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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

In the Matter of Harold Gallager, Manager Mansard Apartments Cohoes, New York Respondent. Proceeding Pursuant to Section1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. §300g-3(g)(3)(B)	Docket No. SDWA-02-2001-8293

INITIAL DECISION AND DEFAULT ORDER

By Order on Default as to Liability, the undersigned, as Presiding Officer in this matter, found Harold Gallager, Manager of the Mansard Apartments Public Water System (the "Respondent"), liable for the violation of an Administrative Order issued pursuant to Section 1414(g) of the Safe Drinking Water Act, 42 U.S.C. §300g-3(g) ("SDWA"), and 40 C.F.R. Part 141, Subpart O, requiring compliance with applicable Consumer Confidence Report ("CCR") requirements. By Motion for an Accelerated Decision on Penalty, the Complainant, the Regional Administrator of the United States Environmental Protection Agency's ("EPA"), Region 2, on behalf of the Administrator of the EPA, has moved for an Accelerated Decision on Penalty,

requesting assessment of a civil penalty in the full amount of Five Thousand Dollars ($5,000), as proposed in the Administrative Complaint.

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 C.F.R. Part 22, and based upon the record in this matter and the following Findings of Violation, Conclusions of Law and Penalty Calculation, the Respondent is hereby assessed a civil penalty in the amount of $5,000.

I. BACKGROUND

This is a proceeding under Section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. §300g-3(g)(3)(B) and is governed by the Consolidated Rules. Complainant initiated this proceeding by filing a Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Request a Hearing ("Complaint") on January 10, 2001 against Respondent. In its Complaint, the Complainant alleged that Respondent violated an Administrative Order issued pursuant to Section 1414(g) of the SDWA and 40 C.F.R. Part 141, Subpart O requiring compliance with applicable Consumer Confidence Report ("CCR") requirements.

> The Complaint explicitly stated on page 5, in the section entitled Failure to Answer, that
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> "[if] Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all of the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for failure to timely file an Answer to the

Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c). Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings thirty (30) days after the Default Order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such Final Order of Default against Respondent, and to collect the assessed penalty amount, in federal court."

On May 15, 2002, Complainant moved for an Order on Default finding Respondent liable for violations alleged in the Complaint. Complainant's Motion for a Default Order as to Liability was granted pursuant to the Consolidated Rules at 40 C.F.R. Part 22, the record in this matter and the Findings of Fact and Conclusions of Law set forth in the Order on Default as to Liability. The Order on Default as to Liability is incorporated herein.

On November 18, 2003, Complainant filed a Motion for an Accelerated Decision as to Penalty. It was served on Respondent by certified mail, return receipt requested on November 21, 2003. To date, the Respondent had failed to file a Response to this Motion. Although the Complainant sought an Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), the undersigned issues this Initial Decision and Default Order pursuant to 40 C.F.R. § 22.17(c), based on the factors enumerated herein. As stated above, Complainant's initial motion in this matter was a Motion for Default as to Liability pursuant to 40 C.F.R. § 22.17(b), and the Respondent continues to be in default on this matter for failure to answer the Complaint, or respond to any of the subsequent motions or the Order on Default as to Liability. An Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), sought by the Complainant, is more appropriate in those instances where the Respondent has answered the Complaint.

Based upon a reading of 40 C.F.R. §22.17, together with pertinent portions of the preamble to the revisions contained in that section, as well as the administrative case law, there is an expectation that a Motion for Default on Liability and Order granting same contemplates a second Motion for Penalty pursuant to 40 C.F.R. §22.17(b). 64 Fed. Reg. 40155 (July 23, 1999); In the Matter of Leroy's Trailer Park Water System, EPA Docket No. SDWA-04-2001-0513; In the Matter of Lawrence County Agricultural Society, EPA Docket No. TSCA-5-98-90.

In addition, the relief sought by a Complainant in its Motion for Accelerated Decision is similar to that sought by a motion for penalty under 40 C.F.R. §22.17(b), and Complainant's Motion for Accelerated Decision, which included an Affidavit in Support of Motion for an Accelerated Decision executed by the person who calculated the penalty, together with Complainant's earlier motions for Default as to Liability and Motion to Enter Default Order as to Liability, specified the penalty sought and the legal and factual grounds therefore, satisfying the requirements of 40 C.F.R. §22.17(b) as to information to be included in a default motion requesting assessment of a penalty. Therefore, in this instance, it is preferable and within the discretion of the undersigned to issue an Initial Decision and Default Order pursuant to C.F.R. § 22.17(c), rather than an Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a), as requested by Complainant.

FINDINGS OF VIOLATION

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, I make the following findings:

1. Harold Gallager, Manager of the Mansard Apartments Public Water System (the "Respondent") is a "person" as defined in Section 1401(12) and (13)(A) of the SDWA, 42 U.S.C.

§ 300f(12) and (13)(A) and 40 C.F.R. § 141.2.

2. Respondent is a "supplier of water" who is an owner and /or operator of a "public water system" within the meaning of Section 1401(4) and (5) of the SDWA, 42 U.S.C. § 300f(4) and (5), and 40 C.F. R. § 141.2. Respondent is the owner and/or operator of the Mansard Apartments, located in Cohoes, New York.

3. Respondent is a "person" subject to an Administrative Order issued under Section 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1).

4. The Mansard Apartments Public Water System provides piped water for human consumption and regularly serves at least 15 service connections and/or a population of at least 25 individuals, and is, therefore, a "community water system" within the meaning of Section 1401(15) of the SDWA, 42 U.S.C. §300f(15), and 40 C.F.R. §141.2.

5. 40 C.F.R. § 141.152(b) requires community water systems to prepare and distribute their first CCR by October 19, 1999, the second by July 1, 2000 and subsequent reports by July 1, annually thereafter.

6. In May 1999, August 1999 and again in May 2000, NYSDOH notified the Respondent in writing of its obligation to prepare and deliver a CCR to the consumers of the Respondent's water system by October 19, 1999, as required by 40 C.F.R. § 141.152(b).

7. 40 C.F.R. § 141.155(c) and (d) require Respondent to mail a copy of the CCR to the primary agency (NYSDOH), as well as any other agency or clearinghouse NYSDOH designates no later than the date the CCR is required to be delivered to its customers as required by 40 C.F.R. § 141.152(b).

8. 40 C.F.R. § 141.153 and § 141.154 contain a summary of the CCR Rule requirements, which is divided into two detailed categories: (1) report content requirements and (2) required additional health information. 40 C.F.R. § 141.153 and § 141.154 require Respondent to include the following eight (8) items of information in their CCR:

(A) Information about the water system

(B) Source(s) of water

(C) Definitions

(D) Levels of detected contaminants

(E) Information on Cryptosporidium, Radon and other contaminants

(F) Required additional health information

(G) Information on violations of National Primary Drinking Water Regulations (NPDWR)

(H) Variance or Exemption information (if applicable)

9. On April 13, 2000, EPA issued an Administrative Order, Docket No. SDWA-02-2000-8397, to place the Respondent on an enforceable compliance schedule. This schedule was intended to provide EPA and NYSDOH with a written plan and proposed schedule identifying when (no later than July 1, 2000), and how the Respondent will deliver a CCR which includes all of the information required by 40 C.F.R. §141.153 and § 141.154, with data from calendar year 1998, to all of the Respondent's consumers.

10. Respondent failed to demonstrate to EPA and NYSDOH that the required annual CCR's were prepared and delivered to its consumers.

11. Respondent therefore failed to demonstrate its compliance with the CCR requirements specified in 40 C.F.R. Part 141, Subpart O and Sections 3 and 4 of the Administrative Order.

12. On January 16, 2001 and pursuant to 40 C.F.R. § 22.5(b)(1), Respondent was served, by certified mail, return receipt requested, a true and correct copy of the Complaint.

13. The Complaint proposed to assess a civil penalty against the Respondent in the amount of $5,000 for failure to comply with the April 2000 Administrative Order.

14. A signed Domestic Return Receipt was received by Complainant.

15. To date, the Respondent has not provided an Answer to the Complaint in this matter or submitted payment of the civil penalty proposed in the Complaint.

16. On May 18, 2002, and pursuant to 40 C.F.R. § 22.5(b)(2), Respondent was served, by certified mail, return receipt requested, with a Motion for Default Order on Liability.

17. A signed Domestic Return Receipt was received by Complainant.

18. To date, the Respondent has failed to respond to the Motion for Default Order on Liability.

19. On June 24, 2002, and pursuant to 40 C.F.R. § 22.5(b)(2), Respondent was served, by certified mail, return receipt requested, with a Motion to Enter Order on Default as to Liability and a proposed Order on Default as to Liability.

20. On July 31, 2002, and pursuant to 40 C.F.R. § 22.5(b)(2), Respondent was served again, in this instance by Federal Express, Priority Overnight Mail, with the Motion to Enter Order on Default as to Liability and the proposed Order on Default as to Liability.

21. Federal Express provided Complainant with a form showing Respondent's signature acknowledging receipt of the documents as proof of delivery to Respondent.

22. To date, the Respondent has failed to respond to the Motion to Enter Order on Default as to Liability and the proposed Order on Default as to Liability.

23. On April 29, 2003, an Order on Default as to Liability was filed and served upon Respondent by certified mail, return receipt requested.

24. On November 21, 2003, and pursuant to 40 C.F.R. § 22.5(b)(2), Respondent was served, by certified mail, return receipt requested, with a Motion for an Accelerated Decision as to Penalty.

25. A signed Domestic Return Receipt was received by Complainant.

26. To date, the Respondent has failed to respond to the Motion for an Accelerated Decision as to Penalty.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred by Section 1414 of the SDWA, 42 U.S.C. § 300g-3.

2. Section 1414(g)(3)(A) of the Act, 42 U.S.C. § 300g-3(g)(3)(A) and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, provide that any person who violates, or fails or refuses to comply with, an Administrative Order issued pursuant to the SDWA shall be liable to the United States for a civil penalty up to $27,500 per day of violation.

3. The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

4. Respondent's failure to file an Answer to the Complaint, or otherwise respond to the

omplaint, constitutes a default by Respondent pursuant to 40 C.F.R. §22.17(a)

5. Respondent's default constitutes an admission of the allegations and a waiver of the Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

6. Respondent has failed to comply with the provisions of an Administrative Order issued pursuant to Section 1414(g) of the Act.

7. Respondent's failure to file a timely Answer to the Complaint was grounds for the entry of an Order on Default as to Liability against the Respondent. 40 C.F. R. § 22.17. However, it must be noted that this earlier Order did not constitute an Initial Decision in accordance with 40 C.F.R. § 22.17(c). A Default Order that does not determine remedy along with liability is not an initial decision, unless it resolves "all issues and claims in the proceeding." Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a Motion for Default on Liability and Order granting same contemplates a second Motion for Penalty.

8. Complainant filed a Motion for Accelerated Decision on Penalty pursuant to 40 C.F.R. § 22.20(a). As set forth above, this Motion is being treated as a Motion for Penalty pursuant to 40 C.F.R. § 22.17(b).

9. Respondent's failure to file a timely answer or otherwise respond to the Complaint is grounds for entry of a default order against Respondent assessing a civil penalty for the aforementioned violations pursuant to 40 C.F.R. § 22.17(a).

10. As described in the penalty calculation below, I find that the Complainant's proposed civil penalty of $5,000 is properly based on the statutory requirements of Section 1414(g) of the

)WA, 42 U.S.C. § 1300g-3(g).

IV. PENALTY CALCULATION

Section 1414(g)(3)(A) of the SDWA, U.S.C. § 300g-3(g)(3)(A) and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, provide that any person who violates, or fails or refuses to comply with, an Administrative Order issued pursuant to the SDWA shall be liable to the United States for a civil penalty up to $27,500 per day of violation. The penalty which the Complainant seeks is $5,000.

In both its Complaint and Motion for Acceleration Decision on Penalty, Complainant seeks a civil penalty of $5,000, based upon the statutory factors in Section 1414(b) of the SDWA, U.S.C. § 300g-3(b)[1] and in accordance with the Agency's Policy on Civil Penalties (#GM-21) while taking into consideration the fact that this case involves a small public water system. The statutory factors under Section 1414(b) of the SDWA include the seriousness of the violation, the population at risk, and other appropriate factors. In addition, EPA looks at such "other appropriate factors" as the degree of willfulness/negligence, prior history of violations and economic benefit to the Respondent as a result of noncompliance.

In calculating the proposed penalty, Complainant took the following findings into consideration:

1. The Respondent failed to prepare and deliver CCR's to its consumers as required by Section 1414(c)(4) of the SDWA, U.S.C. § 300g-3(c)(4) and 40 C.F.R Part 141, Subpart O, and

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1 . Section 1414(b) of the SDWA, U.S.C. § 300g-3(b) specifically provides statutory guidelines for a Federal district court to consider when determining an appropriate civil penalty. While there are no equivalent statutory criteria for consideration in an administrative matter, EPA has followed the statutory guidelines set forth for courts, as well as written penalty policies, when calculating an appropriate penalty amount. See In the Matter of Apple Blossom Court,

Sections 3 and 4 of the Administrative Order. Consumer Confidence Reports are the centerpiece of the public's right-to-know under the SDWA. The purposes of the requirement to draft and distribute these reports are to: inform the consumers, those that drink the water from these facilities, of the source of their water; help consumers understand the process by which safe drinking water is delivered to their homes; educate consumers about the importance of preventative measures, such as source water protection, that ensure a safe drinking water supply; and provide consumers with access to data and information about the quality of the source water including, source water assessments, health effects data, and additional information about the water system. These reports can also promote dialogue between the consumers and their drinking water utilities, and can encourage consumers to become more involved in decisions which may affect their health. Also, and perhaps most importantly, those with special health needs or concerns can use the information provided in these reports to make informed decisions regarding their drinking water.

2. Mansard Apartments Park Public Water System serves sixty (60) people. Therefore, sixty people were denied the information listed above and consist of the "population at risk" in this case. These people were and continue to be unable to make informed choices that affect their health and the health of their families. As a result of Respondent's failure to draft and distribute these reports, these people have been denied their right-to-know about the quality and source of their drinking water.

3. Respondent's degree of willfulness is significant in this case. Respondent has been and continues to be aware of its duty to draft and distribute these reports. As described in the

Complaint, Respondent was notified in writing in May 1999, August 1999, and again in May 2000, of its obligation to prepare and deliver a CCR to its consumers. The Administrative Order, which also described Respondent's obligation to prepare and deliver a CCR to its consumers, was issued to the Respondent on April 13, 2000. The Complaint was issued to Respondent on January 10, 2001, which again described Respondent's obligation to prepare and deliver a CCR to its consumers. All correspondence from EPA was sent certified mail, return receipt requested. All receipts were signed and returned to the Agency. Respondent's failure to comply with the requirements of the Administrative Order constitute a significant degree of willfulness to violate the CCR requirements.

4. Respondent, in addition to violating the Administrative Order, has a past history of violations of the SDWA. The Safe Drinking Water Information System (SDWIS), the national database, shows 52 significant violations of drinking water regulations for this system since 1994.

5. With respect to economic benefit, Respondent has realized an economic benefit as a result of failing to prepare and distribute CCRs. Respondent did not incur the costs associated with sampling, gathering information (sampling data, water source information and information on the water system) to prepare the report, and distributing the reports. The economic benefit associated with avoiding compliance with the requirements of 40 C.F.R. Part 141, Subpart O is as high as $2,000 per report.

6. In summary, the Complainant did not propose the maximum penalty ($27,500) allowed under the SDWA for violation of the April 13, 2000 Administrative Order. Nevertheless, EPA takes violations of its Administrative Orders and reporting requirements seriously. The penalty sought in the amount of $5,000 is fully supported by the application of the statutory factors for

determining a civil penalty in Section 1414(b) of the SDWA in accordance with the Agency's Policy on Civil Penalties and taking into consideration that this case involves a small public water system as outlined above.

Evaluating all of the information, I have determined that the proposed civil penalty is appropriate and was calculated in accordance with statutory factors in Section 1414(b) of the SDWA and the Agency's Policy on Civil Penalties (#GM-21). Further, the record supports this penalty. A penalty of $5,000 is hereby imposed against Respondent.

V. DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, an Initial Decision and Default Order is hereby ISSUED and Respondent is ordered to comply with all the terms of this Order:

(1) Respondent is assessed and ordered to pay a civil penalty in the amount of Five Thousand Dollars ($5,000.00).

(2) Respondent shall pay the civil penalty by certified or cashier's check payable to the "Treasurer of the United States of America" within thirty (30) days after this default order has become a final order pursuant to 40 C.F.R. § 22.27(c). The check shall be identified with a notation of the name and docket number of this case, set forth in the caption on the first page of this document. Such payment shall be remitted to:

Regional Hearing Clerk
EPA Region 2
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

A copy of the payment shall be mailed to:

Regional Hearing Clerk
EPA Region 2
290 Broadway, 16th Floor
New York, New York 10007

(3) This Default Order constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c). Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties 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 the default order, or (4) the Environmental Appeals Board chooses to review the initial decision *sua sponte*.

IT IS SO ORDERED.

Dated: July 2, 2004

Helen S. Ferrara
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that the **Default Order and Initial Decision** by Regional Judicial Officer Helen Ferrara in the matter of **Harold Gallager (Mansard Apartments), Docket No. SDWA-02-2001-8293**, was served on the parties as indicated below:

Federal Express -

Harold Gallager
Mansard Apartments
1155A New Louden Road
Cohoes, New York 12047

Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building, Suite 600
1341 G. Street, N.W.
Washington, D.C. 20005

Pouch Mail -

Assistant Adminisrator for
Enforcement & Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2201A)
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Kim Kramer, Esq..
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Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: July 9, 2004