

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2011 SEP 22 PM 12:54

IN THE MATTER OF:)
)
Bryan Pownell, Owner/Operator)
Bryan's Place Public Water System)
Campbell County, WY)
)
Respondent)
_____)

Docket No. SDWA-08-2011-0025

FILED
EPA REGION VIII
SEP 22 2011

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

Bryan’s Place, owned and operated by Bryan Pownell, (“Bryan’s Place” or “Respondent”) is a Public Water System located in Campbell County, Wyoming. The Public Water System (“PWS” or “System”) is supplied from a ground water source through one well via four (4) year round service connections. The system supplies a bar and three residences that regularly serves at least 25 individuals daily for a minimum of 60 days throughout the year.

On May 20, 2010, Complainant, U.S. Environmental Protection Agency (EPA) Region 8, issued an Administrative Order (AO), Docket No. SDWA-08-2010-0044, to Respondent, Bryan Pownell, pursuant to section 1414(a)(2) and (g)(1) of the Safe Drinking Water Act (Act), 42 U.S.C §§ 300g-3(a)(2) and (g)(1). The AO alleged that Respondent was in violation of the National Primary Drinking Water Regulations (NPDWRs) at 40 C.F.R. Part 141 for failing to monitor his System’s water for total coliform bacteria, failing to monitor the System’s water annually for nitrate, and failing to report these violations to EPA within the required regulatory timeframes.

Complainant then issued an Administrative Order Violation (AOV) letter on October 5, 2010, notifying Respondent that he was in violation of the AO, the Act, and the NPDWRs for failing to monitor for nitrate within 30 days of the AO and failing to submit nitrate analytical results to EPA. Complainant issued a second AOV letter on October 26, 2010, notifying Respondent that he was in violation of the AO, the Act, and the NPDWRs for failing to monitor

for total coliform bacteria during the 3rd quarter of 2010 and for failing to report this violation to EPA.

On February 17, 2011, Complainant filed a Complaint and Notice of Opportunity for a Hearing (Complaint) against Respondent, pursuant to 42 U.S.C. § 300g-3(g)(3), alleging violations of the Act, the NPDWRs, and the AO. Respondent was personally served with the Complaint by the Campbell County Sheriff on February 25, 2011. See, Declaration of Kathelene Brainich, para. 8.¹ The Complaint charges Respondent with three counts: 1) Failure to monitor for total coliform bacteria; 2) Failure to monitor for nitrate; and 3) Failure to report to EPA noncompliance of the NPDWRs. The Complaint proposed a civil penalty of \$1,200. A review of the record indicates that no Answer has been filed with the Regional Hearing Clerk to date.

The Complaint iterates Respondent's obligations with respect to responding to the Complaint, including filing an Answer. See, Complaint, pp. 7-8. Specifically, the 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." (Complaint, p. 7). In addition, "[f]ailure to admit, deny, or explain any material factual allegation in this Complaint will constitute an admission of the allegation." (Complaint, p. 7). Last, the 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.

See, Complaint, p.8. An Answer was not filed thirty days after service of the Complaint.²

On June 28, 2011, Complainant filed a Motion for Default (Motion) against Respondent pursuant to Section 22.17 of the Consolidated Rules. Section 22.17 provides in pertinent part that, "[a] party may be found in default . . . after motion, upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17. The Motion sought a default order against Respondent for failing to file a timely answer to the Complaint and a civil penalty of \$1,200. See, Complainant's Motion for Default, p. 1.

¹ Complainant's Memorandum in Support of Motion for Default (hereinafter "Memo in Support") states the Complaint was personally served on March 4, 2011. Memo in Support, pp. 2, 4. The Consolidated Rules provide that "proof of service shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service." 40 C.F.R § 22.5(b)(1)(iii). The Regional Hearing Clerk has received no such affidavit. However, Complainant states further in its Memo in Support that a phone discussion occurred with Respondent's wife on March 30, 2011 regarding the Complaint, inferring that Respondent was properly served the Complaint pursuant to 40 C.F.R § 22.5(b)(1).

² Due to the inconsistent service dates noted above, it is not possible to determine the date an answer was due. Regardless, Respondent failed to file by either date.

Pursuant to section 22.16(b) of the Consolidated Rules, “[a] party’s response to any written motion must be filed within 15 days, after service of such motion Any party who fails to respond within the designated period waives any objection to the granting of the motion.” Therefore, after July 20, 2011, it was appropriate for this court to address Complainant’s Motion.

On August 3, 2011, this court issued an Order to Supplement the Record. The Order requested additional information to clarify the alleged violations in the Complaint as well as clarify how the penalty was calculated. On August, 31, 2011, Complainant filed Supplemental Declaration of Kathelene Brainich addressing this court’s August 3, 2011 Order. There has been no response from Respondent.

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 Bryan Pownell is a person who owns and operates a public water system.
2. Bryan’s Place Public Water System, located in Campbell County, Wyoming, provides piped water for human consumption to the public.
3. Respondent operates a system that has approximately four (4) service connections and regularly supplies water to at least 25 individuals daily for at least 60 days out of the year.
4. The source of the Public Water System is ground water supplied by one well to a bar and three residences operating year-round.
5. On May 20, 2010, EPA issued an Administrative Order (Docket No. SDWA-08-2010-0044) 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 report coliform monitoring violation to EPA pursuant to 40 C.F.R. § 141.21(g)(2);
 - 4) Failure to report to EPA the nitrate monitoring violation and public notice within 48 hours pursuant to 40 C.F.R. § 141.31(b).
6. On October 5, 2010, and October 25, 2010, EPA sent Respondent “Violation of Administrative Order” letters citing Respondent’s failure to comply with the Administrative Order and NPDWRs.

7. On February 17, 2010, EPA filed a Complaint and Notice of Opportunity for Hearing (Docket No. SDWA-08-2011-0025) and proposed a \$1,200 penalty:
 - 1) Failure to monitor for total coliform bacteria during the 3rd and 4th quarters of 2010;
 - 2) Failure to monitor nitrate and/or submit nitrate analytical results for 2009 to EPA within thirty days of receipt of the Order and as required by regulation for 2010;
 - 3) Failure to report to EPA noncompliance of the NPDWRs for the total coliform violation for 3rd and 4th quarters of 2010 and within 48 hours of violating nitrate in 2010.
8. Respondent failed to monitor the System's water for total coliform bacteria contamination during the 3rd and 4th quarters of 2010 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 Complaint.
9. Respondent failed to monitor the System's water for nitrate in 2009 and failed to report analytical results to EPA for 2010 in violation of the AO and regulations as set forth in Count 2 of the Complaint.
10. Respondent failed to report total coliform analytical results to EPA within the first 10 days of the end of the monitoring period as required by the AO and the regulations for the third and fourth quarters of 2010 as set forth in Count 3 of the Complaint.
11. Respondent failed to report nitrate results to EPA within 48 hours of violation the nitrate monitoring requirement in violation of the AO as set forth in Count 3 of the Complaint.
12. Respondent has not filed an Answer to the Complaint.
13. Complainant filed a Motion for Default and Memorandum in Support on June 28, 2011. The Motion seeks the assessment of a \$1,200 penalty.
14. 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:

15. Respondent Bryan Pownell is an individual 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.
16. The System 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 “transient, non-community water system” within the meaning of section 1401(16) of the Act, 42 U.S.C. §300(f)(16), 40 C.F.R. §141.2.
17. 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.
18. Respondent failed to comply with the NPDWRs, the Administrative Order of May 20, 2010, and the Complaint of February 17, 2011, in violation of section 1414(g) of the Act, 42 U.S.C. §300g-3(g).
19. 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 \$37,500 for each day of violation occurring after January 12, 2009, 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).
20. 40 C.F.R. § 22.15 provides that an answer to a complaint must be filed within 30 days after service of the Complaint.
21. 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.
22. 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 \$37,500 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.³ 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.⁴ This court has reached the following decision regarding the penalty:

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, and to report analytical results and noncompliance with NPDWRs to EPA. The failure to monitor for total coliform occurred for six months. The failure to monitor annually for nitrate in 2009 and report in 2010 was a 12 month violation. The failure to report the violations to EPA occurred for 2 months, one month for each violation. Each violation was given a gravity factor based on the Penalty Policy. See, Penalty Policy, Attachment 2.

³ 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.

⁴ 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.

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.

Furthermore, the record shows fundamental recalcitrance by Respondent. EPA's enforcement efforts have not had the necessary corrective effect upon the Respondent. Resident's of, and visitors to, Rozet, Wyoming, rely on the System for safe drinking water. See, Memo in Support, p. 6. Respondent's lack of regard for the EPA's authority indicates a pattern of behavior that cannot be condoned with respect to public health and safety. 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. See, Declaration of Kathelene Brainich, para. 15-19.

An initial gravity component was calculated by Kathelene Brainich to be \$56.06. The gravity for noncompliance is based upon the gravity factor established by the Penalty Policy, the population served, and the duration of each violation and is adjusted by a factor of 1.4163 in accordance with the Penalty Policy. See, Declaration of Kathelene Brainich, para. 18. Based on Respondents negligence and history of noncompliance the gravity component was increased by a factor of 2.0 and 2.34, respectively, and was applied pursuant to the Penalty Policy, *Id.* at para. 19. This raised the gravity to \$262.20. A further increase was applied to raise the gravity component to a minimum of \$1,000.00.⁵

Economic Benefit: The Complainant calculated an economic benefit of \$60. This calculation was based on the costs of sampling, laboratory analysis, and operator expenses that Respondent would have incurred had he 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.

⁵ In matters similar to this one, where the gravity amount of the penalty calculation is below \$1,000, the Penalty Policy specifies that, as a matter of policy, absent unusually compelling circumstances, the penalty should not be less than \$1,000 in administrative cases. See, Penalty Policy, p. 3.

Based on the Memo in Support of Default, the Declaration of Kathelene Brainich dated June 27, 2011 and the Supplemental Declaration of Kathelene Brainich dated August 31, 2011, the Agency has calculated a reasonable penalty. In this case, Complainant arrived at the proposed penalty by adding the economic benefit and the minimum gravity of \$1,000 multiplied by 20% to arrive at a penalty of \$1,200. See, Supplemental Declaration of Kathelene Brainich, at para. 9.

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 **\$1,200.00**, for its violations of the Act.

V. DEFAULT ORDER⁶

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 **\$1,200.00**.

IT IS THEREFORE ORDERED that Respondent, Bryan Pownell, owner and operator of Bryan's Place 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 **\$1,200.00** 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

⁶ 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 Respondent 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).

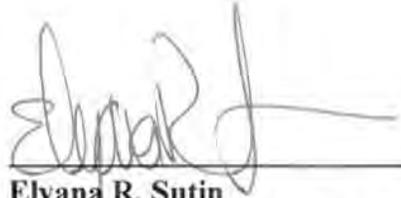
This Default Order constitutes an Initial Decision, in accordance with 40 C.F.R. § 22.27(a) of the Consolidated Rules. This Initial Decision shall become a Final Order forty five (45) days after its service upon a party, and without further proceedings unless: (1) a party moves to reopen the hearing; (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 22nd Day of September, 2011.

A handwritten signature in black ink, appearing to read "Elyana R. Sutin", written over a horizontal line.

Elyana R. Sutin
Presiding Officer, Region 8

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached, **DEFAULT INITIAL DECISION AND ORDER** in the matter of **BRYAN POWNELL, BRYAN'S PLACE; DOCKET NO.: SDWA-08-2011-0025** was filed with the Regional Hearing Clerk on September 22, 2011.

Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Amy L. Swanson, Senior Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on September 22, 2011 to:

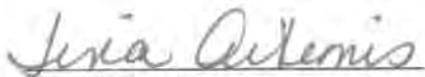
Bryan Pownell, Owner/Operator
Bryan's Place
1416 Highway 51
Rozel, Wyoming 82727

E-mailed to:

Honorable Elyana R. Sutin
Regional Judicial Officer
U. S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-2466

Elizabeth Whitsel
U. S. Environmental Protection Agency
Cincinnati Finance Center
26 W. Martin Luther King Drive (MS-0002)
Cincinnati, Ohio 45268

September 22, 2011


Tina Artemis
Paralegal/Regional Hearing Clerk