

4/19/93

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|---------------------------------|---|-------------------------|
| In the Matter of |) | |
| |) | |
| HERMAN AND DOROTHEA ADKINS, and |) | Docket No. SDWA-III-020 |
| SABINE COMMUNITY WATER SYSTEM, |) | |
| |) | |
| Respondents |) | |

ORDER ON DEFAULT

The EPA's complaint in this case was issued on September 26, 1990, under the Safe Drinking Water Act ("SWDA"), section 1414(g)(3)(B), 42 U.S.C. 300g-3(g)(3)(B), and seeks civil penalties against Respondents Herman and Dorothea Adkins for violations of the Act. The complaint alleges that Respondents Herman and Dorothea Adkins own and operate the Sabine Community Water System, a public water system, in Sabine, Wyoming County, West Virginia. It is further alleged that they are a supplier of water subject to the SWDA and the applicable regulations, 40 C.F.R. Part 141, and that they failed to comply with an Administrative Order issued under the Act which required that Respondents sample and analyze for coliform bacteria, report the analytical results and noncompliance with the National Primary Drinking Water Regulations to the State of West Virginia, notify users of any violations, and notify the EPA of Respondents' compliance with the order. A civil penalty of \$5,000, is requested.

Respondents' answer consisted of an undated letter from Dorothea Adkins, received on September 18, 1991, sent in response

to a letter from Complainant when Respondents failed to file an answer to the complaint. This letter reads as follows:

This is concerning a Default Order sent to what was the Sabine Water Works. I am informing you that there is or has been NO operating water works in Sabine for approx 8 years (more or less). The underground well was completely sank. There is still to date NO well, tank, pump, building or any water paying customers in Sabine[.] Water sampling was and are impossible to be sent in from what is no longer a water system. I do not have anything to do with any source of water in Sabine. The Public Service Commission in Charleston and the Wyoming County Health Department are aware there is no Sabine Works. Residents in the community have their own private well or get their source of water from a hill from a mining hole.

Thank you,
Dorothea Adkins.¹

This letter and a subsequent undated letter from Ms. Adkins postmarked April 20, 1992, are the only papers Respondents have filed in this proceeding. The second letter was a reply to Complainant's letter notifying Respondents that Complainant would again move for a default order if Respondents had not contacted Complainant by April 24, 1992.² In the letter Ms. Adkins again denied any ownership in a distribution water system and she further

¹ Letter sent with letter of Lydia A. Guy, Regional Hearing Clerk, EPA Region IV, to Chief Administrative Law Judge Frazier dated Oct 8, 1991. Complainant had notified Respondents that he intended to move for a default order before the Regional Administrator. See Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties and Revocation or Suspension of Permits (hereafter "Rules of Practice"), 40 C.F.R. 22.16(c), 22.17.

² Complainant's motion was addressed this time to the Presiding Officer who had been assigned to the case. Rules of Practice, 40 C.F.R. 22.21.

asserted that the right in the deed fell back to the coal company.³ Respondents have simply disregarded all other papers served upon them in this proceeding, including Complainant's motion for a default order which is now before me.⁴

It being evident that Respondents have no intention of responding to the motion for a default order, the motion is ready for decision. Accordingly, I have examined the papers before me and, for the reasons hereafter stated, Respondents' defense that there was no water supply system at the time involved and they had no obligation to comply with the Administrative Order is rejected and a penalty of \$5,000, is assessed.

The Facts

On November 27, 1978, Kyle H. Peck and Olive May Peck conveyed to Dorothea L. Adkins all their right, title and interest in and to the water system of the Town of Sabine, consisting of a well and pump, a water tank, a pipeline from the well to the water tank and from the water tank to the general water system, a pump house, the pipes making up the general water system and other property and

³ A copy of this letter was submitted with Complainant's second status report dated June 2, 1992.

⁴ See Complainant's status reports dated December 16, 1991, June 2, 1992 and October 7, 1992. After the motion was filed, two letters were sent to Respondents warning them of the consequences of not replying to the motion. See Judge Frazier's letter to Respondents dated July 31, 1992, and my letter dated February 9, 1993. Respondents refused service of both letters, Dorothea Adkins's letters were returned with the notation "Refused", and Herman Adkins letters were returned with the notation "unclaimed." Copies of the certified mail slips showing proof of mailing and of the returned envelopes are attached as an appendix to this decision.

equipment belonging to the system. The property rights conveyed by the Pecks in the Sabine water system were identical to the property rights conveyed to the Pecks by the Bellemead Coal Co. in 1954. In neither deed is there any mention of any reversion of the property to the coal company.⁵

Herman Adkins is the father of Dorothea Adkins, and has supervised and operated the Sabine Water Works, as the Sabine Community Water System acquired by the Dorothea Adkins is sometimes referred to.⁶ At the present time, his status as operator of the system is unknown.⁷

The water system has approximately 75 service connections and serves a population of 262 people.⁸

On May 23, 1984, the well for the system went dry. At that time the system had between 85 and 100 users. The Adkins did not drill another well and simply left the existing system of pipes and equipment in place doing nothing to maintain it and ceasing to bill the users for water.⁹ Notices from the Public Service Commission to file reports were received but Respondents disregarded them, informing the Commission that since they were not delivering water

⁵ Copies of both deeds are attached to Complainant's motion for a default order.

⁶ Affidavit of Herman Adkins, CX 13.

⁷ Motion for Default Order, Par. 15.

⁸ CX 5.

⁹ CX 13.

they had nothing to report.¹⁰

Consumers in the community, however, did tap water from an abandoned mine and introduced it by gravity into the water supply system, and the system continued to supply water from this source to the community. The water received no treatment before delivery to the consumers.¹¹ Respondents were aware of the use of the system to deliver drinking water and appear to have simply ignored it.¹²

A group called the Sabine Community Water Association was formed to operate and make improvements to the Sabine Water Works so that the system would meet the W. Va. code and regulations.¹³ The Department of Public Health, then, recognizing that the Adkins had no intention of complying with the W. Va. code and regulations governing the community water system, petitioned the Wyoming County Circuit Court in October 1987, for an order restraining Respondents from interfering with the attempts of the Sabine Community Water Association to operate the Sabine Water Works in accordance with the law and the regulations.¹⁴ Several thousand dollars of improvements would have been required to bring the system up to standard, and the Community Association was apparently willing to

¹⁰ CX 13.

¹¹ CX 13; Affidavit of C. Russell Rader submitted with Mr. Snyder's letter of March 8, 1993 (hereafter "Rader Affidavit"), par. 9.

¹² CX 13.

¹³ Rader Affidavit, pars. 4, 5.

¹⁴ Rader Affidavit, par.9; Affidavit of Dennis Blair submitted with Mr. Snyder's letter of March 12, 1993 (hereafter "Blair Affidavit.")

expend this money.¹⁵

The parties met to discuss settlement. Respondents, however, required as a condition of settlement that the Sabine Water Community Association purchase the Sabine Water Works for \$30,000, and that Respondents would be able to resume total control of the Sabine Water Works at any time at their pleasure.¹⁶

The Sabine Community Water Association rejected Respondents' terms as too onerous, but Respondents would not change their conditions.¹⁷ Many of the organizers of the Association then decided to drill their own wells and discontinued their participation in the Association so that the Association was no longer a viable association.¹⁸

The State then turned to the U.S. EPA for assistance in bringing the Sabine water system into compliance with the law and regulations. On August 24, 1989, following notice to Respondents, and after providing an opportunity for a public hearing and for the State to confer with the Administrator, the EPA issued Administrative Order Docket No. III--89-024-DS, the violations of

¹⁵ Rader Affidavit, par. 9; Blair Affidavit, par. 8.

¹⁶ Rader Affidavit, pars. 8, 10.

¹⁷ Rader Affidavit, par. 10. In the opinion of Mr. Rader, who at the time had the responsibility for the enforcement of W. Va. laws governing the operation of public water systems for the district in which the Sabine Water Works was located, Respondents' conditions were unreasonable, given the number of families using the system and the repairs needed. Rader Affidavit, par. 13.

¹⁸ Rader Affidavit, Par. 12.

which form the basis of the Complaint in this proceeding.¹⁹

Discussion

The question raised by Respondents is whether their obligation to comply with the monitoring, analytical and reporting requirements of the SWDA and the regulations thereunder terminated when in May 1984, their well disappeared and they no longer supplied the water that was being distributed through the system.

A "public water system" is defined both under the statute and the regulations as "a system for the provision to the public of piped water for human consumption" which has at least fifteen service connections or regularly serves an average of at least twenty-five individuals. The definition is broad enough to cover a system of pipes and other facilities used to distribute drinking water to consumers.²⁰ Respondent Dorothea Adkins, as the owner of the system, and Herman Adkins as the operator are also a "supplier of water" within the meaning of the SWDA and the regulations thereunder.²¹ Neither the statute nor the regulations, then, support the proposition that Respondents were relieved of the obligation to comply with the SWDA and the regulations thereunder because the water distributed through the system came from a source not owned by Respondents or with whom Respondents contracted.

¹⁹ CX 1, 6, 7, and 9. In accordance with what has been their practice all along of disregarding all efforts to bring them into compliance with the law and regulations, Respondents did not contest the order. CX 1.

²⁰ SDWA, section 1401(4), 42 U.S.C. 300f(4); 40 C.F.R. 141.2.

²¹ SWDA, section 1401(5), 42 U.S.C. 300f(5); 40 C.F.R. 141.2.

This does not mean that Respondents could not have obtained relief from the situation caused by the disappearance of their well. Since under state law the system was a public utility and as such, subject to the jurisdiction of the Public Service Commission, any changes would have had to be approved by the Public Service Commission.²² Respondents, however, could have requested permission from the Public Service Commission to discontinue their operation of the system. There is no evidence either of Respondents making such a request to the Public Service Commission, or of the Public Service Commission authorizing Respondents to discontinue the operation of the system.

Another course of action open to Respondents was to transfer the system to the community association. They elected, however, not to do this except at a price that the association was unwilling to pay. Assuming that Respondents had the right to sell the water system on whatever terms they requested, they should also have recognized that by retaining the property they also retained the obligations that went with it.

Nor is this a situation where Respondents can be said to have relieved themselves of all obligations with respect to the water

²² See State v. Willis, (W. Va. Sup. Ct. App.) 144 S.E. 2d 630 (1965) (person supplying water to a community is a public utility subject to the jurisdiction of the Public Service Commission and the Commission has the authority to order the person to provide adequate service). Cf. Preston County Light and Power Co. v. Renick, (W. Va. Sup. Ct. App.) 113 S. E. 2d 378, 384-385 (1960), (coke company generating and selling electricity for distribution by a power company held to be a public utility which could not discontinue its generation and sale to the power company of electricity unless it obtains authority from the commission to do so).

supply system by having abandoned the property in the legal sense of the word, i.e., relinquished all right and title in the property with the intention of not reclaiming it.²³ First, it is doubtful whether such a defense would be available to the owner of a public water supply system for the reasons given above. Second the evidence is completely to the contrary. Respondents were ready to assert their interest in the system when they realized that the community was also interested in it.

Accordingly, I find that Respondent Dorothea Adkins has violated Administrative Order Docket No. III-89-024-DS as charged in the Complaint. Because the status of Herman Adkins as operator of the system is unknown, and efforts to serve him have proved fruitless, no finding of violation is made at this time against him, and the complaint against him is dismissed without prejudice.

The Appropriate Penalty

The EPA has calculated the proposed penalty of \$5,000, in accordance with the EPA's policies and guidelines. The penalty takes into account the economic benefit to Respondent Dorothea Adkins of noncompliance and what is necessary to deter further violations.²⁴ The \$5,000 penalty is within the amount authorized by statute to be administratively assessed, and appears to meet these criteria, and I find it is appropriate for the violations found.²⁵ Respondent's ability to pay the penalty may be considered as a

²³ Black's Law Dictionary 3 (5th Ed. 1979).

²⁴ CX 16.

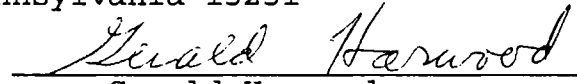
²⁵ SWDA, section 1414(g)(3), 42 U.S.C. 300G-3(g)(3).

mitigating factor justifying a reduction in the penalty that would otherwise be assessed. There has been no claim by Respondent, however, that she would be unable to pay the penalty of \$5,000.²⁶

ORDER²⁷

Pursuant to SWDA, section 300g-3(g)(3)(B), 42 U.S.C. 1414(g)(3)(B), a civil penalty of \$5,000 is assessed against Respondent Dorothea Adkins. Payment of the full amount of the penalty shall be made within sixty (60) days after service of this order on Respondent by forwarding a cashier's check or certified check in the amount of the penalty, payable to the Treasurer, United States of America, to the Regional hearing Clerk at the following address:

EPA-Region III
Regional Hearing Clerk
P.O. Box 3605 15 M
Pittsburgh, Pennsylvania 15251


Gerald Harwood,
Senior Administrative Law Judge

Dated:

4/19/93

²⁶ Taking into account a Respondent's ability to pay in assessing a penalty is not required by the SWDA but is a policy adopted by the EPA. See CX 12 (Guidance on Settling Enforcement Actions Against Public Water Systems under the Amended Safe Drinking Water Act). A letter was written to Ms. Adkins notifying her that her ability to pay the proposed penalty would be considered in assessing the penalty. See my letter of February 9, 1993. Ms. Adkins refused to accept service of the letter. See Appendix.

²⁷ This default order constitutes the initial decision in this matter under the Rules of Practice, 40 C.F.R. 22.17(b). Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Environmental Appeals Board reviews the decision on its own motion, this decision shall become the final order of the Environmental Appeals Board. Rules of Practice, 40 C.F.R. 22.27(c).

A P P E N D I X

USA
SEA

United States
Post Office
Washington, D.C. 20560
Official Business
Penalty for Private Use
\$300

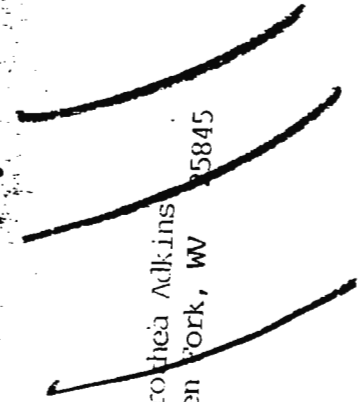
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MAIL

RETURNED TO SENDER
ADDRESS CHECKED
Postage
Paid
Post Office
Washington, D.C. 20560

for records

Dorothea Adkins
Glen Fork, WV 25845



JUL 31 1992
D.C.

NEW YORK, NY
AUG 15 1992
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NEW YORK, NY 10001
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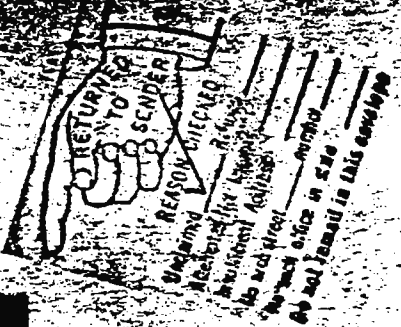
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BUREAU OF LAND MANAGEMENT

Private Use

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MAIL

- Moved, left no address
- No such number
- Attempted-Not known



Herman Adkins
Sabine Community Water System
Sabine, WV 25916

EPA

United States
Environmental Protection
Agency
Washington, DC 20460

Official Business
Penalty for Private Use
\$300

MAIL

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RETURN TO
Dorinda A. Jenkins
1313 1st St
New York, NY 10001
25845

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DC

U.S. OFFICIAL MAIL
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PENALTY
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Name
1st Notice 2/11/73
2nd Notice
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52 FEB 25 1973
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United States
Environmental Protection
Agency
Washington, DC 20460

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MAIL **YOUR RECEIPT**
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U.S. OFFICIAL MAIL
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FOR PRIVATE USE \$300
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Herman Adkins
Sabine Community Water Systems
Sabine, WV 25916

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Certificate of Service

I hereby certify that on this 22nd day of April 1993, copies of Order on Default in the matter of Sabine Community Water Systems, Docket No. SDWA-III-020, were distributed as follows.

Certified Mail To:

Herman Adkins
Sabine Community Water System
Sabine, W. Va. 25916

Dorothea Adkins
Glen Fork, W. Va. 25845

First Class Mail To:

Bessie Hammel
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
401 M Street, S.W. (A-110)
Washington, D.C. 20460

Hand Delivered To:

Douglas J. Snyder, Esq.
Assistant Regional Counsel (3RC12)
U.S. Environmental Protection Agency
841 Chestnut Building
Philadelphia, PA 19107

Date: April 22, 1993

Lydia A. Guy
Lydia A. Guy
Regional Hearing Clerk