

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2008 MAY 15 AM 10: 27

IN THE MATTER OF)
)
Bristlecone Water Improvement)
District)
Panguitch, Utah)
PWS ID #UT4914191/09077,)
)
Respondent.)

Docket No. SDWA-08-2007-0095

COMPLAINANT'S MOTION FOR DEFAULT

Complainant, United States Environmental Protection Agency, Region 8 (EPA), by its undersigned counsel, files this MOTION FOR DEFAULT pursuant to 40 C.F.R. § 22.17. Complainant seeks a default order finding the Respondent liable for the violations alleged in the Second Complaint and Notice of Opportunity for Hearing (Complaint) filed in this matter on September 27, 2007. Complainant also seeks the assessment of the penalty proposed in the Complaint in the amount of \$6,050. This request for a default order and assessment of penalties is based on Respondent's failure to file a timely answer to the Complaint, and subsequent waiver of Respondent's right to contest all facts alleged in the Complaint.

Respectfully submitted,

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8**

Date: 5/14/2008

By: 
Amy Swanson, Enforcement Attorney
U.S. EPA, Region 8
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202-1129
Colorado Atty. Reg. No. 26488
Telephone: 303/312-6906
Facsimile: 303/312-6953

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the MOTION FOR DEFAULT and MEMORANDUM IN SUPPORT were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, and that true copies of the same were sent as follows:

Via hand delivery to:

The Honorable Elyana R. Sutin
Regional Judicial Officer
U.S. EPA Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1159

Via regular mail and facsimile to:

Mr. Neil Foster, President
Bristlecone Water Improvement District
P.O. Box 640021
Bryce, UT 84764

May 15, 2008
Date

Judith M. McTernan
Signature

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

2008 MAY 15 AM 10:52

FILED
EPA REGION VIII
CLERK

IN THE MATTER OF)
)
)
Bristlecone Water Improvement)
District)
Panguitch, Utah)
PWS ID #UTAH09077,)
)
)
Respondent.)

Docket No. SDWA-08-2007-0095

**MEMORANDUM IN SUPPORT OF MOTION
FOR DEFAULT**

Introduction

This memorandum is filed in support of a motion for default and request for the assessment of civil penalties brought by Complainant, the United States Environmental Protection Agency (EPA), in accordance with 40 C.F.R. § 22.17 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

Background

Respondent Bristlecone Water Improvement District (Respondent) owns and operates a Public Water System (System) located in Garfield County, Utah. The System is supplied by a groundwater source consisting of one well which operates year-round and serves approximately 160 people daily.

The Utah Department of Environmental Quality referred the System to EPA in 2004 for enforcement due to an estimated 19 failure to monitor quarterly bacteriological quality violations and five failure to monitor nitrate violations. On May 7, 2004, EPA issued Respondent an

Administrative Order (Order) for violations of the Safe Drinking Water Act (SDWA) and the regulations promulgated thereunder, including failure to monitor for coliform bacteria, failure to monitor for nitrate, failure to provide public notice, and failure to report monitoring violations to EPA. The Order, which remains in effect, includes specific requirements to return the System to compliance with the Act and the National Primary Drinking Water Regulations (NPDWRs). EPA issued Respondent an Administrative Order Violation letter on August 5, 2004, for violations of the Order.

EPA filed a Complaint and Notice of Opportunity for a Hearing (First Complaint) on March 3, 2005, charging Respondent with violations of the Act, the NPDWRs, and the Order. The parties ultimately reached a settlement in principle whereby the Respondent agreed to pay a civil administrative penalty in the amount of \$1,500 to fully resolve the violations alleged. The Respondent also agreed to hire an operator for the System. The parties filed a Consent Agreement and Final Order on December 1, 2005, setting forth the terms and conditions of the settlement.

The System had additional drinking water violations in 2005 and 2006 after filing the Consent Agreement, prompting EPA to issue Respondent a second Administrative Order Violation letter on May 11, 2006. On June 11, 2007, as a precursor to filing a complaint, EPA provided the Respondent with a pre-filing settlement offer (offer) to resolve the new violations. The Respondent did not respond to EPA's offer until after the stated deadline of June 25, 2007. On June 27, 2007, the operator contacted EPA at the request of Mr. Neil Foster, President and Registered Agent for Bristlecone Water Improvement District, to discuss the violations identified in the offer. Whereas the operator was able to work with EPA to satisfactorily address the

compliance issues to prevent future violations from occurring, he was not authorized to address the settlement offer resolving the past violations.

On September 27, 2007, EPA filed a Second Complaint and Notice of Opportunity for Hearing (Second Complaint) to resolve the outstanding violations. The Second Complaint charges the Respondent with four counts of violating the Act and the NPDWRs, and proposes a civil administrative penalty of \$6,050. The Respondent did not file an Answer or otherwise respond to the Complaint.

Although the System's monitoring and reporting compliance has improved since hiring the operator in January 2006, and the System currently is in compliance with the NPDWRs, it is critical to the credibility of the program and to maintaining fairness amongst the regulated community that EPA collect the penalty proposed for the violations alleged in the Second Complaint. EPA has been unsuccessful thus far in addressing the Second Complaint with an authorized representative for Respondent. Based on Respondent's nonresponsiveness, a default order is necessary to fully resolve the Second Complaint, and the violations and proposed penalty set forth therein.

Standard for Finding Default

The regulation governing default in the Consolidated Rules of Practice is found at § 22.17 of the Rules of Practice, 40 C.F.R. § 22.17. Section 22.17(a) of the Rules of Practice provides as follows:

A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; ...or upon failure to appear at a conference or hearing...Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.

Additionally, § 22.17(b) provides that when a default motion requests the assessment of a civil penalty, the moving party must specify the penalty and give the legal and factual grounds for the relief requested.

40 C.F.R. § 22.17(c) provides when the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision...The relief proposed in the complaint...shall be ordered unless the requested relief is clearly inconsistent with the Act.

Argument

I. Respondent Failed to File an Answer

40 C.F.R. § 22.17(a) provides in pertinent part: “A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint” 40 C.F.R. § 22.15(a) specifies that an “answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.”

EPA filed the Second Complaint in this matter on September 27, 2007. In accordance with 40 C.F.R. § 22.5(b)(1) (Filing, service, and form of all filed documents; business confidentiality claims), the Second Complaint along with a copy of the Consolidated Rules were served on Respondent by certified mail, return-receipt requested. The return-receipt prepared by the United States Postal Service and completed by Respondent’s Registered Agent indicates that the Registered Agent accepted service for the Complaint on September 28, 2007. In accordance

with 40 C.F.R. § 22.5(b)(1), Respondent's thirty-day timeframe for filing an answer expired on November 2, 2007.

In this instance, Respondent failed not only to file a timely answer, but failed to file an answer altogether. Respondent was warned of the consequences of failure to file a timely answer in the Second Complaint and the accompanying cover letter. The Second Complaint included specific, highlighted language, informing Respondent of its right to request a hearing and file an answer. Additional language specified the potential consequences of not filing an answer, including a possible default judgment and assessment of a penalty. The cover letter stressed the need for a timely answer, and provided information regarding the process for Respondent to file an answer.

Despite such warning, Respondent failed to comply with the answer requirements set forth in the Consolidated Rules, and/or failed to seek an order from the Presiding Officer granting an extension of time in which to file his answer. Such failure to respond provides an appropriate basis for finding the Respondent in default.

II. Prima Facie Case of Liability

A default order is appropriate when EPA has established a prima facie case of liability against the Respondent. A prima facie case is shown by establishing jurisdiction and facts sufficient to conclude Respondent violated the SDWA. EPA has jurisdiction over Respondent as the agency responsible for monitoring Respondent's compliance with the SDWA. The facts underlying Respondent's noncompliance with the NPDWRs establishing a prima facie case of liability are clearly demonstrated by the administrative record.

When a Respondent fails to file an answer, the Respondent presents no evidence to contradict the alleged violations, and Respondent waives its right to contest them. In the Matter of: James Bond, Owner, Bond's Body Shop, Docket Nos. CWA-08-2004-0047 and RCRA-08-2004-0004 (January 11, 2005, Chief ALJ Susan L. Biro); In the Matter of: Alvin Raber, Jr., and Water Enterprises Northwest, Inc., Docket No. SDWA-10-2003-0086 (July 22, 2004, RJO Alfred C. Smith). The strict language set forth in 40 C.F.R. § 22.17(a) for not filing an answer, and the number of administrative decisions consistently enforcing this language, support a waiver of Respondent's rights and imposition of the proposed penalty amount in this matter.

III. Respondent's Noncompliance with the ACT, NPDWRS, and Administrative Proceedings Poses a Potential Health Threat to Persons Served by the System

Respondent's disregard for the NPDWRs, EPA's authority and the Consolidated Rules governing this proceeding pose a potential health threat to the persons served by the System. Residents of, and visitors to, Bristlecone rely on the System's adherence to and compliance with the drinking water requirements when they drink tap water. If the System fails to regularly monitor for contaminants and/or notify the public and appropriate regulatory agency of its failure to monitor, then the consumers and regulatory agency are without knowledge whether the water is safe to drink. Such negligent disregard for public health and safety cannot be condoned. A default order holding the Respondent accountable for its inaction is necessary to ensure adequate protection of the persons served by the System.

The failure to monitor violations alleged in the Second Complaint are particularly of concern because they are the same type of violations alleged in the First Complaint. These repeat violations illustrate not only a significant duration of time in which the safety of the water served

was unknown, but also a pattern of failing to monitor. The Respondent's failure to monitor for coliform bacteria for the 2nd and 3rd quarters of 2005 and 1st quarter of 2006, and failure to monitor for nitrate in 2006, put the System's consumers at risk by potentially exposing them without their knowledge to harmful levels of coliform bacteria and nitrate. The quality of the water is unknown if a system fails to monitor for total coliform.

Consumption of bacteriological-contaminated water may cause diarrhea and other health complaints. Coliform bacteria may pose a special health risk for infants, young children, the elderly, and persons with compromised immune systems. Consumption of nitrate is similarly harmful. Infants below the age of six months who drink water containing nitrate in excess of MCL levels could become seriously ill, and if untreated, may die. See In Re: Village of Glendora, Docket No. PWS-PAO-91-01 (1992), and In the Matter of: W.N. Bunch, W.N. Bunch Water System, Docket No. SDWA-3-99-002 (2000) (discussing the presence of coliform in drinking water as a grave public health concern).

III. Legal and Factual Grounds in Support of the Penalty Sought

The legal authority for assessing a penalty for alleged violations of the SWDA and NPDWRs is set forth at section 1414(g)(3) of the Act, 42 U.S.C. § 300g-3(g)(3), and 40 C.F.R. § 19.4. Section 1414(g)(3)(A) of the Act, 42 U.S.C. § 300g-3(g)(3)(A), authorizes the assessment of a civil administrative penalty of up to \$32,500 per day of violation for violation of an order issued under section 1414(g)(1) of the Act, 42 U.S.C. § 300g-3(g)(1).

Section 1414(b) of the Act, 42 U.S.C. § 300g-3(b), sets forth the applicable statutory penalty factors to consider in assessing a penalty, including the seriousness of the violation, the

population at risk, and other appropriate factors such as respondent's degree of willfulness and/or negligence, history of noncompliance, if any, and ability to pay. EPA uses the "Public Waters System Supervision Program Settlement Penalty Policy" (Penalty Policy) to apply the statutory penalty factors in a fair and consistent manner. The Penalty Policy includes both a gravity and economic benefit component. Gravity is a monetary value reflective of the seriousness of the violations and the population at risk. Factors including the degree of willfulness/negligence, history of noncompliance and duration are considered in determining the gravity component of a penalty.

In the instant matter, the Second Complaint alleges that Respondent failed to comply with the total coliform and nitrate monitoring and reporting requirements, as required by the Order. Respondent failed to monitor for total coliform in the 2nd and 3rd Quarters (April-September) of 2005, and in the 1st Quarter (January-March) of 2006, for a total duration of non-compliance of nine months. The Penalty Policy classifies the gravity factor for a total coliform monitoring violation as 1.4.

The Complaint also alleges that Respondent failed to monitor annually for nitrate in 2006. The gravity factor prescribed in the Penalty Policy for a nitrate monitoring violation, which is a violation of the Act and the Order, is 1.3.

Third, the Complaint alleges that Respondent failed to notify the public of the NPDWR violations from July 2006 through September 2007, for a total duration of 14 months. The gravity factor prescribed in the Penalty Policy for a failure to notify the public of violations is 1.5.

Fourth, the Complaint alleges that Respondent failed to submit nitrate and total coliform monitoring results to EPA, a separate violation for each report not submitted, for a total duration of 8 months. The gravity factor prescribed in the Penalty Policy for a failure to report coliform sampling results to EPA is 1.4.

Finally, the Complaint alleges that Respondent failed to report the nitrate and total coliform monitoring violations to EPA over duration of 4 months, 1 month per violation. The gravity factor prescribed in the Penalty Policy for a failure to report total coliform monitoring violations to EPA is 1.4.

EPA increased the initial gravity amounts in accordance with the Penalty Policy based on the degree of willfulness/negligence factor (2.0), and history of noncompliance factor involving similar violations (2.5) for an adjusted gravity amount. The Respondent's lack of cooperation combined with the history of recent enforcement actions undertaken to address the noncompliance warranted high increases.

In addition to gravity, EPA calculated an economic benefit component of \$80 which consists of the costs of sampling, laboratory analysis, and operator expenses that Respondent would have incurred had it performed the total coliform and nitrate sampling required by the Act and the regulations. By including these costs in the penalty, the economic benefit enjoyed by Respondent for not complying with the regulations is eliminated. The gravity and economic benefit components combined, as a result of applying the Penalty Policy as described above, and in addition to a standard increase for pleading purposes, totals \$6050.

The penalty proposed in the Second Complaint is consistent with the applicable statutory factors and the Penalty Policy. Courts have readily imposed penalties in default actions where

the requested relief is consistent with the Act.. See In the Matter of: Sector Peep Hoyas Community, Docket No. SDWA-02-2—3-8261 (2005), In the Matter of: John Gateaux, Docket No. SDWA-06-2003-1590 (2003), In the Matter of: W.N. Bunch, W.N. Bunch Water System, Docket No. SDWA-3-99-002 (2000).

Conclusion

Respondent failed to file an answer to the Second Complaint. For the reasons set forth above, Complainant requests that the Presiding Officer find the Respondent in default and issue a default order assessing the proposed penalty amount of \$6,050.