. §300g-3(g)(3) and 40 C.F.R. part 19, not to exceed \$32,500 for each day of violation occurring after March 14, 2004, whenever the Administrator determines that any person has violated, or fails or refuses to comply with, an order under section 1414(g) of the Act, 42 U.S.C. §300g-3(g).
27. 40. C.F.R. § 22.14 provides that an answer to a complaint must be filed within 30 days after service of the complaint.
28. 40. C.F.R. § 22.6(c) provides that service of a complaint is complete when the return receipt is signed.
29. 40. C.F.R. § 22.17 provides that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint.
30. This default constitutes an admission, by Respondent, of all facts alleged in the Complaint and a waiver, by Respondent, of its rights to contest those factual allegations pursuant to 40 C.F.R. § 22.17(a).

IV. ASSESSMENT OF ADMINISTRATIVE PENALTY

Under section 22.27(b) of the Consolidated Rules, “. . . the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by Complainant in the Complaint . . . , or motion for default, whichever is less.” 40 C.F.R. § 22.27(b).

The courts have made it clear that, notwithstanding a Respondent’s default, the Presiding Officer must consider the statutory criteria and other factors in determining an appropriate penalty. See, *Katson Brothers Inc., v. U.S. EPA*, 839F.2d 1396 (10th Cir. 1988). Moreover, the Environmental Appeals Board has held that the Board is under no obligation to blindly assess the penalty proposed in the Complaint. *Rybond, Inc., RCRA* (3008) Appeal No 95-3, 6 E.A.D. 614 (EAB, November 8, 1996).

Section 1414(g)(3) of the Act, 42 U.S.C. § 300g-3(g)(3), authorizes the Administrator to bring a civil action if any person violates, fails or refuses to comply with an order under this subsection. The Administrator may assess a Class I civil penalty of up to \$32,500 per day of violation for violation of an order. See, 40 C.F.R. Part 19.

In accordance with 40 C.F.R. §22.17(c), “the relief proposed in the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.” See, *In the Matter of Freeman’s Group, Inc.*, Docket No. UST-06-00-519-AO (2005); *In the Matter of Glen Welsh*, Docket No. SDWA-3-99-0005 (2000). Section 1414(b) of the Act requires EPA to take into account the following factors in assessing a civil penalty: the seriousness of the violation, the population at risk, and other appropriate factors. 42 U.S.C. § 300g-3(b). EPA also used the “Public Water System Supervision Program Settlement Penalty Policy” (Penalty Policy) to determine the penalty in a fair and consistent manner.⁴ This Court took these factors into account in evaluating the penalty as set forth below.

The statutory factors are evaluated, in conjunction with the Penalty Policy, to create gravity and economic benefit components to the penalty.⁵ This Court has reached the following decision regarding the penalty:

⁴ The Penalty Policy, dated May 25, 1994, is a settlement policy and not a pleading policy for purposes of litigating the matter. It takes into consideration the Respondent’s degree of willfulness and/or negligence, history of noncompliance, if any, and ability to pay. These are considered the “other appropriate factors” under Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b); and therefore, the policy is instructive in determining the penalty in that it incorporates the statutory factors.

⁵ Gravity is the amount of the penalty that reflects the seriousness of the violations and the population at risk. Furthermore, the degree of willfulness/negligence, history of noncompliance, ability to pay, and duration of the violation are considered in determining the gravity portion of the penalty. Economic Benefit includes the expenses the Respondent would have incurred had it complied with the Act and its implementing regulations.

Seriousness of the Violation: Respondent has failed to comply with the requirements of the NPDWRs and the AO which required Respondent, *inter alia*, to monitor for total coliform bacteria and nitrates, to notify the public of the failure to monitor, and to report analytical results and noncompliance with NPDWRs to EPA. The failure to monitor occurred for nine months. The failure to notify the public occurred for 14 months. The failure to submit analytical results to EPA occurred for 8 months and the failure to report the violations to EPA occurred for 4 months.

EPA has determined that exposure to coliform bacteria and nitrates can present health risks. Monitoring for coliform bacteria identifies whether the water may be contaminated with organisms that cause disease, including gastrointestinal disorders. Consumption of water contaminated with coliform bacteria may pose a risk for small children, the elderly and individuals with compromised immune systems. In addition, monitoring for nitrates is critical to children's health because nitrates interfere with oxygen carrying capacity of children's blood, causing serious illness or death if untreated. See, *EPA Guidance Water on Tap: What You Need to Know*, (EPA-816-K-03-007, October, 2003). By not monitoring for these contaminants, Respondent puts water consumers of this System at risk by possibly exposing them, without their knowledge, to harmful levels of coliform bacteria and nitrates.

Also important to the health of consumers of this System is the fact that, in contravention of the Act and the NPDWRs, Respondent never provided the public with notification of its failures to conduct the monitoring. If the System is not regularly monitoring and reporting any failures then the regulators, and more importantly, the consumers are unable to determine if the water is safe to drink. Congress clearly intended the Act to provide this information when it stated "...consumers served by the public water systems should be provided with information on the source of the water they are drinking and its quality and safety, as well as prompt notification of any violation of drinking water regulations."⁶ Respondent's violations are significant and cannot be taken lightly.

Furthermore, the record shows fundamental recalcitrance by Respondent. Neither the State of Utah nor EPA's enforcement efforts have had the necessary corrective effect upon the Respondent. Respondent's lack of regard for the State and EPA's authority and the repeat violations alleged in the Second Complaint, indicate a pattern of behavior that cannot be condoned with respect to public health and safety. Furthermore, Respondent had an operator who willingly contacted EPA to identify and resolve the compliance issues to prevent future violations; however, this effort was insufficient since the operator had no authority to address the past violations. Addressing the penalty in order to create fairness in the regulated community as well as ensuring the credibility of the regulators is equally important. The Agency's increase in the gravity amounts for willfulness/negligence, history of noncompliance for similar violations, and Respondent's lack of cooperation are justified.

⁶ Pub. L. 104-182 Section 3(10). (Aug. 6, 1996).

Economic Benefit: The Complainant calculated an economic benefit of \$80. This calculation was based on the costs of sampling, laboratory analysis, and operator expenses that Respondent would have incurred had it performed the total coliform and nitrate sampling required by the Act and NPDWRs. This component of the penalty eliminates any economic benefit realized by the Respondent for not complying. Finally, with respect to Respondent's ability to pay, there is no information in the record indicating Respondent is unable to pay the proposed penalty.

The Consolidated Rules provide that, ". . . [the] relief proposed in the Complaint or motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c). Accordingly, based on the statute, regulations and the administrative record, I assess the Respondent a civil penalty in the amount of **\$6,050.00**, for its violations of the Act.

V. DEFAULT ORDER⁷

In accordance with section 22.17 of the Consolidated Rules, 40 C.F.R. § 22.17, and based on the record, the findings of fact and conclusions of law set forth above, I hereby find that Respondent is in default and liable for a total penalty of **\$6,050.00**.

IT IS THEREFORE ORDERED that Respondent, Bristlecone Water Improvement District shall, within thirty (30) days after this order becomes final under 40 C.F.R. § 22.27(c), submit by cashier's or certified check, payable to the United States Treasurer, payment in the amount of **\$6,050.00** in one of the following ways:

CHECK PAYMENTS:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045

⁷ Pursuant to 40 C.F.R. § 22.17(c), Respondent may file a Motion to set aside the default order for good cause.

Field Tag 4200 of the Fedwire message should read " D 68010727
Environmental Protection Agency "

OVERNIGHT MAIL:

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Natalie Pearson
314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
Contact – Jesse White 301-887-6548
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006
CTX Format

ON LINE PAYMENT:

There is now an On Line Payment Option, available through the Dept. of Treasury.
This payment option can be accessed from the information below:

WWW.PAY.GOV
Enter sfo 1.1 in the search field

Open form and complete required fields.

Respondent shall note on the check the title and docket number of this
Administrative action. Respondent shall serve a photocopy of the check on the Regional
Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202

Each party shall bear its own costs in bringing or defending this action.

Should Bristlecone Water Improvement District fail to pay the penalty specified above in full by its due date, the entire unpaid balance of the penalty and accrued interest shall become immediately due and owing. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty, if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate, in accordance with 40 C.F.R. § 102.13(e).

This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a Party, and without further proceedings unless: (1) a party moves to reopen the hearing; (2) a party appeals the Initial Decision to the Environmental Appeals Board; (3) a party moves to set aside a default order that constitutes an initial decision; or (4) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

Within thirty (30) days after the Initial Decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. 40 C.F.R. § 22.27(a). If a party intends to file a notice of appeal to the Environmental Appeals Board it should be sent to the following address:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Where a Respondent fails to appeal an Initial Decision to the Environmental Appeals Board pursuant to § 22.30 of the Consolidated Rules, and that Initial Decision becomes a Final Order pursuant to § 22.27(c) of the Consolidated Rules, Respondent waives its right to judicial review.

SO ORDERED This 18th Day of November, 2008.



Elyana R. Sutin
Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **DEFAULT INITIAL DECISION AND ORDER, DOCKET NO.: SDWA-08-2007-0095** was filed with the Regional Hearing Clerk on November 18, 2008.

Further, the undersigned certifies that a true and correct copy of the document was delivered to Amy Swanson, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document were placed in the United States mail certified/return receipt requested on November 19, 2008, to:

Bristlecone Water Improvement District
Neil Foster, President
POB 640021
Bryce, UT 84764

E-mailed to:

Michelle Angel
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MSD-0002)
Cincinnati, OH 45268

November 19, 2008



Tina Artemis
Paralegal/Regional Hearing Clerk

