UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 JUL 23 PM 1:02

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	)	
	)	
Rick Nelson, Owner	)	
Fort Devils Tower	)	**Docket No. SDWA-08-2011-0021**
Devils Tower, WY 82714	)	
	)	
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

Fort Devils Tower, owned and operated by Rick Nelson, ("Fort Devils Tower" or "Respondent") is a Public Water System located in Crook County, Wyoming. The Public Water System ("PWS" or "System") is supplied from a ground water source through one well via 26 service connections. The system serves approximately 150 individuals daily from May-September and serves between 30-50 individuals in October and November. (Complaint, p.3). The PWS is considered a transient non-community water system.

On September 24, 2003, Complainant, United States Environmental Protection Agency ("EPA") Region 8, issued an Administrate Order ("AO"), Docket No. SDWA-08-2003-0062, to Respondent, Rick Nelson, pursuant to sections 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"), 40 C.F.R. Part 141, for failing to monitor the 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 May 24, 2005, notifying Respondent that he was in violation of the AO, the Act, and the NPDWRs for failing to monitor for total coliform bacteria and nitrate and for failure to provide public notice for the failure to monitor. Complainant issued a second AOV letter on April 6, 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 4th quarter of 2009 and for failing to report this violation to EPA. Complainant issued a third AOV letter on September 27, 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 2nd quarter of 2010 and for failing to report this violation to EPA. Finally, Complainant issued a fourth AOV letter on November 22, 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 14, 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. Respondent was served with the Complaint on February 17, 2011. See, Certified Return Receipt ("Green Card").[1] The Complaint charges Respondent with three counts: 1) Failure to monitor for total coliform bacteria; 2) Untimely reporting of monitoring results; and 3) Failure to report the coliform monitoring to EPA. The Complaint proposed a civil penalty of $2,000. 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. (Complaint, pp. 6-8). Specifically, the Complaint states, "[r]espondent must file a written answer in accordance with 40 C.F.R. §§ 22.15 and 22.42 within thirty (30) calendar days after this complaint is served." (Complaint, p. 6). 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. 8). Last, the Complaint states:

> IF RESPONDENT DOES NOT FILE A WRITTEN ANSWER WITH THE REGIONAL HEARING CLERK....RESPONDENT MAY BE SUBJECT TO A DEFAULT ORDER REQUIRING PAYMENT OF THE FULL PENALTY PROPOSED IN THIS COMPLAINT.

(Complaint, p.7). An Answer was not filed thirty days after service of the Complaint.[2]

On February 23, 2012, 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

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[1] Complainant's Memorandum in Support of Motion for Default (hereinafter "Memo in Support") states "the precise date of service of the Complaint is not known, because the signature on the return receipt card accompanying the Complaint was not dated. Memo in Support, p. 5. However, the U.S. Postal Office confirms delivery on February 17, 2011 based on the Green Card.

[2] Respondent was required to file an Answer by March 17, 2011.

Respondent for failing to file a timely answer to the Complaint and sought a civil penalty of $2,000. (Complainant's Motion for Default, p. 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 March 13, 2012, it was appropriate for this court to address Complainant's Motion.

On April 5, 2012, 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 April 30, 2012, Complainant filed Supplemental Memorandum in Support of Motion for Default and included the Declaration of Mario Merida, addressing this court's April 5, 2012 Order. There has been no response filed by 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 Rick Nelson is a person who owns and operates a public water system.

2. Fort Devils Tower Public Water System, located in Crook County, Wyoming, provides piped water for human consumption to the public.

3. Respondent operates a system that has approximately 26 service connections and regularly supplies water to at least 150 individuals daily from May to September. The system serves approximately 50 individuals daily in October and 30 individuals in November. Between January and March the system serves an average of three (3) people daily.

4. The source of the Public Water System is ground water supplied by one well and operates year-round.

5. On September 24, 2003, EPA issued an Administrative Order (Docket No. SDWA-08-2003-0062) 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 for total coliform bacteria and nitrate pursuant to 40 C.F.R. § 141.201;
    4) Failure to report coliform monitoring violation to EPA pursuant to 40 C.F.R. § 141.21(g)(2);

5) Failure to report to EPA the instances of non-compliance within 48 hours pursuant to 40 C.F.R. § 141.31(b).

6. On May 19, 2005, April 6, 2010, September 27, 2010 and November 22, 2010, EPA sent Respondent "Violation of Administrative Order" letters citing Respondent's failure to comply with the Administrative Order and NPDWRs.[3]

7. On February 14, 2011, EPA filed a Complaint and Notice of Opportunity for Hearing (Docket No. SDWA-08-2011-0021) and proposed a $2,000 penalty for:

1) Failure to monitor for total coliform bacteria during the 4th quarter of 2009;
2) Failure to report the results of coliform monitoring for May 2010, June 2010 and September 2010 by the 10th day of the following month; and,
3) Failure to report to EPA noncompliance of the NPDWRs for the total coliform violation for 4th quarter of 2009 within ten days after the system discovers the violation.

8. Respondent has not filed an Answer to the Complaint.

9. Complainant filed a Motion for Default and Memorandum in Support on February 23, 2012. The Motion seeks the assessment of a $2,000 penalty.

10. 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:

11. Respondent Rick Nelson 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.

12. The System has at least 15 service connections, 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

[3] For the purpose of calculating the penalty, only the AOV letters dated April 6, 2010, September 27, 2010 and November 22, 2010 were considered.

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.

13. 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.

14. Respondent failed to comply with the NPDWRs, the Administrative Order and the Complaint of February 14, 2011, in violation of section 1414(g) of the Act, 42 U.S.C. §300g-3(g).

15. 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).

16. 40. C.F.R. § 22.15 provides that an answer to a complaint must be filed within 30 days after service of the Complaint.

17. 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 a complaint.

18. 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.[4] This court considered these factors 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] In addition, EPA filed the Declaration of Mario Merida to support its penalty calculation. (See, Supplemental Memorandum in Support of Motion for Assessment of Penalty on Default, April 30, 2012). Based on the above, 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 Complaint, which required Respondent, *inter alia*, to monitor for total coliform bacteria, to timely report monitoring results and to report coliform monitoring violations to EPA. The failure to monitor for total coliform occurred in the fourth quarter of 2009 for three months.[6] The failure to report the violations to EPA occurred for 13.37 months. Each violation was given a gravity factor based on the Penalty Policy. (Penalty Policy, Attachment 2).

EPA has determined that exposure to coliform bacteria 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

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[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 willfuless/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.

[6] The 2003, 2004 and 2005 violations are not factored into the gravity since they occurred more than five years prior to the proposed penalty in the complaint and are outside the statute of limitations.

individuals with compromised immune systems. See, *EPA Guidance Water on Tap: What You Need to Know* (EPA-816-K-03-007, October, 2003). By not monitoring for this contaminant, Respondent puts water consumers of this System at risk by possibly exposing them, without their knowledge, to harmful levels of coliform bacteria.

Furthermore, the record shows fundamental recalcitrance by Respondent. EPA's enforcement efforts have not had the necessary corrective effect upon the Respondent. Visitors to Devils Tower, Wyoming, rely on the System for safe drinking water. (Memo in Support, p. 10). Respondent's lack of regard for the Safe Drinking Water Act indicates a pattern of behavior and history that is not 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. (Declaration of Mario Merida, para. 19).

An initial gravity component was calculated by Mario Merida to be $504.79. 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. (Declaration of Mario Merida, para. 18). As mentioned above, the population served changes during the year but at its peak the PWS serves 150 people. Based on Respondents negligence and history of noncompliance the gravity component was increased by a factor of 1.6 and 1.756920, 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 $1,419.01.[7]

Economic Benefit: The Complainant calculated an economic benefit of $35.[8] This calculation was based on the costs of sampling 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.

Based on the Memo in Support of Default, the Declaration of Mario Merida dated April 30, 2012, the Agency has reasonably applied the statutory factors. In this case, Complainant arrived at the proposed penalty by adding the economic benefit and gravity components and in addition applied a "standard increase for pleading purposes." (Supplemental Declaration of Mario Meria, at para. 21).

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[7] 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. (Penalty Policy, p. 3).

[8] The Memo in Support suggests that economic benefit is $125.00. However, there is no rationale for how this number is derived. The declaration of Mario Merida states economic benefit is $35.00 and is based on a reasoned explanation. Therefore, this court is using the $35.00 calculation for economic benefit.

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 **$2,000.00**, for its violations of the Act.

V. DEFAULT ORDER[9]

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 **$2,000.00.**

IT IS THEREFORE ORDERED that Respondent, Rick Nelson, owner and operator of Fort Devils Tower 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 **$2,000.00** 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

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

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

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 23rd Day of July, 2012.

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 **RICK NELSON, OWNER, FORT DEVILS TOWER; DOCKET NO.: SDWA-08-2011-0021** was filed with the Regional Hearing Clerk on July 23, 2012.

Further, the undersigned certifies that a true and correct copy of the document was delivered via e-mail to Jean Belille, 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 July 23, 2012, to:

Rick Nelson, Owner
Fort Devils Tower
601 Highway 24
Devils Tower, WY 82714

And e-mailed to:

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

July 23, 2012

Tina Artemis
Paralegal/Regional Hearing Clerk