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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

Leisure Valley West, Central and East Water Systems; Olan Hott, Respondent	)	Docket Nos. SDWA-III-023 SDWA-III-024 SDWA-III-025

INITIAL DECISION

I. Procedural History

This case was initiated on June 28, 1996, by the filing of three separate complaints pursuant to Section 1414(g)(3)(B) of the Safe Drinking Water Act ("SDWA"), as amended, 42 U.S.C. § 300g-3(g)(3)(B), against Respondents Leisure Valley West, Central and East Water Systems (collectively, "Leisure Valley Systems" or "Systems"). The complaints charge each Respondent with violations of the Administrative Order ("AO") issued to them and directing them to comply with monitoring, reporting and public notification requirements of the SDWA and its implementing regulations at 40 C.F.R. §§ 141.21 and 141.31. The complaints identify Mr. Olan Hott as the owner and operator of the three Respondent water systems, and each proposes a penalty of $5,000 for the violations alleged.

Respondents failed to answer the Complaints and Complainant filed motions for default with the Regional Judicial Officer ("RJO"), pursuant to 40 C.F.R. §

22.16(c)[(1)], on March 13, 1997. Following Complainant's motions for default, Respondents retained counsel who, on April 7, 1997, filed a response to the motions for default and requested an extension of time to file Answers to the Complaints. On April 28, 1997, Respondents filed Answers to the Complaints and Motions to Dismiss, and requested that a hearing be held in this matter. The RJO granted Respondents' motions for extension of time to file answers and denied Complainant's motions for default on May 8, 1997.

On January 23, 1998 Respondents' cases were assigned to Administrative Law Judge Spencer Nissen. Judge Nissen issued an order sua sponte, pursuant to 40 C.F.R. § 22.12(a), consolidating the three cases and ordering Complainant to show cause why the complaints should not be dismissed on February 18, 1998. On May 14, 1998, Judge Nissen denied Respondents' motions to dismiss. By motion filed July 21, 1998 Complainant sought leave to file amended complaints.

On August 11, 1998, the consolidated cases were reassigned to the undersigned and the hearing was set for September 10 and 11, 1998 in Beckley, West Virginia. Complainant's motion for leave to file amended complaints was granted during a telephone conference on August 27, 1998 and amended complaints were filed September 15, 1998; Respondents did not file answers to the amended complaints.

Prior to the hearing, Frederick D. Greco, Respondents' counsel, moved to withdraw himself as counsel for Respondents on the ground that Respondents desired to proceed without counsel at the hearing. Mr. Greco's motion to withdraw was granted on September 4, 1998. The hearing was held as scheduled on September 10, 1998 in Beckley, West Virginia.

II. The Complaints

The three amended complaints[(2)] charge Respondents with violations of paragraphs 20 through 24[(3)] of the AOs[(4)] issued to Respondents on July 31, 1991, and the regulations cited therein. Specifically, Complainant charges each Respondent with the following five types of violations:

failure to sample and analyze for coliform bacteria from October through December 1993, January through March 1994, and July through September 1994 in violation of paragraph 20 of the AO and 40 C.F.R. § 141.21(a);[(5)]

failure to report the results of monitoring and analysis for the periods Respondents were not in compliance with 40 C.F.R. § 141.21(a) in violation of paragraph 21 of the AO and 40 C.F.R. § 141.31(a);

failure to report to the State, within 48 hours, any failure to comply with the National Primary Drinking Water Regulations during the periods Respondents were not in compliance with 40 C.F.R. § 141.21(a) in violation of paragraph 22 of the AO and 40 C.F.R. § 141.31(b);

failure to submit to the State representative copies of notices required by 40 C.F.R. § 141.32 to be provided to the public and users of the water system concerning monitoring and analytical violations for coliform bacteria during the periods Respondents were not in compliance with 40 C.F.R. § 141.21(a) in violation of paragraph 23 of the AO and 40 C.F.R. § 141.31(d); and

failure to provide the public and users of the water systems with notification of Respondents' failures to comply with 40 C.F.R. Part 141, Subpart C, during the periods Respondents were not in compliance with 40

C.F.R. § 141.21(a) in violation of paragraph 24 of the AO and 40 C.F.R. § 141.32.

Complainant avers that, taking into consideration the seriousness of the violations, the population at risk and the economic benefit to the Respondents of noncompliance, a penalty of $5,000 per complaint, the statutory maximum, is warranted.

III. Findings and Conclusions

A. Liability

At the outset of the hearing Respondents stipulated to the violations of paragraphs 20 through 24 of the AOs and 40 C.F.R. §§ 141.21(a), 141.31(a), 141.31(b), 141.32 and 141.31(d) alleged in the amended complaints. Tr.-22. The allegations in the complaints are supported by Complainant's exhibits 1 through 26, 28 through 30 and 64 and 65, which were introduced into evidence at the time of Respondents' stipulation. Tr.-24. These exhibits include, inter alia, copies of notices of violation, proposed administrative orders and administrative orders issued to Respondents, lab reports relating to the Leisure Valley systems, and receipts for certified letters containing notices of violation, proposed administrative orders and administrative orders issued to Respondents and signed by Al Williamson,[(6)] manager of the Leisure Valley Mobile Home Park and operator of the three Leisure Valley Systems.

Respondents' stipulation left two issues to be determined at the hearing. First, whether Respondents' water systems fit the jurisdictional requirements of the SDWA, and second, the appropriate penalty for Respondents' violations if Respondents are found to fall within the jurisdiction of the SDWA. Complainant maintains that the evidence adduced at hearing establishes that the three Leisure Valley systems met both of the alternative criteria used to define a public water system when the violations alleged in the complaints occurred. Complainant adds that Respondents' actions in conducting sampling and providing results to the West Virginia Department of Health ("WVDH") at various times in 1992, 1993 and 1994 constitute admissions that Respondents fell within the jurisdiction of the SDWA.

David Thomas, a technical analyst with the WVDH testified that he made several visits to the Leisure Valley Mobile Home Park, starting with an "official visit" on September 26, 1991, one month after issuance of the final administrative orders by EPA. Tr.-81-84; CX 54 (Official Visit Report). In his official visit report Mr. Thomas recorded the following information regarding the numbers of service connections and persons served by the Leisure Valley systems: Leisure Valley West, 28 connections 70 people; Central, 18 connections, 40 people; East, 25 connections, 60 people.[(7)] According to Mr. Thomas, the information recorded in his report regarding the number of service connections was supplied by Mr. Al Williamson who, as mentioned earlier, was the operator of the Leisure Valley systems at the time of his visit. Tr.-82-83. Mr. Thomas also testified that, based on his observations, in particular the presence of porches and metal skirting on the mobile homes, the residents of the park at the time of his visit appeared to be permanent. Tr.-83-84.

Mr. Thomas further testified to sanitary surveys he conducted of the three systems on November 12, 1993 (West), November 9, 1993 (Central), and November 10, 1993 (East). CXs 55, 56, 57. The sanitary surveys list the numbers of connections and persons served for the respective systems as 21 connections, 27 persons (West); 15 connections, 27 persons (Central); and 20 connections, 54 persons (East). CX 57 at 1, 4; CX 56 at 1, 4; CX 55 at 1, 4. The information recorded by Mr. Thomas regarding the number of connections and persons served was again provided to him by Respondents' Mr. Williamson. Tr.- 95, 87, 88.[(8)]

As an additional ground on which to find jurisdiction, Complainant points to Respondents' submission of samples to the State Laboratory several times during the time period at issue. See CXs 62 and 64 (Reports on samples collected and sent to the WVDH laboratory in various months of 1992, 1993 and 1994). These submissions constitute admissions that the systems were subject to the SDWA, Complainant maintains.

The evidence presented by Complainant on the issue of jurisdiction is persuasive. In particular, Mr. Thomas' reports and uncontroverted testimony, based on information provided to him by the manager of the Leisure Valley systems, Mr. Williamson, establish that, at the times relevant to the violations charged, Respondents' water systems fell within the jurisdiction of the SDWA.

B. Penalty

The Consolidated Rules of Procedure that govern this proceeding direct the Presiding Officer, in determining the dollar amount of any civil penalty to be assessed, to take into consideration any criteria set forth in the SDWA and any civil penalty guidelines issued under the SDWA. 40 C.F.R. § 22.27(b). The Consolidated Rules further direct that "[i]f the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." Id.

The SDWA does not specify the factors that should be considered when assessing a penalty in an administrative action, and Complainant, in calculating its proposed penalty, did not rely on any civil penalty guidelines issued under the SDWA.(9) The SDWA does, however, provide that U.S. District Courts should consider the "seriousness of the violation, the population at risk, and other appropriate factors" in assessing a penalty. SDWA § 1414(b), 42 U.S.C. § 300g-3(b). In the absence of specific guidance for assessing administrative penalties, these factors will guide assessment of the penalty in the instant case. See Paul Durham, d/b/a Windmill Hill Estates Water System, Docket No. SDWA-C930036, 1997 SDWA Lexis 2, at *40 (ALJ April 15, 1997).

Complainant proposes the statutory maximum penalty of $5,000 for each of the Leisure Valley systems. In support of its proposed penalties, Complainant focuses its arguments on the seriousness of Respondents' violations and on the recovery of the economic benefit that accrued to Respondents as a consequence of their violations.(10)

Complainant states that the seriousness of the violations Respondents are charged with played a significant part in its penalty calculation. According to Complainant, coliform bacteria are an indicator contaminant; where coliform bacteria are present other contaminants such as E. coli bacteria, giardia or human fecal matter may also be present. These other contaminants can cause acute health effects including diarrhea, cramps and hepatitis. Failure to monitor for coliform bacteria is a serious violation because of the role monitoring plays in protecting public health. In the instant cases, failure to monitor put users at risk, as indicated by samples from the East and Central systems which showed the presence of coliform bacteria, including one sample from the Central system which showed the presence of fecal coliform. Tr.- 111, 121-23 (Ong); CX 62a-e.

In addition to putting users at risk, failure to monitor deprives the Agency of information essential to carrying out the goals of the SDWA. Moreover, Respondents failed to inform their users of their monitoring violations, depriving them of the opportunity to protect themselves from potentially contaminated water and to pressure the systems to comply. Finally, Complainant points to the seven boil water advisories issued by WVDH for Respondents' failure to properly chlorinate their water as additional support for the seriousness component of its proposed penalty.

The other component of Complainant's penalty calculation is recovery of Respondents' economic benefit of noncompliance. Complainant argues that Respondents' economic benefit from noncompliance is recoverable under the statutory

category of "other appropriate factors." Citing B.J. Carney Inds. Inc., CWA Appeal 96-2, 1997 EPA App. Lexis 7, at *88-90 (EAB, Remand Order, June 9, 1997), Complainant asserts that recovery of Respondents' economic benefit will both deter future violations by removing the economic incentive to violate the law, and by maintaining a level playing field for competitors who do invest in environmental compliance.

Mr. Lange, an environmental engineer in EPA III's Safe Drinking Water Branch, testified that he calculated Respondents' economic benefit by first arriving at a dollar amount for each of the five types of violations committed by each Respondent, then multiplying the figures by the number of quarters each Respondent was in violation. Mr. Lange's dollar estimates per quarter for the five types of violations alleged are as follows:

failure to take and send samples for analysis -	$32.00
failure to report to the State under 40 C.F.R. § 141.31(a) -	$15.32
failure to report to the State under 40 C.F.R. § 141.31(b) -	$15.32
failure to submit to the State copies of public notices -	$15.57
failure to provide public notice of violations to users -	$55.00

Tr. 153-58; CX 31.

Multiplying each of these figures by the number of calendar quarters the Leisure Valley systems were in violation -- 3 quarters for Leisure Valley West and East and 4 for Leisure Valley Central -- yields an economic benefit figure of $399.63 for Leisure Valley East, $533.64 for Leisure Valley Central and $399.63 for Leisure Valley West. Tr.- 158-59; CX 31. Complainant points out in its brief that the State Laboratory routinely reports the results of its analyses to the State Environmental Engineering Division without charge and that, therefore, the cost of reporting monitoring results may not have been an avoided cost for Respondents. Complainant's Brief at 18 n.6. Deducting these costs from the above figures yields adjusted economic benefit amounts of $353.67 for Leisure Valley East, $487.68 for Leisure Valley Central and $353.67 for Leisure Valley West. Id. at n.7.

I find Complainant's effort to recover Respondents' economic benefit of noncompliance to be appropriate under the SDWA and its adjusted calculation of Respondents' benefit to be reasonable in these cases. On the other hand, although Respondents' violations are serious, Complainant has not shown that the facts of these cases warrant imposition of the statutory maximum penalty, especially when further consideration is given to the population at risk and additional "appropriate factors" beyond the recovery of Respondents' economic benefit.

In the instant cases Respondents serve small and varying numbers of customers, estimated to be somewhere between twenty persons on the low end and seventy on the high end. Complainant states, without elaborating, that the statutory factor of "population at risk" did not play a role in calculation of its proposed penalty because Respondents' populations were similar to the populations served by many other systems subject to SDWA enforcement actions in EPA Region III. Complainant's witness Ms. Johnson, however, testified that when considering the population at risk in assessing a penalty, the size of that population is one factor considered and agreed that a system serving a large population would warrant a higher penalty than one serving a small population. Tr.-76. The small populations served by Respondents in the instant cases, following this analysis, warrant a penalty that is less than the statutory maximum.

A related issue is Complainant's decision to amend its complaints in order to characterize Respondents as non-community water systems, a type of system falling near the lower regulatory boundary of water systems, without altering its proposed penalties. The original complaints filed in this matter identified Respondents as community water systems. Community water systems are required to monitor for coliform monthly, while non-community systems are required to monitor for coliform quarterly. Despite this amendment, which resulted in a correspondingly significant reduction in the number of violations Respondents were charged with committing - from 45 to 15 for Leisure Valley East and West and from 60 to 20 for Leisure Valley

Central -- Complainant's proposed penalty did not change.

Another factor deserving of consideration here, and not taken account of in Complainant's penalty calculation, is the culpability of Respondents' owner Mr. Hott. Evidence and testimony presented at the hearing show that Mr. Hott's culpability in these cases is low based on his lack of knowledge of the violations. Exhibits introduced by Complainant show that EPA and WVDH dealt almost exclusively with Mr. Al Williamson,[(11)] manager of the Leisure Valley systems at all times relevant to the complaints, regarding the AOs and the violations which gave rise to them. See, e.g., CXs 1-3, 7, 9, 11, 28-30, 54-57, 62. Hearing testimony established that Mr. Williamson was not only the operator of the Leisure Valley water systems, but also effectively ran the Leisure Valley Mobile Home Park during the years at issue and had little or no contact with Mr. Hott during those years. Tr.-181, 184 (Ammons). As such Mr. Williamson bears a substantial amount of responsibility for the violations charged to the Leisure Valley systems and through them to Mr. Hott. This does not absolve Mr. Hott of responsibility for not taking measures earlier to prevent or correct the violations committed at property owned by him, but it does argue in favor of a reduced penalty.[(12)]

This argument is strengthened by the fact that Mr. Hott, who cannot read or write, is not the sort of sophisticated businessman who might be expected to be aware of the various regulatory requirements that accompany the ownership of a public water system. Mr. Hott's lack of sophistication in such matters distinguishes the instant case from another in which a Respondent sought a reduced penalty on the ground that he did not understand the law. Paul Durham, d/b/a Windmill Hill Estates Water System, Docket No. SDWA-C930036, 1997 SDWA Lexis 2. In Paul Durham the Respondent was a licensed attorney and sophisticated businessman who built, owned and sold rights of access to the water system at issue. As such, the court in Paul Durham found not credible Mr. Durham's claims of confusion and lack of understanding of the law. Id. at *50.

Moreover, since he resumed control over the Leisure Valley systems Mr. Hott has taken measures to come into compliance and update the Leisure Valley water systems. Gary Wilson, a district engineer with the Office of Environmental Health Services of the West Virginia Bureau of Public Health, testified that since 1996 the Respondents' water systems have been consolidated into one system, that chlorine contact tanks have been installed, that a licensed operator has been retained to conduct sampling, and that the consolidated system was in full compliance as of 1997. Tr.-171, 176. Leisure Valley's voluntary expenditures on improvements to the Systems were not required for it to come into compliance. Leisure Valley could have opted to continue adding chlorine bleach or some other appropriate disinfectant to the Systems periodically. Tr. -60-62.

Taking into consideration all of the facts and circumstances presented in these cases, I find that penalties in the amount $1553.00, each, for Leisure Valley East and West and $2087.00 for Leisure Valley Central are appropriate. These amounts reflect an assessment of $400 for the violations committed in each calendar quarter, plus the economic benefit that accrued to Respondents as a consequence of their monitoring and public notification violations.

ORDER

For the foregoing reasons, Respondent is assessed a total civil penalty of $5,193.00.

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 $5,193.00, payable to the Treasurer, United States of America, and mailed to EPA Region III, Regional Hearing Clerk, P.O. Box 360515, Pittsburgh, PA 15251.

A letter identifying that the check is for the payment of the civil penalty for the

Leisure Valley Water Systems, and the docket numbers involved (SDWA -III- 023,024, and 025) must accompany the check together with Mr. Olan Hott's name and address.

The Respondent is reminded that failure to pay the penalties within the prescribed statutory period after entry of this Order, may result in interest being assessed on the penalty.

Pursuant to 40 C.F.R. Section 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. Section 22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

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William B. Moran
United States Administrative Law Judge

Dated: June 25, 1999

1. 40 C.F.R. § 22.16(c) provides that the Regional Judicial Officer shall rule on all motions made or filed before the filing of an answer to a complaint. After the filing of an answer, jurisdiction over the proceeding shifts to an Administrative Law Judge. Id.

2. The complaints were amended primarily to recast the monitoring violations as violations by "non-community water systems" and not "community water systems." A "public water system" is defined in the regulations as "a system for the provision to the public of piped water for human consumption, if such system 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." 40 C.F.R. § 141.2.

A "community water system" is defined as "a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents." 40 C.F.R. § 141.2. Community water systems serving between 25 and 1,000 persons are required to monitor for coliform bacteria on a monthly basis. 40 C.F.R. § 141.21(a)(2).

A "non-community water system" is defined as "a public water system that is not a community water system." 40 C.F.R. § 141.2. Non-community water systems like Respondents are required to monitor for coliform bacteria on a quarterly basis. 40 C.F.R. § 141.21(a)(3)(i). Thus, the amended complaints charge Respondents with significantly fewer total violations than the original complaints.

3. Due to a scrivener's error Complainant, in its amended complaints, erroneously cites the paragraphs of the administrative orders Respondents are charged with violating as paragraphs 23 through 27.

4. 40 C.F.R. § 22.42(c) provides for the issuance of a complaint seeking a civil penalty when a person has violated any provision of an administrative order issued under section 1414(g)(1)of the SDWA, 42 U.S.C. § 300g-3(g)(1).

5. Respondent Leisure Valley Central is also charged with failing to sample and analyze for coliform bacteria from April through June of 1994.

6. Also included are a copy of a letter addressed to Mr. Hott at a P.O. Box in Great Falls Virginia notifying him of the proposed AOs dated October 18, 1990; a certified letter receipt for the final AOs stamped as received August 5, 1991 and signed by Olan Hott; and a copy of the letter and AOs addressed to Mr. Hott and dated July 31, 1991. CX 22, 23, 24.

7. Mr. Thomas testified that he estimated the number of persons served by each system by multiplying the number of connections by 2.5 persons per connection.

8. Complainant adds that, even if Respondents had produced evidence at hearing in support of the argument offered in their motions to dismiss, that at some times relevant to the complaints fewer than fifteen connections were used by any of the Leisure Valley systems, jurisdiction should still be found. Agency guidance on the incremental use of connections at facilities such as mobile home parks, Complainant states, directs that systems which fluctuate above and below the fifteen connection threshold during the year be treated as public water systems and subject to the SDWA. See EPA Water Supply Guidance Manual (1993), SDWA Hotline Guidance Memorandum Number WSG H73, Incremental Supply Connections. Complainant notes that EPA Region III has consistently treated trailer park water systems as public water systems if they have at least fifteen permanent service connections. Quoting the Incremental Supply Connections guidance, Complainant argues that to do otherwise would make regulatory tracking and oversight unmanageable as systems would be considered alternatively subject, and not subject, to the regulations every few months.

9. Complainant's witness Ms. Johnson testified that no formal penalty policy exists for calculation of administrative penalties under the SDWA.

10. Complainant asserts that consideration of the statutory factor "population at risk" had a minimal impact on the penalty calculation due to the similarity of the populations served by the Leisure Valley systems to many other systems that are the subject of enforcement actions in EPA III. Tr.- 152 (Lange); Complainant's Post-hearing Brief at 16.

11. Mr. Williamson is now deceased. Tr.-183.

12. While it appears that Mr. Hott did receive notice of at least the final AOs in the mail, the weight that this fact might ordinarily be accorded is diminished by Mr. Hott's inability to read and his belief that Mr. Williamson was in charge at Leisure Valley.