



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 10
 1200 Sixth Avenue
 Seattle, Washington



_____)
 IN THE MATTER OF:)
) Docket No. SDWA-10-2001-0147
 Apple Blossom Court a.k.a.)
 Apple Blossom Mobile Home)
 Park, Bruce Benz, and)
 Patricia Benz)
 Respondents.)
 _____)

DEFAULT ORDER AND INITIAL DECISION

I. INTRODUCTION

This Default Order is issued in a case brought under the authority of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f et seq. The Complaint, filed pursuant to Section 1414(g)(3) of the SDWA, 42 U.S.C. § 300g-3(g)(3), alleges that Respondents failed to comply with an Administrative Compliance Order (ACO) issued in response to violations of the National Primary Drinking Water Regulations (NPDWR), 40 C.F.R. Part 141. Complainant is the Manager of the Drinking Water Unit for Region 10 of the United States Environmental Protection Agency (EPA).

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties at 40 C.F.R. Part 22, 64 Federal Register 40138 (July 23, 1999) and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Penalty, Complainant's Motion for Default Judgment is hereby GRANTED.

Respondents are hereby found in default and a civil penalty is assessed in the amount of \$15,000.

II. FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record in this matter, I make the following findings of fact:

2.1 On June 28, 2001, EPA issued Marie Benz an Administrative Compliance Order (ACO) pursuant to Section 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g). The ACO was issued in response to a failure to abide by the NPDWR, 40 C.F.R. Part 141.

2.2 Marie Benz received a copy of the ACO by certified mail on July 5, 2001.

2.3 Marie Benz is an operator of a public water system located at Apple Blossom Mobile Home Park in Oregon. Bruce Benz and Patricia Benz are owners of this public water system. Marie Benz was previously the owner of this system before

transferring this interest to her son, Bruce Benz, and his wife, Patricia Benz. As an operator of the public water system, Marie Benz is an agent acting on behalf of the owners, Bruce Benz and Patricia Benz.

2.4 On March 28, 2002, Complainant issued an Administrative Complaint for Penalty and Notice of Opportunity for Hearing (Complaint) based on the failure to comply with the ACO.

2.5 Respondents were served a copy of the Complaint by certified mail on April 3, 2002.

2.6 Complainant notified Respondents of the requirement at 40 C.F.R. § 22.15 mandating that Respondents file a written answer within 30 days after service of the Complaint. An extension of time for answering the Complaint was ordered by the Presiding Officer, with the final deadline set at June 3, 2002.

2.7 Respondents have failed to file an answer with the Regional Hearing Clerk.

2.8 On September 18, 2002, Complainant filed a Motion for Default Order with the Regional Hearing Clerk. The Motion was served on the Respondents by first class mail, return receipt requested.

2.9 As of the date of this Default Order and Initial Decision, Respondents have failed to respond to the Motion for Default Order.

III. CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record in this matter, I make the following conclusions of law:

3.1 Procedure for this case is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22. The Consolidated Rules, 40 C.F.R. § 22.17(a), apply to motions for default, and provide in pertinent part:

(a) Default. A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; 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.

(c) Default order. 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.

3.2 The Complaint was lawfully and properly served upon Respondents in accordance with the Consolidated Rules, 40 C.F.R. § 22.5(b)(1).

3.3 Pursuant to 40 C.F.R. § 22.15(a) and by order of the Presiding Officer, Respondents were required to file an answer by no later than June 3, 2002.

3.4 Respondents failed to file a timely answer to the Complaint.

3.5 Complainant has moved for this Default Order in the manner prescribed by the Consolidated Rules, 40 C.F.R. § 22.17(a).

3.6 Respondents are in default pursuant to the Consolidated Rules, 40 C.F.R. § 22.17(a).

3.7 In accordance with 40 C.F.R. § 22.17(a), the default in this case constitutes an admission by Respondents of all the facts alleged in the Complaint and a waiver by Respondents of a right to a hearing regarding these factual allegations. Respondents are thus held to have committed the violations alleged in the Complaint.

3.8 When the Presiding Officer finds that a 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. 40 C.F.R. §22.17(c). The present Default Order, which resolves all outstanding issues and claims in this proceeding, constitutes the Initial Decision in this matter.

3.9 As described in the "Determination of Penalty" section below, I find the Complainant's requested civil penalty of \$15,000.00 is properly based upon the statutory requirements of the Safe Drinking Water Act and the cited EPA penalty policy.

IV. DETERMINATION OF PENALTY

4.1 Under the Consolidated Rules, the Presiding Officer shall determine the amount of the civil penalty

based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange, or the motion for default, whichever is less.

40 C.F.R. § 22.27(b).

4.2 A penalty of \$15,000 proposed in the Complaint was calculated taking into account the factors prescribed by

Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), and is consistent with the policy factors relied upon by EPA in cases of this type.

4.3 Complainant's explanation of its calculation of the proposed penalty, as set out on pages 5 and 6 of Complainant's Memorandum in Support of Motion for Default Order and in Complainant's Supplemental Memorandum of Law and Facts in Support of Proposed Civil Penalty is incorporated herein by reference.

4.4 Complainant's Supplemental Memorandum of Law and Facts in Support of Proposed Civil Penalty contains an explanation of the penalty calculation as set forth below in Paragraphs 4.5 through 4.13:

4.5 There are statutory criteria for a district court to consider when determining an appropriate civil penalty to assess for the failure to comply with an order issued under subsection 1414(g) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3(g). According to subsection 1414(b) of the SDWA, such criteria include "the seriousness of the violation, the population at risk, and other appropriate factors". 42 U.S.C. § 300g-3(b). While there are no equivalent statutory criteria for consideration in an administrative matter, the United States Environmental Protection Agency (EPA) has

developed a written policy that is to be used by EPA personnel when calculating an appropriate penalty amount to be paid in the settlement of a claim for violation of an order issued under subsection 1414(g) of the SDWA, 42 U.S.C. § 300g-3(g). This policy was effective May 25, 1994, and is entitled "Public Water System Supervision Program Settlement Penalty Policy for Civil Judicial Actions and Administrative Complaints for Penalties" (PWS Policy).¹

4.6 Complainant has followed the PWS Policy in calculating the proposed civil penalty to be paid in this matter. In so doing, Complainant made an attempt to accomplish the objectives set forth in the PWS Policy. These objectives are: (1) deter violations of the law by placing the violator in a worse position financially than those in the regulated community who have complied in a timely fashion; (2) provide fair and equitable treatment of the regulated community; and (3) provide an expeditious resolution of the identified problems. PWS Policy at 1.

¹ The PWS Policy is Exhibit 10 to Complainant's "Motion for Default Order".

4.7 Complainant performed a step-by-step calculation of the proposed penalty amount.² This calculation was based upon eight violations of the National Primary Drinking Water Regulations which are documented to have occurred during the period of time from January 1, 1997, through December 31, 2000. There was a total of 358 months of violations.³

4.8 The calculation of the proposed penalty took into consideration the economic benefit derived by Respondents, and the gravity of the violations. PWS Policy at 2. The gravity factor included consideration of the seriousness of the violations and the population at risk. Id. These are among the criteria a district court would consider in assessing a civil penalty under subsection 1414(b) of FIFRA, 42 U.S.C. § 300g-3(b). The gravity amount was adjusted based on the degree of willfulness and/or negligence and the history of noncompliance. PWS Policy at 2.⁴ These factors may or may

² According to subsection 1414(g) of FIFRA, 42 U.S.C. § 300g-3(g), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, Complainant may seek a civil penalty of \$5,500 to \$27,500 in this administrative proceeding

³ Based upon 10,675 days of violation, and according to Section 1414(g) of FIFRA, 42 U.S.C. § 300g-3(g), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, the maximum penalty which could be assessed in a judicial case is \$293,500,000.

⁴ Two other potential factors, litigation considerations and ability to pay, did not enter into the analysis by

not be consistent with what a district court would consider as "other appropriate factors" under subsection 1414(b) of FIFRA, 42 U.S.C. § 300g-3(b).

4.9 The economic benefit calculation began with an estimate of the avoided and delayed costs for each of the violations. These estimates were based upon typical sampling and analysis costs from random private laboratories in the state of Oregon and the local county of the Apple Blossom public drinking water system. The estimates also included the cost to the state of Oregon for performing a sanitary survey⁵. These costs are broken down as follows:

(1) coliform sampling		
10 tests @ \$ 15.75 per sample	=	\$157.50
(2) sanitary survey		
\$530 total: Respondents' portion	=	\$65.00
(3) radiological		
2 periods @ \$ 65 per sample	=	\$130.00
(4) lead/copper		
10 tests @ \$ 15 per sample	=	<u>\$150.00</u>
Total economic benefit	=	\$967.50

Complainant, because there was no information provided by Respondents from which to reasonably calculate either of these factors.

⁵ This function should have been, at least in part, performed and funded by Respondents.

4.10 In calculating the economic benefit, Complainant could have also taken into account the costs avoided for having not provided public notifications, consumer confidence reports, printing and mailing. As a form of compromise to Respondents, Complainant chose not to include an estimate of these costs as part of the proposed civil penalty amount.

4.11 The gravity of the violations was calculated with considerable weight given to the long history of problems associated with the Apple Blossom public drinking water system. Complainant has information indicating that, since at least 1987, there have been failures at this system to monitor for coliform and to report results which exceed the maximum contaminant limit for coliform. In addition, prior to commencement of this proceeding, there had been no sampling at this system for lead and copper. Also, there was no compliance with the Administrative Compliance Order prior to initiation of the instant penalty proceeding. In total, several violations have existed unabated for many years, and have resulted in the potential exposure of as many as 60 people to a risk of harm from consumption of contaminated drinking water.

4.12 Utilizing a worksheet, which is a part of the PWS Policy, the initial gravity amount calculated by Complainant was \$4,291. This amount was adjusted upward 200% based upon a

consideration of the willingness and/or negligence and history of non-compliance. In essence, given that regulatory requirements were disregarded for years, Complainant determined that a 100% increase was warranted for the gravity amount. PWS Policy at 6-7. There was also a 100% increase for the many failures to cooperate with compliance efforts by EPA and the state of Oregon. Id. at 7. Complainant issued an Administrative Compliance Order and two notices of non-compliance with the Administrative Compliance Order. Complainant then initiated this penalty proceeding. Prior to these efforts, the state of Oregon issued notices about failures to comply with drinking water requirements dating as far back as 1992. None of these government efforts produced compliance.

4.13 The adjusted gravity component, combined with the economic benefit component, brought the total proposed penalty amount to \$13,840. In that a settlement penalty amount is meant to represent a reasonable compromise of the claims against Respondents for the maximum statutory penalty⁶, Complainant slightly increased the proposed cash settlement penalty amount to \$15,000.

⁶ See PWS Policy at 8 and footnote 3 above.

4.14 I adopt the Complainant's penalty analysis and find that a civil penalty of \$15,000.00 against Respondents is appropriate in this case.

V. ORDER

Accordingly, it is hereby ORDERED that:

5.1 Default be entered against Respondents pursuant to Section 1414(g)(3) of the SDWA, 42 U.S.C. § 300g-3(g)(3) and the Consolidated Rules, 40 C.F.R. § 22.17.

5.2 A penalty of \$15,000 is hereby assessed against Respondents.

5.3 No later than 30 days after the date that this Default Order becomes final, Respondents shall submit a cashier's check or certified check, payable to the order of "Treasurer, United States of America," in the amount of \$15,000 to the following address:

Mellon Bank
EPA Region 10
P.O. Box 360903M
Pittsburgh, Pennsylvania 15251

Respondents shall note on the check the title and docket number of this administrative action.

5.4 Respondents shall serve a photocopy of the check to the Regional Hearing Clerk at the following address:

Regional Hearing Clerk
EPA Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

5.5 Should Respondents fail to pay the penalty specified in Paragraph 5.2 above in full by its due date, Respondents shall also be responsible for payment of the following amounts:

- a. Interest. Any unpaid portion of the assessed penalty shall bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1) from the date this Default Order becomes final, provided, however, that no interest shall be payable on any portion of the assessed penalty that is paid within 60 days after this Default Order becomes final.
- b. Handling Charge. Pursuant to 31 U.S.C. § 3717(e)(1) and Chapter 9 of EPA Resources Management Directive 2540, a monthly handling charge of \$15 shall be assessed if any portion of the assessed penalty is more than 30 days past due.
- c. Penalty Charge. Pursuant to 31 U.S.C. § 3717 (e)(2), Respondents shall be assessed a penalty charge of not more than 6 percent per year for failure to pay a portion of the penalty more than 90 days past its due date.

5.6 In the event of failure by Respondents to make payment as directed above this matter may be referred to a

United States Attorney for recovery by appropriate action in United States District Court.

5.7 Pursuant to 40 C.F.R. § 22.17(b), this Default Order is the initial decision in this matter. In accordance with 40 C.F.R. § 22.27(c), this Default Order shall become final within forty-five (45) days after its service upon the parties unless it is appealed to the Environmental Appeals Board⁷ or the Environmental Appeals Board elects, sua sponte, to review the initial decision.

DATED this 13th day of February, 2003.

[signed]
STEVEN W. ANDERSON
Regional Judicial Officer

⁷Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within **thirty days** after this Initial Decision is served upon the parties.