UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

PAUL DURHAM, d/b/a WINDMILL HILL
ESTATES WATER SYSTEM, DKT. No. [SDWA]-C930036

Respondent

INITIAL DECISION

DATED: April 14, 1997

SDWA: Pursuant to Section 1414 of the Public Health Service Act (a/k/a the Safe Drinking Water Act), 42 U.S.C. §300g-3, Respondent Paul Durham is assessed a penalty of $5,000.00 for failing to monitor for total coliform in the community public water system known as Windmill Hill Estates Water System and to make reports of total coliform laboratory analysis of the same, for a period totaling 11 months, in violation of Section 1445 of the Public Health Service Act, 42 U.S.C. §300j-4.

PRESIDING OFFICER: ADMINISTRATIVE LAW JUDGE SUSAN L. BIRO

APPEARANCES:

For Complainant: Carlos A. Zequeira, Esquire

Serafina Esposito Lobsenz, Esquire

Amie Dutta, Esquire

Enforcement Counsel

U.S. EPA Region 6

1445 Ross Avenue

Dallas, Texas 75202-2733

For Respondent: Paul Durham, Esquire, *Pro Se*

1607 Hampden Road

Bartlesville, Oklahoma 74003

I. PROCEDURAL HISTORY

On August 10, 1993, Myron 0. Knudson, P.E., the Division Director of the Water Management Division of Region 6 of the Environmental Protection Agency (hereinafter "the Complainant" or "the EPA"), filed a Complaint against Paul Durham, d/b/a Windmill Hill Estates Water System (hereinafter "the Respondent" or "Mr. Durham"). [1] The Complaint charged Mr. Durham with violating Administrative Order No. F920155, issued pursuant to Section 1414 (g) (1) of the Public Health Service Act, also known as The Safe Drinking Water Act ("SDWA" or "the Act") , 42 U.S.C. §300g-3 (g) (1) . [2] Specifically, the Complaint alleged that Mr. Durham was a "supplier of water," (defined as an "owner or operator" of a "public [community] water system") and that, in violation of the Administrative Order, he had failed to submit monthly laboratory analysis of total coliform in water samples drawn from the Windmill Hill Estates Water System for the months of September 1992 through June 1993. [3] The Complaint proposed a civil penalty of $1,000.00.

On August 31, 1993, Mr. Durham, filed a *pro se* Answer to the Complaint, wherein he acknowledged that he had not submitted the monthly reports of water analysis for the system. However, he explained in his Answer that, he lived 80 miles from the water system, he had hired others to sample and submit the analysis on his behalf and, unbeknownst to him, those persons had omitted to do so. Mr. Durham further stated that the situation had been rectified so that the omissions should not reoccur, and requested a hearing on the Complaint.

A year and a half later, on January 25, 1995, the EPA filed a Motion to Amend the Complaint. Mr. Durham did not oppose the Motion and it was granted by the Regional Judicial Officer on February 28, 1995.[4] The First Amended Complaint realleged the violation set forth in the original Complaint regarding Mr. Durham's failure to *submit* water analyses for September 1992 through June 1993. In addition, the First Amended Complaint also charged Mr. Durham, as an owner or operator of a "public [community] water system," with violating the Administrative Order by failing *to use* the services of an approved laboratory

to analyze water samples during the months of September 1992 through June 1993, October 1993 through March 1994, and June and July 1994; and by failing to submit the laboratory analyses results to the EPA during October 1993 through March 1994 and June and July 1994. The Amended Complaint proposed a $5,000 penalty. A copy of the Administrative Order was attached to the Amended Complaint.

On April 19, 1995, Mr. Durham filed an Answer to the First Amended Complaint. In this Answer, Mr. Durham claimed that his Windmill Hill Estates Water System was not a *"public water system,"* as that phrase is defined in the Act. He further realleged that the delinquencies in collecting, analyzing and reporting on water samples drawn from the system were out of his control.

An "Order of Designation and Order Establishing Procedures" was issued on March 6, 1996. That Order required the parties to engage in a prehearing exchange of witnesses' identification and proposed exhibits on September 9, 1996, in accordance with Section 22.19(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (40 C.F.R. §22.19(b)) (hereinafter cited as "EPA Rules").

On September 9, 1996, the EPA filed its prehearing exchange. Mr. Durham never filed aprehearing exchange.

After due notice, a hearing was held in this matter before the undersigned Administrative Law Judge on January 14, 1997 in Dallas, Texas. Three (3) witnesses testified at the hearing on behalf of the EPA and two (2) exhibits (Complainant's Exhibits 1and 2) were admitted into evidence. [5] Prior to the hearing, the EPA orally moved to further amend the Complaint to dismiss the claims of violations for the period of September 1992 through March 1993 and, without objection, the Motion was granted. Tr. 6. During the hearing, Mr. Durham stipulated that, during the eleven (11) months remaining in issue in the action -- April, May and June of 1993; October, November and December of 1993; January, February and March of 1994; and June and July of 1994, water samples from his water system were not drawn and submitted to approved laboratories for total coliform analysis, or an insufficient number of samples were submitted for analysis, and thus, reports of the laboratory analysis were not submitted to the EPA. Tr. 155-57. However, Mr. Durham continued to pursue the defense that he was not obliged to analyze and submit such monthly reports because Windmill Hill Estates Water System was not a "*public water system*" of any type under the SDWA. He also asserted that the proposed penalty of $5,000 was

excessive. The transcript of the hearing was filed on February 4, 1997. Each party was given the opportunity to submit post-hearing briefs. The record closed with the filing of reply briefs. [6]

II. THE ISSUES

The issues in this case are as follows:

1. Whether Windmill Hill Estates Water System was, during the period at issue (April 1993 through July 1994), a *"public [community] water system,"* as that phrase is defined in 42 U.S.C. §300f(4) and 40 C.F.R. §141.2 and thus, subject to monthly total coliform monitoring and reporting requirements; and

2. If, Windmill Hill Estates was, during the period at issue, a *"public [community] water system,"* and Mr. Durham, as its owner/operator, failed to perform monthly coliform analysis and report the results for eleven (11) months during that period, is the imposition of a $5,000 civil penalty appropriate.

III. THE POSITIONS OF THE PARTIES

The EPA's position in this proceeding was that, during the period of time at issue (April 1993 through July 1994), Windmill Hill Estates Water System was a *"public water system,"* more particularly a *"community water system,"* as those phrases are defined in the Act and regulations, in that the system regularly served at that time at least 25 year-round residents. As a result, Mr. Durham, its owner/operator was required under the Act to submit monthly water samples from the system to an approved laboratory for analysis for total coliform and report the results of the analyses to the EPA. It is undisputed that Mr. Durham failed to have the water analyzed for coliform for eleven (11) months out of the sixteen (16) month period between April 1993 and July 1994 and thus, did not report the results of such analysis to the EPA. The EPA asserted that a $5,000 penalty was appropriate based upon the extent and gravity of the violations, the degree of willfulness, the economic benefit of non-compliance and the history of prior violations.

It was Mr. Durham's position at the hearing that, during the period of time at issue, Windmill Hill Estates Water System was not any type of *"public water system,"* as that phrase is defined in the Act, because it did not have at such time 15 or more connections or regularly serve 25 or more individuals and, therefore, he was not legally obligated to perform monthly total coliform analysis and report those results. Further, Mr. Durham argued that, even if

such an obligation existed and was violated, the violations were the result of the actions of others, and not committed willfully on his part, and he could not afford to pay the proposed penalty.

IV. DISCUSSION

A. WAS WINDMILL HILL ESTATES WATER SYSTEM A *"PUBLIC COMMUNITY WATER SYSTEM"* FROM APRIL 1993 THROUGH JULY 1994?

The Safe Drinking Water Act (42 U. S. C. §300f (4)) defines a "*public water system*" as:

a system for the provision of piped water to the public for human consumption, if such system has at least fifteen service connections or regularly *serves at least twenty-five individuals* (emphasis added). [7]

The Act requires the owners and operators of all *"public water systems"* to abide by water monitoring and reporting requirements established by regulation. [8]

The regulations promulgated to implement the Act divide public water systems into *"community"* and *"non-community"* water systems. A *community water system* is defined as one that serves at least 15 connections used by "year-round" residents or serves 25 "year-round" residents. A *non-community system* is all others. 40 C.F.R. §141.2. [9] The regulations require "community" public water systems, regularly serving populations of 25 to 1,000 individuals, to monitor the water by collecting monthly samples, having the samples analyzed for the presence of coliform, and reporting the analytic results to the state within 10 days. 40 C.F.R.

§141.21(a)(2) and §141.31(a).[10] A "non-community" water system, using surface water or ground water under the direct influence of surface water, serving the same population, must monitor to the same extent as a community water system, that is, monthly. However, a non-community system, using only ground water, serving such numbers of persons, is only required to monitor quarterly. 40 C.F.R. §141.21(a)(3). [11] If sample analytic results are positive for coliform, the regulations then require a series of follow-up analyses. [12]

It is undisputed that, at all times relevant hereto, Respondent Paul Durham was the "owner and/or operator" of Windmill Hill Estates Water System, located in Ottowa County, Oklahoma. Tr. 13, 59. There appears also to be no dispute as to

the fact that Windmill Hill Estates Water System is a system for the provision of "piped" water for "human consumption." At a minimum, it provides piped water to some of the residents of Windmill Hill Estates, a residential development. Tr. 13, 186-87. As indicated above, during the hearing, Mr. Durham stipulated that he did not submit water samples or a sufficient number of samples from the water system for coliform analysis to any laboratory and thus, reports as to the results of such analyses could never be, and were not, submitted to the state or the EPA during the eleven (11) months at issue. Tr. 155-57.

The EPA proffered evidence at the hearing to the effect that Windmill Hill Estates Water System was, at all times relevant hereto, a *"public water system,"* specifically, a *"community water system,"* as those phrases are defined in the Act and the regulations.

As its first witness, the EPA offered the testimony of Mr. William Davis, Project Manager of the EPA Region 6's Drinking Water Enforcement Program, which enforces the Federal Safe Drinking Water Act in Oklahoma and elsewhere. Tr. 40-43. Mr. Davis initially provided an overview of the SDWA enforcement program, testifying that the federal and state water quality authorities work collaboratively, with primary or initial enforcement responsibility for public water systems in Oklahoma delegated to the state authorities, in this case the Oklahoma Department of Environmental Quality ("ODEQ") . Tr. 41. The federal authorities have secondary authority and become involved in enforcing the Act's requirements where the state authorities request such action or fail to act. Tr. 42.[13]

Mr. Davis further testified that in February 1992, ODEQ referred the Windmill Hill Estates matter to him for the institution of federal enforcement proceedings. In response, Mr. Davis indicated that he investigated the "status of the water system" and its violation record. Tr. 46, 50, 53. Information supplied to him by ODEQ indicated that Windmill Hill Estates was a "public, community, water system," as defined in the Act, meaning it had at least 15 connections and/or served 25 year-round residents, and thus, came within federal jurisdiction.[14] Tr. 56-57, 89. Such information also revealed that Windmill Hill Estates had repeatedly failed to submit laboratory analysis of coliform monitoring in violation of the Act. As a result, Mr. Davis sent to Mr. Durham a proposed Administrative Order noting the past violations and prospectively requiring monthly monitoring and reporting of total coliform levels. Tr. 56-57. That proposed Order stated, *inter alia*, that Windmill Hill Estates Water System was a public water system which served at least 25 year-round residents. Tr. 103. Mr. Davis testified that Mr. Durham never responded

to the proposed Order and, therefore, a Final Order was issued in August 1992. Tr. 45-51. The Final Order directed Mr. Durham to: (1) collect monthly water samples from the system and submit the samples to an approved laboratory for total coliform analysis; and (2) submit copies of the laboratory analysis to the EPA. Tr. 218.[15]

Mr. Davis further testified that around December of 1996, Mr. Durham did assert to him that Windmill Hill Estates Water System did not serve the requisite number of individuals to be covered by the SDWA. Tr. 99, 103-104. Mr. Davis stated that in response to this assertion he contacted ODEQ and requested it verify the information regarding the persons served by the system. Tr. 99. He testified that ODEQ never advised him that Windmill Hill Estates Water System did not serve at least 25 year-round residents. Tr. 89. Further, Mr. Davis testified that since February of 1992 he has consistently reviewed the government's computer records maintained on the Windmill Hill Estates Water System and it has never been designated on the computer records as "inactive," meaning that it falls outside the coverage of the SDWA. Tr. 241-242. Mr. Davis stated that had he received evidence that the system was not covered by the Act, he would have withdrawn the enforcement action. Tr. 233. Mr. Davis acknowledged, however, that he, personally, had never seen the Windmill Hill Water System and he had no personal knowledge as to the number of full-time residents regularly served by it. Tr. 98. [16]

Also testifying on the EPA's behalf was Mr. Mike Harrell, Supervisor of the ODEQ Public Water Supply Unit in charge of state enforcement of the Safe Drinking Water Act. Mr. Harrell testified that inspections, known as "sanitary surveys," are conducted of water systems by state inspectors. Such surveys are conducted initially at the time the water system is established and thereafter, at least once per year. Included in the information sought or confirmed by the survey is the number of connections and persons served by the system. Tr. 194-96. [17] Mr. Harrell stated that upon completion of a survey, a copy of the survey report is provided to the person in charge of the system then on site. Tr. 170, 190, 196. The surveys are also maintained by ODEQ as public records. Tr. 193. Mr. Harrell further testified that data obtained during the survey is used to update computerized records maintained on each water system. Tr. 199. If, at any time, an owner or operator of a water system believes a survey report or the computerized database contains erroneous information, he may request another survey be conducted by a state inspector or engineer to determine if a change is warranted. Tr. 199-200.

Mr. Harrell testified that sanitary surveys of Windmill Hill Estates Water System were conducted by Clyde Mason, a local inspector employed by the state for 20 years. Tr. 197. Mr. Harrell recalled seeing a 1993 sanitary survey report of Windmill Hill Estates Water System which indicated that more than 25 full-time (year-round) residents were served by the system. Tr. 174. He stated that at no time has Mr. Durham or anyone else ever provided him with evidence showing that Windmill Hill Estates did not serve at least 25 year-round residents. Tr. 187. Mr. Harrell stated that the Windmill Hill matter was referred to the federal authorities more than two years ago because it met the numerical threshold as to persons served for federal enforcement action. Tr. 180, 195.

Mr. Durham challenged the testimony of the witnesses to the effect that during the relevant time period (April 1993 through July 1994) there were more than 25 persons regularly served by his Windmill Hill Estates Water System. The primary thrust of his challenge was that the witnesses' testimony was based not on any personal knowledge, but was rather derived solely from what Mr. Durham suggested was erroneous information maintained in a "mysterious" computer database. Tr. 98, 116.

As to the "mysterious " database, the EPA' s witnesses testified that in order to facilitate the Act's federal and state collaborative enforcement effort, the EPA maintains a national computer database (now known as the "Safe Drinking Water Information System") operated out of North Carolina, to which state and federal authorities submit information regarding public water systems. Tr. 65-66. Included in the information maintained in the computer database is the identity of each public water system, the number of people regularly served by the system, the results of the system's water sample analyses, and the system's history of violations.[18] Tr. 62. As indicated above, Mr. Harrell testified that the information regarding the number of individuals served by the system which is entered into the computer database, is obtained through the initial and yearly sanitary surveys. Tr. 110, 168,171, 196. Only the state agency which enters the data into the computer can change it, so data on the number of persons served could not be changed by another state or the federal authorities. Tr. 111. Mr. Davis indicated that, as part of a quality control program, a sample of the records maintained on the computer system undergo an audit by federal authorities every two years. Such audits have shown the data entered into the computer database by ODEQ to be very reliable. Tr. 63-64, 111-112. Mr. Harrell testified that he knows of no water system in Oklahoma, other than Windmill Hill Estates, which has ever challenged the accuracy of the data contained in the computer system. Tr. 200. Mr. Davis stated it had been the

standard practice of federal officials to rely upon the data in the computer database in connection with instituting enforcement actions. Tr. 110-111. He specifically indicated that his office had relied upon the computer database in every one of approximately 1,000 enforcement actions it had instituted and found the database to be "extremely accurate." Tr. 112.

While there was much testimony at the hearing regarding computer records, the EPA did not submit into evidence any computer records generated contemporaneously with the period of violations at issue. [19]

The EPA bears the burden of proving, by a preponderance of the evidence, each element of its *prima facie* case including the fact that Windmill Hill Estates Water System is a "public water system" within the purview of the SDWA. *See*, Administrative Procedure Act, 5 U.S.C. 556(d) (1996) and EPA Rule 22.24. It is clear that the quality of the evidence the EPA submitted on this, the key issue in the case, was not the best which could have been proffered. [20] However, as the fact finder, I am persuaded that the Complainant has introduced enough reliable, probative and substantial evidence to afford a reasonable basis for the conclusion that it is more likely than not that the Windmill Hill Estates Water System regularly served more than 25 full-time residents in 1993-94 and thus, during that time, was a *"public water system"* under the SDWA.

While I agree with Mr. Durham that the testimony of the EPA's witnesses as to the number of persons served by his water system during the relevant period was not based upon personal knowledge, but rather was based completely upon hearsay (and primarily hearsay within hearsay) , contained in computer and other government records, none of which were submitted into evidence, I still find that such testimony is worthy of substantial weight based upon the following:

First, it is well established that hearsay testimony is admissible in administrative proceedings. *See*, Administrative Procedure Act, 5 U.S.C. 556(d) (1996) and EPA Rule 22.22. Furthermore, it is well settled that "hearsay evidence may be substantial evidence in an administrative proceeding if there are circumstances which give it credibility and probative value to a reasonable mind." *See, Sanders v. United States Postal Serv.,* 801 F.2d 1328, 1331 (Fed. Cir. 1986).

Second, even in federal court litigation, government records are admissible as an exception to the hearsay rule, even though the declarant is available as a witness. *See*, Fed. R. Evid. 803. The rationale given for the exception is that public records, "by virtue of their being based on a legal duty and authority

[to create and maintain them], contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial." *See, Ellis v. International Playtex, Inc.,* 745 F.2d 292, 300 (4th Cir. 1984) *quoting from United States v. A.T.& T.,* 498 F. Supp. 353, 360 (D.D.C. 1980). *See also, In the Matter of Great Lakes Div. of Nat'l Steel Corp.,* EPCRA Appeal No. 93-3, 5 E.A.D. 355 (Final Order, June 29, 1994); 1994 EPCRA LEXIS 7. Therefore, it would seem appropriate to extend this "guarantee of trustworthiness" to the uncontroverted hearsay testimony of witnesses regarding data contained in government records which, had they been proffered, would have been admitted into evidence, if it is shown that those records were created and maintained pursuant to legal duty and authority.

There is more than sufficient evidence that, in fact, the public records on which the witnesses in this case relied for their testimony were clearly created and maintained pursuant to legal duty and authority. The SDWA regulations mandate that states granted primary SDWA enforcement authority record and report extensively to the EPA's Administrator regarding the water systems within their jurisdiction. *See generally,* 40 C.F.R. Part 142. Specifically, each such state is required to establish a program for the creation and maintenance of a current inventory of public water systems. *See,* 40 C.F.R. §§ 142.11 and 142.14(c). Included among the reports to be maintained by the states are sanitary surveys and records of any enforcement actions. *See,* 40 C.F.R. §142.14 (d) (1) and (3) . Further, the states are required to maintain compliance records of "tests, measurements, analyses, decisions, and determinations performed on each public water system." *See,* 40 C.F.R. §142.14(a).

In addition, 40 C. F. R. §142.15 (b) (1) requires that states with primary enforcement authority submit to the EPA's Administrator their inventory of public water systems as well as annual reports of all additions or corrections to it. Each state is also required to submit quarterly reports to the Administrator of any new violations by public water systems in the state and new enforcement actions taken by the state against public water systems. *See,* 40 C.F.R. §142.15(a)(1) and (2). Moreover, the Administrator is required to annually review each state's compliance with the requirements of Part 142 and may withdraw approval of a state's primacy program where the Administrator finds the state does not meet the program and reporting requirements of Part 142. *See,* 40 C.F.R. §142.17(a) .

The witnesses at the hearing testified that the computerized "Safe Drinking Water Information System," (formerly known as the "Federal Reporting Data

System") , is the federal database which was created to contain the information gathered pursuant to these regulations. Tr. 180. They further testified that they were personally familiar with the database and its operations and, in fact, the EPA's witnesses testified consistently with regard thereto. Furthermore, the witnesses testified that the computer database has periodically undergone quality assurance review and the data from Oklahoma had been found to be extremely reliable. The witnesses indicated that they routinely relied upon the computer data in their official capacity to initiate enforcement action under the SDWA. Tr. 110, 111, 112.

Third, these computer records were created under circumstances which give the hearsay data therein credibility and probative value to a reasonable mind. The witnesses testified that the information which was entered into the computer regarding the number of persons regularly served by Mr. Durham's water system was based upon the personal observations and/or information gathered by an experienced inspector, working in his official capacity, as part of an on-site sanitary survey. The observations and information gathered by an inspector are certainly "probative evidence." *See, In the Matter of Norma J. Echevarria, et ux*., CAA Appeal No. 94-1, 5 E.A.D. 626 (Final Decision, December 22, 1994); 1994 CWA LEXIS 22. Thus, I find the testimony of the witnesses on the number of persons served by the system, albeit relying upon the computer records, is not based on impermissible "inferences resting merely on surmise and conjecture." *See, Kent Lumber Co. v. Illinois Cent. R.R. Co.,* 65 F.2d 663 (5th Cir. 1933) . Rather, that testimony is based upon reliable public records and such testimony can constitute substantial evidence upon which a decision in this matter can be based.

It is noted that other Safe Drinking Water Act proceedings have also relied upon the information contained in this computerized database system to determine whether the threshold number of connections/users has been met to establish the EPA jurisdiction. *See, In the Matter of John David Gladden, Tanglewood*

Subdivision Water Sys., Docket No. PWS-AO-85-02 (Decision and Order, December 29, 1989) and *In the Matter of Anthony J. Taylor, Andover Water Corp.,* Docket No. PWS-NJ-CFP-03 (Order for Accelerated Decision, August 14, 1992); 1992 PWS LEXIS 3,6. [21]

Thus, in sum, I find that Mr. Durham' s characterization of the computer database as "mysterious," *i.e.*, having indicia of unreliability, cannot be supported.

Fourth, while recognizing that Mr. Durham does not bear the burden of proof on this issue, I find it very significant that despite all of his denials in this case, at no time before, during or after the issuance of the proposed or Final Administrative Order, or before or during the administrative hearing, did Mr. Durham proffer any evidence whatsoever to refute the EPA's conclusion that his water system serves more than 25 full-time residents. Tr. 187. Moreover, the EPA's witnesses testified that Mr. Durham did not even have to proffer any of his own evidence to challenge the characterization of his system prior to the hearing stage. Rather, the witnesses indicated that at any time, Mr. Durham could have merely requested a special sanitary survey be conducted in support of a change in his characterization as a "public water system." In response to such a request a survey would have been conducted on site which would have perhaps resolved this issue to Mr. Durham's satisfaction. Tr. 199-200. However, tellingly, Mr. Durham never even requested such a survey. [22]

This circumstantial evidence of his lack of action in support of his claim seems particularly significant because Mr. Durham is not unsophisticated in legal and business matters. To the contrary, Mr. Durham has long been an attorney, licensed to practice law in the State of Oklahoma. He has represented himself and others in legal matters and maintains an office for the practice of law. Tr. 6, 11. He was in-house counsel for Phillips Petroleum for many years until he retired in 1986. Tr. 17. He stated that he personally owned not only the water system, but was involved in partnerships and subchapter S corporations and owned "a lot of Oklahoma real estate." Tr. 20. He indicated that he traveled to South America on business. Tr. 22. He suggested in unsworn statements made at the hearing that he built Windmill Hill Estates, a residential development, as part of a larger unincorporated community he named "Durhamtown." Tr. 187.

The record indicates that if Mr. Durham was not aware of it beforehand, the proposed Administrative Order issued in 1993 told him in no uncertain terms that federal water enforcement authorities had concluded that his system served more than 25 year-round residents and, thus, was regulated as a *"public [community] water system"* Nevertheless, Mr. Durham chose not to challenge the proposed Order, even though he was given an opportunity to have an informal public hearing thereon. Tr. 46-47, 59, 61, 103. Even after the Final Order was issued and Mr. Durham was sent reminder letters in regard thereto, he still did not seek to have the Order vacated either by, submitting to the EPA evidence allegedly in his possession showing he did not serve 25 year-round residents, or by requesting a sanitary survey for the purpose of having his system recharacterized. [23] **Tr. 59-60. Moreover, the pendency of this case gave Mr.**

Durham yet another opportunity to proffer any evidence he had in support of his assertion that his water system did not meet the numerical criteria of the Act. Nevertheless, again, Mr. Durham failed to take advantage of the opportunity given him and presented no direct case at the hearing. In fact, he did not even raise the issue of his water system not meeting the federal statutory definition during the first year and a half that the case was pending. Thus, the evidence of the EPA on this issue has stood unchallenged by opposing evidence at every step of the proceeding. [24]

It is well established that where a Respondent has been given the opportunity to provide independent, corroborating evidence and has failed repeatedly to produce such evidence, a Presiding Officer may draw a negative inference as to what such a Respondent's reports would show. *See, In the Matter of Great Lakes Div. of Nat'l Steel Corp.,* EPCRA Appeal No. 93-3, 5 E.A.D. 355 (Final Decision, June 29, 1994); 1994 EPCRA LEXIS 7. *See also, In the Matter of Ocean State Asbestos Removal Inc./Ocean State Building Wrecking and Asbestos Removal Co.,* Docket No. CAA-I-93-1054 (Initial Decision, January 24, 1997) ; 1997 CAA LEXIS 1 (The failure of a party to present exculpatory evidence in these circumstances provides a basis to draw an inference that the facts do not support its position). *Cf. In the Matter of Central Paint and Body Shop, Inc*., RCRA Appeal No. 86-3, 2 E.A.D. 309, 310 (Final Decision, January 7, 1987) ; 1987 RCRA LEXIS 60 (a presiding officer may rely upon reports and other documents in preference to a respondent's testimony).

Thus, while through cross-examination, Mr. Durham did raise some interesting issues regarding how the official calculations of the number of persons served by a water system is tallied, he did not discredit the otherwise reliable testimony of the EPA's witnesses to the fact that Windmill Hill Estates Water System was serving 25 year-round residents during the relevant period of 1993-94 and was, therefore, correctly characterized and regulated as a *"public [community] water system*

"under the SDWA."

Accordingly, I conclude that for the relevant period at issue in this case, Windmill Hill Estates Water System was a *"public water system,"* specifically a *"communi ty water system,"* as defined under the Act. Consequently, in accordance with the SDWA, Mr. Durham, as the owner/operator of the system, was legally required, *on a monthly basis,* to gather and submit water samples from the system for total coliform laboratory analysis and to report the results of the analysis to the designated officials. Mr. Durham has stipulated to the fact

that in April 1993, May 1993, June 1993, October 1993, November 1993, December 1993, January 1994, June 1994 and July 1994: (a) he failed to have analyzed any water samples drawn from the system; and (b) he failed to submit reports of such analysis to EPA. As to February and March 1994, it is undisputed that he failed to submit the requisite number of samples for analysis and, therefore, an insufficient number of reports were submitted in connection therewith. Tr. 75-79 and Exhibit 1. Therefore, I find that the Respondent Paul Durham committed a total of twenty-two (22) violations of the Act, *i.e.*, 11 months of failing to submit the requisite number of water samples for analysis and 11 months of not submitting the results of such analysis to regulatory authorities.

B. IS THE PROPOSED PENALTY OF $5,000 APPROPRIATE?

The next step in the decision involves determining the appropriate penalty for the violations. Section§300g-3 (g) (3) (A) , 42 U.S.C. provides that any person found violating an administrative order shall be liable for a civil penalty of "not more than $25,000 per day of violation." Section 300g-3(g)(3)(B) authorizes the assessment of a civil penalty of up to $5, 000 in administrative actions. The Complainant is seeking to impose a $5, 000 administrative penalty on Mr. Durham for his twenty-two (22) violations of the Act.

Section §300g-3 (b) of the Act provides that when imposing penalties for violations, a United States district court must consider "the seriousness of the violation, the population at risk and other appropriate factors." Although the Act only specifies that United States district courts are to consider these factors in imposing penalties, it is appropriate to consider the same factors in administrative actions.

Furthermore, the EPA' s Rules require administrative penalty assessments to take into consideration any civil penalty guidelines *"issued under the Act,"* and require that specific reasons for deviating from the amount of the penalty recommended in the Complaint be stated. *See*, EPA Rule §22.27 (b) . At the hearing, the Complainant stated that it relied principally on a "draft" public water system penalty calculation policy to determine the appropriate penalty. Mr. Davis specifically testified that the draft used was created in the Spring of 1994, and was the latest of several drafts proposed by the staff at the EPA headquarters and regional offices. He acknowledged that no policy had ever been finally *"issued under the Act."* Tr. 206. Although Mr. Davis testified as to how the penalty would be calculated under the draft policy, the EPA did not offer a copy of the draft policy in evidence. The EPA's Rules do not suggest that

"draft" penalty policies need be considered in penalty assessments and I am not bound to follow "draft" policies. *See, In the Matter of Employers Ins. of Wausau,* TSCA Appeal No. 95-6, _ E.A.D._, (Final Decision, February 11, 1997); 1997 TSCA LEXIS 1. However, I find the criteria used in the draft policy to be consistent with that set forth in the Act and, thus, will consider many of the same issues raised in the draft policy to determine an appropriate penalty. Mr. Davis indicated that in calculating the penalty to be imposed in this case, the EPA took into account the two factors specifically delineated in the statute -- the seriousness of the violation (the gravity component) as well as the population at risk. The EPA further took into account other factors it deemed "appropriate," as provided for by the Act, such as the economic benefit derived by the violator from non-compliance with the law ("the benefit component"), the degree of the Respondent's willfulness or negligence, his history of non-compliance, his ability to pay, the degree of his cooperation or lack thereof and any other factors unique to the Respondent's case.

Specifically, Mr. Davis testified that in calculating the proposed penalty, the EPA took into account the gravity of the violation, that is, Mr. Durham's failure to monitor and submit samples for analysis and report the results thereof, despite the outstanding Administrative Order, the number of people exposed (37), and the duration of the exposure, *i.e.*, 11 months of violations or 330 days. Based upon mathematical factors attributed to the risk, the EPA calculated the "gravity component" to be less then $1,000, but because of the default provisions in the draft policy, a figure of $1,000 was used in the calculations. The economic benefit of the violations to Mr. Durham was determined by the EPA to be $309. The EPA then doubled the gravity component for the degree of negligence and willfulness of the Respondent, taking into account his education and knowledge of the violation. It also increased the amount eightfold because of Mr. Durham's violation history, which revealed that since 1991/92 there were issued to Mr. Durham d/b/a Windmill Hill Estates Water System a total of six (6) administrative orders, one notice of violation, two proposed administrative orders, a final administrative order and two complaints for penalty (the initial and First Amended Complaint). Mr. Davis testified that a reduction for an inability to pay was not made in the EPA's calculations because Mr. Durham had failed to proffer evidence as to an inability to pay, despite being requested to do so. The sum finally reached was more than three times the amount sought herein, but in an effort to resolve the matter administratively, the Complainant pursued only the administrative limit of $5,000. Tr. 208-16.

While I believe all the factors considered by the EPA in assessing the penalty are lawful and appropriate, I am not convinced that the EPA correctly evaluated and applied each of those factors to determine an appropriate penalty to be assessed in this case.

First, I believe the EPA's calculations understate the seriousness of the violations. Expert testimony at the hearing indicated that coliform analysis involves testing for the presence of coliform bacteria, which are bacteria which come from the gastrointestinal tracts of warm-blooded animals. Such bacteria also exist in the environment. Mr. Davis indicated that some coliform organisms can, by themselves, be very dangerous to the health of persons with compromised immune systems. Tr. 129. However, coliform is mainly used as a secondary pathogen, to suggest the presence of other organisms dangerous to the health of humans. Tr. 51-52. Exposure to such organisms can result in gastrointestinal diseases, nausea, vomiting, dizziness, and convey illnesses like hepatitis, typhoid, giardiasis and cryptosporidiosis. Tr. 129-32. Mr. Durham's failure to have the water analyzed for months at a time left the health of men, women and children drinking it exposed to these conditions. This threat was not theoretical. Testimony and evidence submitted at the hearing indicated that Windm ill Hill Estates had been cited for a coliform violation in each of the years of 1985, 1986 and 1987. More importantly, fecal coliform was detected in samples submitted in September and October, 1994, only two and three months after July, 1994, the end of period at issue here during which no sampling was done at all. Tr. 74, 130, 185-86, 222; EX. 1. [26] While there was no evidence introduced at the hearing to the effect that anyone ever complained that they became ill from drinking the water, I find this fact to be of little solace. Tr. 130, 230. It simply may be that the persons who imbibed the water did not think to attribute any illness they suffered to it. Further, even if no one actually became ill from the water, such a positive result is attributable more to the good fortune of the residents, rather than any prophylactic measures taken by Mr. Durham. Mr. Durham was also fortunate in this regard since, undoubtably, the penalty sought in this case is insignificant next to any award which might have been given in a legal action instituted against him, had someone become seriously ill, or worse yet, died, from imbibing water from his unmonitored system.

In addition, Mr. Durham' s 22 violations of the Act can be more broadly seen as directly undermining the purpose of the SDWA enforcement program, which is the foundation of the EPA's ability to generally protect human health by maintaining water potability. Without the results of periodic water analysis the Agency cannot effectively exercise its power under the Act to take measures

to prevent the consumption of contaminated water and demand water improvement efforts.

On the other hand, the figure of "37" used by the EPA as the population exposed appears to be unsupported by the record. That figure can only be attributed to Exhibit 1, a document which the EPA itself acknowledges was created a number of years after the period at issue or the testimony of Mr. Harrell as to what the computer records showed as of the day before the hearing. Tr. 168. For the purposes of determining a penalty for violations committed in 1993-94, all that can be concluded is at least 25 persons would potentially be exposed to the risk.

However, I find the EPA's determination that Mr. Durham derived only $309 in economic benefit from the violations, to be far too low. While the actual cost of analyzing the 11 months of samples would probably have been no more than that figure, and probably far less, considering the testimony revealed a cost of $5-15 per sample analyzed, the cost of obtaining and submitting the samples for analysis would be far higher. Tr. 132-33. Mr. Durham would either have to hire and pay an operator to draw and submit the water samples on his behalf, at what he represented was a cost of $80-$600 per month, or he, himself, would have had to become an operator and travel to the system from his home or law office to draw the required samples. [27] Tr. 16, 26, 28-29, 138-39, 228. There was testimony at the hearing clearly evidencing that Mr. Durham always hired an operator to draw and submit the samples and never became an operator and travelled to the water system to performing the sampling himself, even when he knew he had no operator in place to perform such sampling on his behalf. Tr. 23-24. Thus, 11 months of not paying a competent operator to sample the water potentially resulted in a cost savings to Mr. Durham of $880 to $6, 600. At the very least, it saved him the cost, time and inconvenience of becoming an operator and traveling each month 80 miles to the water system and 80 miles back to sample the water.

In addition, while the EPA doubled the subtotal it had then reached in its calculations due to the fact that Mr. Durham was capable of and did, in fact, understand the legal requirements imposed upon him, I think that this factor is far more significant than even such an increase suggests. As indicated above, Mr. Durham is a licensed attorney and sophisticated businessman. He built and maintained ownership of the water system, selling rights of access thereto to residents of his residential development. Tr. 13. Thus, Mr. Durham had both the ability and impetus to familiarize himself with the water system regulations. Therefore, I find Mr. Durham's claims that he did not understand what the law

required of him and was confused in regard thereto by letters he received from enforcing agencies (tr. 11), to be simply not credible.

As to the issue of Mr. Durham's prior history of violations, I note that Mr. Durham did not challenge Mr. Davis' recital of a litany of federal administrative actions instituted against him in regard to his water system. Tr. 223. The only contention he challenged was the assertion that a state action with regard to the system was still pending. Tr. 183-84. Testimony and Exhibits 1 and 2 reveal that even after the time period at issue in this case, Mr. Durham continued to fail to sample, test and report bn the water for months at a time, the last month of violation being as recent as February of 1996. Tr. 184-185. [28]

At the hearing, Mr. Durham alleged an inability to pay the proposed penalty. Tr. 17-24. However, during the course of this proceeding, he has never proffered a single document in support of this assertion. To the contrary, at the hearing Mr. Durham admitted that, because of his assertion of an inability to pay, a number of months earlier the EPA had requested that he submit his tax returns to it for review. Mr. Durham further acknowledged that he had refused to submit such records to the EPA and did not proffer any records whatsoever regarding his financial status at any time in connection with this action. Tr. 216-217, 230-232. Thus, there is simply no credible evidence in the record supporting Mr. Durham's claim of an inability to pay the penalty.

Mr. Durham also alleged at the hearing that the failure to monitor and submit the analysis to officials was beyond his control, such that he should not be penalized for this failure. Specifically, he alleged that he had hired a number of operators, many of whom were derelict in their duty to draw and submit water samples for analysis. Tr. 16. He also asserted that he had attempted to hire others to perform the work, but was unable to do so. Tr. 24. Again, however, there is no evidence in the record to support these assertions. Moreover, I find that even if true, these assertions cannot justify Mr. Durham's persistent failure to adequately supervise his water system to assure regulatory compliance. Perhaps, an omission in a single month or even two months could be attributed to unknown and unknowable operator negligence. However, this case involves 11 months of violations. Further, Mr. Durham certainly was aware that, during those months when he did not employ an operator, that no person would be undertaking the sampling on his behalf. Nevertheless, even in those months, he did not undertake to personally draw and submit the samples for analysis, even though doing so would have involved comparatively minimal expense and inconvenience on his part. It is simply not appropriate to excuse or

significantly reduce the penalty for the failure to monitor based on the misfeasance of his agents or the lack of an agent, when the circumstances indicate that Mr. Durham had no basis for believing in good faith that he could reasonably rely on the actions of others to fulfill the regulatory requirements. *Cf., In the Matter of Red Fox Park Homeowners Ass'n,* Docket No. SDWA-VII-8-PWS-91-06 (Initial Decision, March 23, 1993); 1993 SDWA LEXIS 1,8.

Therefore, after careful consideration of all the relevant factors referred to above, I conclude that a penalty of $5,000, equating to approximately $450.00 per month of violation or $227 per violation, is entirely warranted in this case.

CONCLUSION

I find that Respondent, Paul Durham, is a "person" who is a "supplier of water," specifically he is the owner and/or operator of Windmill Hill Estates Water System, which is a "public water system," more specifically a "community water system," as those phrases are used in the Act. As such, he is subject to the requirements of the Act (42 U.S.C. §§300g-3 et seq.) and the regulatory requirements set forth in 40 C.F.R. Part 141, requiring him to both monitor and report on total coliform in the water system on a monthly basis. A Final Administrative Order was issued pursuant to Section 300g-3(g)(1) to Mr. Durham on August 26, 1992 requiring that he comply with those statutory and regulatory requirements. Nevertheless, in violation of the Order, for a period of 11 months during April 1993 until July 1994, Mr. Durham failed to (a) monitor the water in the system for total coliform bacteria pursuant to 40 C. F. R. § 141.21 (a) and 141.21 (b) (5) ; and (b)submit the laboratory analysis of the same to the EPA and/or state authorities pursuant to 40 C.F.R. §141.21(f) (3) . As a result, I find the imposition of a civil penalty in the amount of $5,000 is appropriate in light of all the factors in this case.

ORDER

1 1. Respondent is assessed a civil penalty of $5,000.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this Order by submitting a certified or cashier's check in the amount of $5,000, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

3 . A transmittal letter identifying the subject case and the EPA docket number, as well as Respondent's name and address must accompany the check.

4 . If Respondent fails to pay the penalties within the prescribed statutory period after entry of the Order, interest on the penalty may be assessed.

5 . Pursuant to 40 C.F.R. §22.27(c) this Initial Decision shall become the Final Order of the Agency, unless an appeal is taken pursuant to 40 C.F.R. §22.30 or the Environmental Appeals Board elects, *sua sponte,* to review this decision.

Susan L. Biro

Administrative Law Judge

Date: 4/15/97

Washington, D.C.

[1] **The Division Director' s authority to institute the action was delegated to him by the Regional Administrator of the EPA Region 6, who, in turn, had been delegated such authority by The Administrator of the Environmental Protection Agency. *See, EPA Delegations Manual,* Chapter 9, Section 9-33-A (April 3, 1989).**

[2] **"The Safe Drinking Water Act" ("SDWA") was initially enacted in 1974 as Title XIV of the "Public Health Service Act," 42 U.S.C. §§300f to 300j-26. The provisions therein were amended and added to in 1986 and 1988 under Acts which were authorized to be cited as the "Safe Drinking Water Act Amendments of 1986" and the "Lead Contamination Control Act of 1988," respectively. For the sake of clarity, further citations to the statutory provisions will be to the United States Code section only.**

[3] **Administrative Order No. F920155, upon which the Complaint was based, was issued on August 26, 1992, after opportunity for public hearing. The Order was prompted by Mr. Durham's failure to submit monthly laboratory analysis of total coliform in water samples drawn from the water system for the months of September 1991, October 1991, December 1991 and January 1992. The Order required Mr. Durham, thereafter, to submit to the EPA monthly copies of total coliform laboratory analysis pursuant to 40 C.F.R. §141.21 so compliance with maximum contaminant levels could be assessed. Tr. 217-218.**

[4] The Motion was ruled upon by the Regional Judicial Officer because an Administrative Law Judge had not yet been assigned to the case. Although the case was at issue in August 1993, it was apparently not transmitted by the Regional Hearing Clerk to the Office of Administrative Law Judges until May 5, 1995.

[5] In response to his failure to submit a prehearing exchange, Mr. Durham was advised in writing prior to the hearing, that he was considered to have waived his right to introduce testimony or exhibits into evidence at the hearing, as provided for by EPA Rule 22.19. *See*, Order Scheduling Hearing dated December 12, 1996. Mr. Durham never objected to or moved for reconsideration of this determination. Nevertheless, immediately prior to the initiation of the hearing, Mr. Durham was offered yet another opportunity to proffer to the EPA any exhibits he wished to introduce into evidence. Mr. Durham also failed to take advantage of this opportunity and thus was not permitted to introduce any exhibits into evidence. Tr. 34-39. However, Mr. Durham was allowed at the hearing to conduct extensive cross-examination of the EPA's witnesses. During the hearing, Mr. Durham claimed that he had not submitted his prehearing exchange because the Order establishing the date for the exchange was sent to his law offices rather than his preferred home address, and he had only recently discovered the Order when preparing for the hearing. Tr. 11-12. However, the pleading file reflects that, prior to the hearing, Mr. Durham received numerous other documents which notified him either of his need to submit a prehearing exchange or his failure to do so, and that, he, himself, used the law firm address as his return address on pleadings he filed in this case prior to the hearing. *See e.g.*, Respondent's Petition to Request Hearing Date (December 31, 1996).

[6] The Respondent's Briefs were submitted in the form of Affidavits. In his Affidavits, Mr. Durham made additional factual allegations, requested discovery, and requested an opportunity to submit unspecified evidence in support of his defenses. To the extent that the Affidavits can be considered to be either a Motion for Discovery under EPA Rule 22.19 (f) and/or a Motion to Reopen the Hearing under EPA Rule 22.28, such Motions are denied. As indicated, *infra*, the Respondent is a licensed attorney who has represented himself and others in legal matters. He had an extensive opportunity in the three years prior to the hearing to request discovery, but never did. He was given an opportunity to present evidence at the hearing in support of his allegations, but he chose not to do so. Respondent has not proffered any explanation of good cause as to why the unspecified evidence he now wishes to proffer was not adduced at the hearing. Granting discovery or reopening the hearing at this

time will only serve to reward Mr. Durham's dilatory tactics and further unjustifiably delay resolution of the case. Similarly, it is noted that the Complainant also attached to its Reply Brief an Affidavit containing facts not adduced at the hearing and also did not move to reopen the hearing for the purpose of admitting the document into evidence. For the same reasons stated above, this Affidavit is not being considered as part of the evidentiary record.

[7] The Regulations (40 C.F.R. §142.2) define a "*public water system*" slightly differently from the Act. A *"public water system"* is defined in the Regulations as a water system that "has at least fifteen service connections or regularly serves *an average of* at least twenty-five individuals *daily at least 60 days out of the year* (emphasis added)." In J. Gordon Arbuckle *et al.*, *Environmental Law Handbook* (12th ed. 1993) it is noted that the EPA gave no explanation as to why it added the clarification to the regulatory definition that the system serve an "*average*" of 25 individuals daily. However, the author surmises that:

...EPA was seeking to interpret the statutory definition of [a public water system] as broadly as possible. In the absence of such a clarification, there would be systems that regularly serve very large numbers of people that could escape regulation simply by showing that there are days when they do not serve 25 people. EPA added the clarification that 60 days of service per year would constitute regular service in order to insure that the act would apply to public accommodations that are only open seasonally.

Id. at 251.

[8] Section 300j-4(a)(1) provides as follows:

Every person who is a *supplier of water*... shall... make such reports, conduct such monitoring, and provide such information as the Administrator may reasonably require by regulation... (emphasis added).

The term *"supplier of water"* is defined as *"any person who owns or operates a public water system.''* 42 U.S.C. §300f (5) . Thus, the regulatory requirements to monitor and report apply to both owners and operators of water systems. 40 C.F.R. §141.31. Therefore, Mr. Durham could not absolve himself of liability for violating the regulatory requirements by shifting the blame for such violations to his operators. However, the actions of others in causing the violations could be a factor in determining an appropriate penalty to be imposed upon Mr. Durham. *See, In the Matter of Red Fox Park Homeowners Assn,*

Docket No. SDWA-VII-8-PWS-91-06 (Initial Decision, March 23, 1993); 1993 SDWA LEXIS 1,8.

[9] The Regulations further divide non-community water systems into ''*transient*" *and "non-transient"* systems, with a transient system being one that does not regularly serve at least 25 of the same persons over 6 months of the year, and a non-transient system as all others. 40 C.F.R. §141.2.

[10] The regulations (40 C. F. R. §141.21 (a) (1)) provide that public water systems must collect total coliform samples at sites which are representative of water throughout the distributive system according to a written sample siting plan. The standard sample volume is 100 ml. and the time from sample collection to initiation of analysis may not exceed 30 hours. The samples are required to be analyzed according to one of 5 alternative methods specified by regulation. 40 C.F.R. §141.21(f) (3). Section 141.31(a) requires that the results of the analyses be reported to the state within 10 days either directly by the laboratory or the supplier of water. The supplier is also required to report within 48 hours the failure to monitor.

[11] While Mr. Durham did allege that some of the users of his system were part-time residents (tr. 89), he never specifically argued that his water system was a *"non-community"* type of public water system which used *only* ground water and thus, he was only required to monitor quarterly. To the contrary, Mr. Durham challenged the EPA' s classification of his system as one which used only ground water, and affirmatively represented that his system used or was influenced by surface water. Tr. 136-37. However, Mr. Durham offered no proof of this, or that any of his users were part-time residents. Of course, if Mr. Durham is correct, and his system uses or is influenced by surface water, then it would make no difference if Windmill Hills served was a *"non-community"* system, since it would be required to monitor to the same extent as a *"community"* water system, that is, monthly.

[12] Subsection 141.21(b)(1), 40 C.F.R. provides that:

If a routine sample is total coliform-positive, the public water system must collect a set of repeat samples within 24 hours of being notified of the positive result.

[13] Section 300g-3 (a) (1) (B) , 42 U.S.C. provides that if the EPA finds that a public water system has not complied with any *national* primary drinking water regulation in effect under the Act and the State has not commenced proceedings

within thirty days, it may issue an Order requiring the system to comply with such regulation. Subsection 300g-3 (g) (2) provides that any such Order shall not take effect until notice and opportunity for public hearing and, where applicable, consultation with state enforcement authorities. Oklahoma authorities, however, also enforce *state* drinking water regulations, which grant them broader jurisdiction over state water systems than the Federal enforcement authorities have. Specifically, the witnesses testified that Oklahoma drinking water regulations cover water systems with as few as two (2) connections. Tr. 167-68. Thus, Mr. Durham probably would have been obligated to have his system's water periodically sampled and analyzed pursuant to state regulation, even if he were not required to do so by Federal Regulation, an obligation he acknowledged being aware of at the hearing. Tr. 25.

[14] Mr. Davis indicated that a *"connection"* is the place where the water system ends and the user's tap begins, often at a meter going into a home. An "*individual*" is defined as a person of any age, including children and adults. Tr. 120.

[15] The Complainant did not introduce into evidence the August 1992 Final Administrative Order. The issuance of such an Order is a jurisdictional prerequisite to instituting a judicial or administrative proceeding for enforcement of the Safe Drinking Water Act. See, EPA Rule 22.42 (c) ; 42 U.S.C. §300g-3 (a) and In *the Matter of HABSCO, Inc.,* Docket No. C8905, (R.J.0. Region 6, July 26, 1993) . While establishing the jurisdiction of the Court is the burden of the Complainant and it failed to submit as evidence a copy of the Order, there was uncontroverted testimony as to its terms, and that the Order was issued. Tr. 46-47. The Complainant's citation in its post-hearing brief to the proposed order or to various certified mail receipts relating to the orders, none of which were introduced into evidence, is completely inappropriate and is not being considered in this decision. Complainant's brief at 4-5

[16] Mr. Davis stated that he was the enforcement agent assigned to the case for the first year after it was referred to his office, then it was transferred to another agent, Craig Lutz. The case was transferred back to him from Mr. Lutz two years ago and Mr. Lutz advised Mr. Davis regarding the interim progress of the case upon transfer. Tr. 112-14.

[17] Mr. Davis also testified that information as to the number of persons served by a system is obtained by the inspector during the sanitary survey either from a statement made by the system's representative on site or by the inspector

independently counting the connections and people being regularly served. Tr. 55.

[18] The Complainant's third witness, Mr. Ted Witten, the Supervisor of the Microbiological Section of ODEQ's laboratory, testified regarding the procedures for entering, tracking and extracting data in the computerized database regarding water sample analysis. Tr. 140-161.

[19] However, the EPA did introduce into evidence, as Exhibit 1, a copy of an undated computer printout containing information on Windmill Hill Estates Water System, which Mr. Davis testified he personally generated from the national database in September or December 1996. Tr. 65-66, 239. Exhibit 1 indicates, under the category title "POPULATION SERVED," the number "37." The printout does not reflect when the number "37" was entered into the system, nor does it indicate whether the number was changed at any point. Tr. 239-241. Further, it does not identify whether the population served are year-round residents, or in any other way identify the system as a "community" water system. Therefore, I find this Exhibit to be of little probative value as to the year-round population served by Windmill Hill Estates Water System in 1993-94, when the violations allegedly occurred.

[20] The Answer to the First Amended Complaint, f iled in April of 1995, put the EPA on notice that Mr. Durham was contesting the characterization of Windmill Hill Estates Water System as being a *"public water system."* Thus, it is unfortunate that EPA was unable to proffer at the hearing in January 1997 better evidence on this issue such as the testimony of the inspector who had personally visited the site, sanitary surveys from 1993-94 (such as the one proposed as an exhibit but not admitted into evidence due to EPA's failure to submit it with its prehearing exchange) , Respondent's business records such as water bills, the testimony of one of the numerous operators hired by the Respondent, Affidavits from users of the system, *etc.*

[21] In a recent Environmental Appeals Board (E.A.B.) decision, *In the Matter of Green Thumb Nursery, Inc.,* FIFRA Appeal No. 95-4a, _E.A.D._ (Final Decision, March 6, 1997) ; 1997 FIFRA LEXIS 1, the Respondent also contested the reliability of information EPA provided from its computerized FIFRA database rather than a search of paper files to determine that Respondent's pesticide product was not registered. The Board indicated that Respondent's objection was meritless, stating that a search of a database where such data is normally recorded can be relied upon as proof of the nonoccurrence (or, presumably, conversely, the occurrence) of an event.

[22] **There is a well known rule that where a matter is *particularly* within the knowledge of one of the parties, the burden is on him to prove it. *See, In the Matter of Lamar and Frances Thumm, et al*., Docket No. TSCA-V-C-222, (Initial Decision, April 26, 1985) ; 1985 TSCA LEXIS 50, and numerous citations therein. However, as indicated in those cases, this generally is held to mean the burden of production, going forward with evidence, rather than a shifting of burden of proof. In this case, the government's opportunity to inspect the water system suggests that it had such sufficient access to information regarding the number of persons using the system and that this information could not be deemed to be "*particularly*" within the knowledge of the Respondent. Of course, if such information was determined to be *"particularly"* within the knowledge of the Respondent, such that the rule relating thereto applied, it is clear that the Respondent would not have met his burden in this case.**

[23] **For example, *without submitting any evidence in support thereof at the hearing,* Mr. Durham alleged that some unspecified number of the persons served by his water system during the relevant period were "part-time," not "year-round" residents. If proven true, this fact might have undermined the validity of the Administrative Order and this action. As indicated in the text above, the pertinent regulations provide that a system using only ground water and serving less than 25 year-round residents, need only monitor quarterly. EPA's records (Exhibit 1) reflect that it has classified Windmill Hill Water System as one using only ground water. If 25 "year-round" residents were not being served by the system during the period at issue here, then it would be classified as a "non-community" public water system, only be required to conduct quarterly monitoring. See, 40 C. F.R. §141.21 (a) (3) (i) . Mr. Durham did apparently submit laboratory analysis for the water for four (4) months out of the sixteen (16) month period at issue in this case, and, therefore, may have met the quarterly testing criteria. However, Mr. Durham never took advantage of the numerous opportunities given to him to show that this was, in fact, the case. Rather, he chose to take the position that the total number of individuals served by the system never exceeded 25, and to allege that, therefore, he was exempt from the obligations imposed on water systems by the Act and its regulations.**

[24] **I find it extraordinary that Mr. Durham would suggest in his Post-Hearing Brief/Affidavit, that "[i]f given an opportunity, I can prove I had fewer than 15/25 connections and users." Mr. Durham has had more than one such opportunity and has consistently failed to use them.**

[25] For example, Mr. Durham elicited from Complainant's witnesses testimony indicating that, in determining the number of persons "regularly" served by a water system, the inspector counts those persons who unlawfully tap into the system, without the owner or operator's knowledge, and those using it unlawfully because they are not paying f or the water. Tr. 192. Further, Mr. Davis testified that the state inspectors have adopted the policy of counting the actual number of connections and estimating the potential number of people using the system, because of the difficulty of determining the actual number of people served on a particular day by a small water system. Tr. 110. Mr. Durham suggested, *but did not prove,* that these facts and/or assumptions were responsible for the EPA's conclusion that his system was serving more than the 22 persons purportedly reflected in his accounting books. Tr. 13-14, 190-91, 187. However, Mr. Durham also suggested that the figure "37" for the number of persons actually using his system was given to the inspector by one of Mr. Durham's operators, a person clearly in a position to have accurate personal knowledge as to the correct number of users and a person cloaked with apparent authority to make such a statement against interest to the inspector. Tr. 13.

[26] Mr. Davis testified that in order to be cited for a *"coliform"* violation, a system has to test positive, twice, for coliform, *i.e.* both during initial and follow-up testing. It a system fails to perform the follow-up tests after initially obtaining a positive result, then it is given a *'monitoring"* violation, rather than a *"coliform"* violation, because the finding of coliform is considered to be "unconfirmed." Tr. 123-124. However a "boil order" goes into effect upon receipt of the initial sample testing positive for coliform, and is lifted only when confirmation of non-contamination is received. Tr. 221. Mr. Durham received such monitoring violations, for failing to submit the requisite follow-up samples, in February and March of 1994. (Exhibit 1 and Tr. 77). Thus, Mr. Durham's system may have been contaminated with coliform in those months as well.

[27] Mr. Davis testified at the hearing that the state requires that the person submitting the water samples be a "certified operator." However, he stated that "anybody can apply to become an operator." Upon applying, applicants are automatically given a class *D* license, which lasts for 12 months. During that period, the operator can collect samples and perform all the other tasks required of an operator. At some point before the expiration of the 12 months, the applicant is required to pass a basic test. Mr. Davis stated that the test requires no more than an llth grade education. Tr. 134-135. Thus, Mr. Durham, who has a law degree, was certainly capable of becoming a "certified operator." Mr. Davis, in fact, testified that he had suggested to Mr. Durham that he or

his wife could become a certified operator and thus, avoid the costs associated with hiring an operator. Tr. 139

[28] **I note, however, that while admitting that the record reflected that Mr. Durham must have notified the users of his system of his failure to analyze, or at least the record did not indicate that Mr. Durham had failed to issue such notices, Mr. Davis did not consider that positive factor in calculating the penalty. Tr. 220-21..**