



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
<http://www.epa.gov/region08>

2011 JUL 14 AM 8:56

FILED
EPA REGION VIII
HEARING CLERK

Ref: 8ENF-L

JUL 14 2011

Honorable Elyana Sutin, Regional Judicial Officer
U.S. Environmental Protection Agency, Region 8 (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

Re: In the Matter of Cheerful Cesspool Service
Docket No. CWA-08-2009-0017
Response to Order to Supplement the Record

Dear Judge Sutin:

In accordance with your Order to Supplement the Record (Order) issued on June 17, 2011, enclosed is a Declaration of Darcy O'Connor addressing the factual basis for the proposed penalty. Also in accordance with your Order, this letter seeks to clarify the Clean Water Act (CWA) section 308 violation with respect to what relief Complainant is seeking from the court and to reconcile language in the Complaint with that in Complainant's Motion for Default Order (Motion).

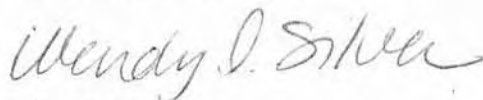
As you correctly point out in the Order, the Complaint discusses Respondent Cheerful Cesspool's prior compliance history and states that a partial response was received from Respondent on August 15, 2002, whereas the Memorandum in Support of Complainant's Motion for Default (Memorandum) states that Respondent has no prior history of similar violations. Upon review, Complainant has determined that the statement in the Memorandum may be somewhat misleading. As correctly stated in paragraph 26 of the Complaint, Respondent has a prior history of failing to provide full and timely responses to section 308 requests for information in 2001-2003. However, as EPA did not file a complaint in the matter of the 2001-2003 section 308 violations, those violations were neither factored in to the proposed penalty in the current matter (see paragraph 8 of the enclosed Declaration) nor discussed in the Memorandum. Therefore, the prior compliance history need not be considered in this case. As a point of further clarification, the partial response received from Respondent on August 15, 2002, is unrelated to the CWA section 308 violation currently before the court.

As to the relief sought from the court, Complainant seeks to have the court find that the Respondent failed to fully and timely respond to EPA's CWA section 308 request for information, as set forth in the Motion and accompanying Memorandum. While the Complaint alleges that Respondent completely failed to respond to the information request, a partial response was received by Complainant approximately four months after the Complaint was filed. See Declaration, para. 6.



This letter and attached Declaration are being sent to Respondent by First Class U.S. mail and by certified mail as the rules do not require that they be sent by certified mail and Complainant does not wish to risk having a certified mailing rejected by Respondent.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Wendy I. Silver".

Wendy I. Silver
Senior Attorney

Enclosure

cc: Merl Reynolds, Cheerful Cesspool Service

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 2011 JUL 14 AM 8:56
REGION 8

IN THE MATTER OF:)
)
Cheerful Cesspool Service)
18758 Surface Creek Road)
Cedaredge, CO 81413)
)
Respondent.)
_____)

Docket No. CWA-08-2009-0017

FILED
EPA REGION VIII
READING CLERK

DECLARATION OF DARCY O'CONNOR

Pursuant to the Order to Supplement the Record issued by the Honorable Elyana R. Sutin, Regional Judicial Officer, on June 17, 2011, ordering the Complainant, U.S. Environmental Protection Agency (EPA) Region 8, to supplement the record with respect to its proposed penalty, Darcy O'Connor, Unit Chief, NPDES Enforcement Unit, EPA Region 8 Water Technical Enforcement Program, hereby submits the following Declaration.

I, Darcy O'Connor, declare as follows:

1. I am employed by EPA in the Region 8 Water Technical Enforcement Program. Since May 2007, I have held the position of Unit Chief, NPDES Enforcement Unit.
2. In my capacity as Unit Chief, I am involved with the development and review of all penalty calculations developed by the Region 8 NPDES Enforcement Unit for violations of section 301, of the Clean Water Act (CWA).
3. I was involved with development of, and reviewed the final penalty calculation for, the complaint in this matter and have personal knowledge of the matters set forth in this Declaration.
4. On June 18, 2009, EPA filed an Administrative Complaint and Notice of Opportunity for Hearing in this matter, alleging that the Respondent, Cheerful Cesspool Service, violated section

308 of the CWA, 33 U.S.C. § 1318, by failing to respond to a request for information by EPA issued pursuant to that section. The Complaint proposes a penalty of \$6,200.

5. In calculating a penalty, section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), requires that EPA take into account the nature, circumstances, extent and gravity of the violation, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. The proposed penalty in this matter is consistent with these statutory factors. The CWA statutory factors were used in calculating the proposed penalty because EPA's CWA programs have not adopted pleading (complaint-based) penalty policies and EPA guidance specifically bars the use of settlement penalty policies in administrative litigation. See OECA Guidance on Use of Penalty Policies in Administrative Litigation at p.2, fn.2. A discussion of the application of each of the CWA statutory factors in this matter follows.

6. As to statutory factor 1, the nature, circumstances, extent and gravity of the violation, Respondent refused to provide any response to EPA's section 308 request for information for 647 days. (A partial response was received by EPA on October 19, 2009, approximately four months after the complaint in this matter was filed.) The request for information was properly issued pursuant to section 308 of the CWA, 33 U.S.C. § 1318, which grants EPA the authority to determine, among other things, whether any person is in violation of any limitation, prohibition, or standard of performance, or to carry out § 405 of the Act. The request sought information regarding the septage disposal methods utilized by Respondent. Respondent's failure to timely provide the requested information completely undermined EPA's ability to fulfill its statutory mandate to ensure compliance with the CWA. Furthermore, land application of septage can cause nutrient contamination of nearby surface and ground waters, and without a response from

Respondent, EPA had no knowledge of whether and where Respondent land-applied septage and whether such contamination existed.

7. As to statutory factor 2, ability to pay, EPA is without knowledge regarding Respondent's finances, and therefore did not reduce the penalty based upon this statutory factor.

8. As to statutory factor 3, prior history of violations, while EPA records note that Respondent failed to respond fully and timely respond to a CWA section 308 request for information in 2001 and a supplemental request in 2003, EPA did not factor this non-compliance into the penalty calculation.

9. As to statutory factor 4, degree of culpability, Respondent's failure to respond to the request for information until 647 days after the due date and approximately four months after the complaint in this matter was filed, despite numerous written and telephonic reminders, and then to provide only a partial response, represents a high degree of culpability.


10. As to statutory factor 5, economic benefit or savings resulting from the violation, I estimated that it would require eight hours to gather the responsive information, and I used an hourly wage of \$15.85, the mean hourly wage for Office and Administrative Support Occupations from the U.S. Bureau of Labor Statistics, May 2007 State Occupational Employment and Wage Estimates - Colorado. Using this data, I calculated an avoided cost of \$127.

11. As to statutory factor 6, such other matters as justice may require, EPA is unaware of any such matters and did not make any adjustments to the proposed penalty based on this statutory factor.

12. The facts related to the statutory factors discussed in paragraphs 6 - 11, above, support the proposed penalty of \$6,200 for the failure to fully and timely respond to EPA's section 308 request for information.

I declare the foregoing to be true and correct to the best of my knowledge, information and belief under penalty of perjury.

Dated: 7/13/11


Darcy O'Connor, Unit Chief
NPDES Enforcement Unit
U.S. EPA, Region 8

In the Matter of: Cheerful Cesspool Service
Docket No. CWA-08-2009-0017

CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent by first class mail and by certified mail a copy of the foregoing DECLARATION OF DARCY O'CONNOR to:

Merl Reynolds
Cheerful Cesspool Service
18758 Surface Creek Road
Cedaredge, CO 81413

The original and one copy were hand-delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129

Date: 7/14/2011

Judith M. McTernan