

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

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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  
HEARING CLERK

**ORDER TO SUPPLEMENT THE RECORD**

On May 20, 2010, Complainant, U.S. Environmental Protection Agency (EPA) Region 8, issued an Administrative Order (Order), 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 Order 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 public water system's (System) 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. Order, Docket No. SDWA-08-2010-0044, para. 6-9, at 1.

Complainant then issued an Administrative Order Violation (AOV) letter on October 5, 2010, notifying Respondent that he was in violation of the Order, the Act, and the NPDWRs for failing to monitor for nitrate within 30 days of the Order 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 Order, the Act, and the NPDWRs for failing to monitor for total coliform bacteria during the 3<sup>rd</sup> quarter of 2010 and for failing to report this violation to EPA.

On February 17, 2011, pursuant to 42 U.S.C. § 300g-3(g)(3), Complainant filed a Complaint and Notice of Opportunity for a Hearing (Complaint) against Respondent, alleging violations of the Act, the NPDWRs, and the Order. Respondent was personally served with the Complaint on March 4, 2011. Memorandum in Support of Motion for Default at 2 (hereinafter "Memorandum in Support"). 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. Respondent failed to file an answer with the Regional Hearing Clerk within 30 days after being served with the Complaint, as required by 40 C.F.R. § 22.15(a).

On June 28, 2011, Complainant filed a Motion for Default (Motion) against Respondent pursuant to Section 22.17 of the Consolidated Rules of Practice Governing the Administrative

Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (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. Complainant’s Motion for Default at 1.

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.

**I. THE VIOLATIONS ALLEGED IN THE COMPLAINT, THE MEMORANDUM IN SUPPORT OF MOTION FOR DEFAULT, AND THE DECLARATION OF KATHELENE BRAINICH ARE INCONSISTENT WITH THE RECORD**

Complainant’s May 20, 2010 Administrative Order cites Respondent for, among other things, a violation of the NPDWRs for failing “to monitor the system’s water for total coliform bacteria during *the 3<sup>rd</sup> (July-September) and 4<sup>th</sup> (October-December) quarters of 2009*, and the 1<sup>st</sup> (January-March) quarter of 2010 . . . .” Order para. 6, at 1 (emphasis added). The Complaint in this matter, however, alleges in Count I that “Respondent failed to monitor for total coliform bacteria during *the 3<sup>rd</sup> (July, August, September) and 4<sup>th</sup> (October, November, December) quarters 2010*, in violation of the Order, the Act, and the NPDWRs.” Complaint at 4 (emphasis added). This allegation in the Order and Complaint are inconsistent.

Additionally, Complainant’s Memorandum in Support of Motion for Default states in the discussion of the penalty calculation that “Respondent failed to monitor for total coliform in *the 3<sup>rd</sup> and 4<sup>th</sup> Quarters (July-December) of 2010 . . . .*” Memorandum in Support at 8. Furthermore, although the Declaration of Kathelene Brainich acknowledges that the Order cited Respondent for failing to monitor total coliform during the “3<sup>rd</sup> quarter 2009 through 1<sup>st</sup> quarter 2010,” it goes on to state that “Respondent failed to monitor for total coliform during the 3<sup>rd</sup> and 4<sup>th</sup> quarters (July-December) of 2010 . . . .” Declaration of Kathelene Brainich para. 4, at 1, para. 15, at 4.

Although the October 26, 2010 AOV letter indicates that Respondent failed to monitor for total coliform bacteria during the 3<sup>rd</sup> quarter of 2010, the information before the Court does not indicate that EPA found Respondent in violation of the coliform monitoring requirements for both the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2010, as alleged in Count I of the Complaint. Therefore, the allegation in Count I of the Complaint, the narrative in the Memorandum in Support of Motion for Default, and the accompanying declaration of Kathelene Brainich are inconsistent with the

record. This inconsistency must be reconciled before this court can rule on Complainant's Motion for Default.

## **II. THE PENALTY CALCULATION IS INSUFFICIENT FOR THIS COURT TO DETERMINE ITS ACCURACY**

In addition to the issues described above, Complainant's description of the penalty calculation in this case is insufficient. Section 22.17(b) of the Consolidated Rules requires a movant, in a Motion for Default, to "specify the penalty or other relief sought and state the legal and factual grounds for the relief requested." 40 C.F.R. § 22.17(b). Additionally, section 22.27(b) provides in pertinent part:

If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

40 C.F.R. § 22.27(b). For the reasons below, this Court is unable to determine whether the proposed penalty corresponds to the applicable penalty criteria.

First, due to the discrepancy between the timeframes of the violation alleged in Count I of the Complaint and the violation noted in paragraph six of the Order, this Court cannot determine the accuracy of Complainant's initial gravity component calculation. The 1994 Public Water System Supervision Program Settlement Penalty Policy (Penalty Policy) uses the duration of the violation, in months, to determine the population exposure factor, which is multiplied by a factor related to the seriousness of the violation to determine the gravity component for that particular violation. Penalty Policy at 5. The gravity components for each violation are then added to come up with the initial gravity component. Until Complainant clarifies the correct duration of the coliform monitoring violation alleged in Count I of the Complaint, this court cannot determine the appropriate value for the initial gravity component of the penalty calculation.

Second, even if the Complaint alleged the correct duration of the coliform monitoring violation, Complainant's description of the penalty calculation fails to adequately explain how they arrived at the proposed penalty of \$1,200. Although the Complaint alleges three counts of violating the Order, the Act, and the NPDWRs, for purposes of calculating the proposed penalty amount, there are four distinct violations. Those violations are: 1) failure to monitor for total

coliform bacteria; 2) failure to monitor annually for nitrate; 3) failure to report total coliform monitoring violations to EPA; and 4) failure to report nitrate monitoring violations to EPA. *See* Complaint at 4–5; Penalty Policy, Attachment 2. Each violation has a corresponding factor related to the seriousness of the violation (the “gravity factor”), which, as noted above, is used to determine the gravity component for that violation. Penalty Policy at 4.

Complainant’s Memorandum in Support of Motion for Default and the accompanying Declaration by Kathelene Brainich only specifies one gravity factor for a reporting violation, despite noting in the Memorandum that “Respondent failed to report the nitrate and total coliform monitoring violations to EPA over duration of 2 months, *1 month per violation.*” Memorandum in Support at 8. The failure to include the gravity factor for both total coliform and nitrate monitoring reporting in Complainant’s penalty calculation raises the question of whether Complainant considered a fourth violation in their penalty calculation. This Court cannot determine the accuracy of the penalty calculation without fully addressing this factor.

Additionally, Complainant uses a history of non-compliance factor of 2.34, based on “[f]ive violation letters and two administrative order violation letters . . . .” Declaration of Kathelene Brainich, para. 19 at 5. The record in this case, however, only reveals the issuance of one Administrative Order on May 20, 2010, and two AOVs on October 5 and 26, 2010. Thus, Ms. Brainich’s declaration is inconsistent with the record. Furthermore, based on the Penalty Policy’s instructions, even if Complainant can justify utilizing five violation letters and two administrative orders to calculate the history of non-compliance factor, it is unclear how Ms. Brainich arrived at the factor listed in the penalty calculation. Complainant must clearly explain how it calculated the history of non-compliance factor and justify the number of violation letters and administrative orders used to reach its conclusion.

Third, both the Memorandum in Support of Motion for Default and the Declaration of Kathelene Brainich reference the addition of “a standard increase for pleading purposes” to the proposed penalty without stating the increase amount or justifying its existence. Memorandum in Support at 9; Declaration of Kathelene Brainich, para. 21, at 5. Without knowing the amount of the “standard increase for pleading purposes,” or the basis for this increase, this Court cannot determine if Complainant accurately applied it to the proposed penalty amount in this case. Thus, Complainant must state the increase amount and justify its incorporation into the penalty calculation.


### III. ORDER

Complainant is hereby **ORDERED** to supplement the record with respect to the violation alleged in Count I of the Complaint **on or before August 31, 2011**. Complainant may submit a declaration or affidavit reconciling the inconsistencies between the Order, the Complaint, the Memorandum in Support of Motion for Default, and the Declaration of Kathelene Brainich, or an

amended complaint. In accordance with 40 C.F.R. § 22.14(c), if an amended complaint is necessary, Respondent shall be afforded 20 days to file an answer from the date of service.

Complainant is also **ORDERED** to clarify the details of its penalty calculation so this Court can determine whether the proposed penalty corresponds to the applicable penalty criteria.

SO **ORDERED** this 3<sup>rd</sup> day of August, 2011.



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Elyana R. Sutin  
Regional Judicial Officer

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached, **ORDER TO SUPPLEMENT THE RECORD** in the matter of **BRYAN POWNELL, BRYAN'S PLACE; DOCKET NO.: SDWA-08-2011-0025** was filed with the Regional Hearing Clerk on August 3, 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 August 3, 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

August 3, 2011



Tina Artemis  
Paralegal/Regional Hearing Clerk

