

8/16/96

no response
to motion for
accel. Decis

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
DUO WATER WORKS,)	DOCKET NO. SDWA-III-006
)	
)	
RESPONDENT)	

ORDER GRANTING MOTION FOR PARTIAL
ACCELERATED DECISION

This civil penalty proceeding under § 1414 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300g-3, was initiated on December 29, 1988, by the filing of a complaint by the Director of the Water Management Division, EPA Region III, charging Respondent, Duo Water Works (Duo), with violation of an administrative order issued pursuant to Section 1414(g)(1) of the Act.^{1/} The complaint included findings that Duo's water system located in Rupert, Greenbrier County, West Virginia, is a system for the provision to the public of piped water for human consumption, that Duo's water system was supplied by a ground water source, that the system has approximately 15 service connections and serves approximately 65 individuals "year-round". Therefore, the complaint alleged that Duo is a public water system within the meaning of SDWA § 1401(4)

^{1/} The complaint was served on a Mr. Cecil Wayne Lilly by a Deputy Sheriff of Greenbrier County, West Virginia, on April 20, 1989 (Complainant's Prehearing [CPH] Ex. 30). A Status Report by Complainant, dated April 19, 1991, states that the last person to take any responsibility for operation of the system was Mr. Lilly's father who had passed away. The delay in service was apparently due to difficulty in locating a representative of Respondent responsible for operation of the system.

and a community water system as defined in 40 CFR § 141.2.^{2/} For this alleged violation, it was proposed to assess Duo a penalty of \$5,000, the maximum permitted in an administrative proceeding.^{3/}

Duo, through counsel, served an answer under date of May 12, 1989. The answer asserted that Respondent lacked sufficient knowledge to admit or deny the allegations in the complaint, denied that there was an entity known as "Duo Water Works" and requested an informal hearing. The matter was not forwarded to the Chief Judge for assignment of an ALJ until June 11, 1990.

It appears that Respondent acquired title to the water system identified in the complaint in 1959. See the deed from Gauley Coal Land Company, a West Virginia Corporation, conveying described land in Duo, known as the Water Plant Lot and improvements thereon, to named trustees of Duo Water Works, a cooperative association, dated November 14, 1959 (CPH Ex. 1). The

^{2/} Section 1401(4) of the Act defines a "public water system" as a system for the provision of piped water for human consumption, if such system has at least 15 service connections or regularly serves at least 25 individuals. A "community water system" as defined by 40 CFR § 141.2 means a public water system which serves at least 15 service connections used by year-round residents or at least 25 year-round residents. All references to the Code of Federal Regulations are to the version in effect on July 1, 1988.

^{3/} SDWA § 1414(g)(3)(B), 42 U.S.C. § 300g-3(g)(3)(B). SDWA § 1401(1) provides that "primary drinking water regulation" means a regulation which, inter alia, applies to public water systems. Public water systems are defined in SDWA § 1401(4) (supra note 2). SDWA § 1414(g)(1) authorizes the Administrator to issue an order to require compliance with such [primary drinking water] regulation. Part 141 of Title 40 of the Code of Federal Regulations is entitled "National Primary Drinking Water Regulations".

record contains a copy of a letter from the West Virginia Department of Health, dated May 2, 1977, informing Duo that it had failed to submit [water] samples for bacteriological analysis and operational reports on a monthly basis as required by Public Water Supply Regulations (CPH Ex. 3). A similar letter from the Department of Health, dated May 23, 1978 (CPH Ex. 5), warned Duo that it was subject to a penalty for willful failure to comply with the regulations requiring the submission of monthly operating reports. The mentioned correspondence was addressed to Duo in care of Mr. Sandy Lilly, Rupert, West Virginia.

Additionally, Duo was on lists, published by the Department of Health, of public water supplie(r)s failing to monitor, collect and test water samples for microbiological contaminants for the quarters ending June 30 and September 30, 1981 (CPH Exs. 7 & 8). Duo was ordered to commence collection and submission of water samples by letter, dated June 30, 1982 (CPH Ex. 10), and apparently did so, because by letter, addressed to Duo in care of Mr. Brian Foley, Rupert, West Virginia, dated November 22, 1982, Duo was informed that its most recent compliance report revealed that its water supply was in violation of microbiological and/or turbidity maximum contaminant levels (MCLs) (CPH Ex. 11). Duo was instructed that it must inform its customers of the violation by prescribed methods and was requested to provide a copy of the public notice of the violation to the Department of Health.

Duo was on a published list of water suppliers which failed to monitor for microbiological contaminants for the quarter

ending December 31, 1994 (Public Notice, dated February 8, 1985, CPH Ex. 12). A Boil Water Advisory, dated September 18, 1984, issued by the West Virginia Department of Health, which advises all customers of the Duo water system to boil drinking water, is in the record (CPH Ex. 15). The advisory was based upon Duo's failure to properly chlorinate the water and to submit bacteriological samples [for testing], conditions which were deemed to constitute a potential health hazard. A violations summary for the Duo Water System, covering the period January 1983 through June 30, 1985, indicates that Duo submitted samples and operational reports only for the period January, February and March 1983 (CPH Ex. 15).

A Department of Health memorandum, dated July 26, 1985, written by Robert L. Frost, District Sanitarian, contains information reportedly gleaned from Mr. Walter Propps, a resident of Duo, during a visit on July 17, 1985 (CPH Ex. 14). The memorandum states that no pump was presently used in the Duo system, that water is piped from a ground source to the distribution system, that there was no operator [of the water system], that no treatment or storage was provided, that former Water Board people [members] had moved away, and that 13 of 21 houses are occupied by 31 people using the water. The allegation in the complaint that the Duo water system is used by approximately 65 individuals on a year-round basis appears to be based on Health Department, Drinking Water Division, Quarterly Report Forms for the federal fiscal years 1983- 1985, which indicate that there are 65 population/connections (CPH Exs. 15 & 16). The notation "65

population/connections" is not an assertion that there are 65 users of the system. Moreover, the forms appear to have been prepared by Health Department personnel rather than by Duo. Respondent's prehearing exchange confirms that there are 21 houses in the community, but states two are vacant and that there are 47 residents of Duo, West Virginia (letter from J. Michael Anderson, Respondent's counsel, dated February 14, 1991). A map of Duo, Meadow Bluff District, Greenbrier County, West Virginia, attached to a Department of Health memorandum, dated December 11, 1989 (CPH Ex. 36), reflects that there are 25 lots in Duo of which three are vacant and that two houses are vacant.

In a letter, dated August 9, 1985, the State of West Virginia, by its Department of Health, requested that EPA implement legal action against Duo and another named water system (CPH Ex. 16). Both systems were described as persistent violators with whom it was extremely difficult to deal. The letter indicated that the major difficulty was finding a person or persons against whom to take enforcement action [serve process]. It appears that Duo was restored to the list of water systems receiving bottles on a monthly basis from the Department of Health in which to collect samples for bacteriological testing purposes in September 1987 and by a letter from the Department of Health, addressed to Duo in care of Leslie Ray, Rupert, West Virginia, signed by the District Sanitarian, dated October 27, 1987, Duo was informed of the action necessary to bring its system into compliance with drinking water regulations (CPH Ex. 18).

The Duo system was inspected on April 20 and July 6, 1988, during which water samples were collected from two residences (CPH Ex. 17). Laboratory analysis of the former sample reportedly resulted in a finding of 2.2 (presumably coliforms per liter) and analysis of the latter sample reportedly resulted in a finding of 5.1 (presumably coliforms per liter).^{4/} Water Bacteriological Reports, dated April 13, and June 8, 1989, issued by the West Virginia State Hygienic Laboratory, reporting analyses of samples collected from residences in Rupert, W.V., on April 10, and June 7, 1989, state that coliform organisms were not found (CPH Exs. 29 & 32). A report of analysis of a sample collected on November 21, 1989, however, states that coliform organisms were found (CPH Ex. 35).

By a letter, dated April 18, 1988, the West Virginia Department of Health again requested EPA to take enforcement action against Duo Water Works for failure to comply with the National Primary Drinking Water Regulation (CPH Ex. 22). Thereafter, EPA published a Notice of Proposal to Issue Administrative Order and Opportunity for a Public Hearing (CPH Ex. 23). The Administrative Order, referred to in the complaint, Docket No. III-88-023-DS, dated September 30, 1988, contains findings which, in addition to setting forth the jurisdictional basis for the order, i.e., that Respondent is a supplier of piped water to the public for human

^{4/} Laboratory reports reflecting these results are not in the record. The MCL for microbiological contaminants is based upon the presence or absence of total coliforms in a sample, rather than on coliform density (40 CFR § 141.63).

consumption and a public and community water system as defined by the Act and regulation, state, inter alia, that Respondent violated 40 CFR § 141.14 by allowing its system to exceed the MCL for coliform bacteria during the three-month period July 1-September 30, 1982.^{5/} Additionally, the order alleged that Respondent violated 40 CFR § 141.21(b) by failing to analyze or sample for coliform bacteria each month during the periods October 1981 through July 1982, September 1982, and December 1986 through June 1988; that Respondent violated 40 CFR § 141.31(a) by failing to report to the State of West Virginia results of monitoring and analysis for the mentioned monitoring periods; that Respondent violated 40 CFR § 141.31(b) by failing to report to the State of West Virginia within 48 hours any failure to comply with the national primary drinking water regulation; that Respondent violated 40 CFR § 141.36 by failing to provide the public and users of its system with notification of its failure to comply with Subpart B (MCLs) and Subpart C (Monitoring and Analytical Requirements) of Part 141 during the specified periods; and that Respondent violated 40 CFR § 141.31(d) by failing to submit to the State of West Virginia copies of each notice of MCL violations for

^{5/} CPH Ex. 26. No test reports supporting the allegation that the MCL for coliform bacteria was exceeded during the July-September 1982 period are in the record and it is noted that Duo is charged with failing to sample and analyze for coliform bacteria during the period October 1981-July 1982 and September 1982. Duo was informed that the MCL for coliform bacteria was exceeded during this period by a letter from the Department of Health, dated November 22, 1982 (CPH Ex. 11).

coliform bacteria and monitoring and analytical violations for coliform bacteria as referenced above.

The administrative order determined that 60 days was a reasonable time for Respondent to achieve compliance with the MCL for coliform bacteria and that 30 days was a reasonable time for Respondent to achieve compliance with monitoring, reporting, and public notification requirements. Respondent was ordered to submit, within 30 days, plans for remedial action to EPA Region III and to the West Virginia Department of Health; to implement said plans and to comply with the MCL for coliform bacteria within 60 days; commencing immediately, to sample and analyze for coliform bacteria in accordance with 40 CFR § 141.21(b) a minimum of once each month, three times each calendar quarter; to report the analytical results to the State of West Virginia within the first ten days of the month following the month in which the results were received or within ten days of the end of the monitoring period whichever is the shortest as required by § 141.31(a); to comply with 40 CFR § 141.31(b) by reporting to the State of West Virginia within 48 hours any failure to comply with any requirement of the national primary drinking water regulation, including monitoring; commencing immediately, to notify all persons served by Duo Water Works of its failure to comply with the MCL for coliform bacteria and of its failure to monitor for coliform bacteria; to send to EPA and the West Virginia Department of Health copies of representative notices to users and to the public of such failures; and to report monthly to EPA of the compliance status and progress toward

compliance with each of the mentioned requirements. As indicated previously, the complaint alleges that Respondent has violated an administrative order.

Respondent's prehearing exchange does not include any exhibits and identifies no witnesses other than unnamed residents of the Town of Duo (letter from J. Michael Anderson, Respondent's counsel, ante at 5). The letter states that only two or possibly three of the 47 residents of the town are employed and that the residents have no means whatsoever to finance a water system. The letter further states that Duo Water Works is not a business and has not been a business for the past ten years, that prior [to that time] the town had a water pump, electricity for the same and a tank, but that the residents failed to pay for water service, the system was shutdown and that the residents now rely on a gravity feed system to obtain water from an abandoned mine. These assertions are substantially confirmed by Status Reports, dated August 17, 1990, and April 19, 1991, filed by Complainant, which state, inter alia, that respondents are a small community of users, none of whom were officially responsible for operation of the system when EPA issued its administrative order for compliance; that the community was originally a coal camp built by a mining company, that when the mining company left, the water system was given to the community, that since that time almost no maintenance has been performed on the system, that the system has deteriorated and the treatment system has been abandoned, that water currently flows from the source by gravity without any treatment, that Duo is

a very poor community and that many of the residents are unemployed and are on welfare.

This matter was scheduled for hearing on August 23, 1994. The hearing was canceled based upon Complainant's representation that it was filing a motion for an accelerated decision on liability and that, if disposition of the motion resolved the issue of liability, no adjudication on the penalty would be required (Request for Continuance of Hearing Date, August 10, 1994). Complainant filed a motion for an accelerated decision on liability on August 10, 1994. The motion alleges that there is no dispute as to material fact but that Duo violated an identified administrative order as alleged in the complaint and that Complainant is entitled to judgment as a matter of law. The motion is supported by the affidavits of Robert Lange, an environmental engineer in the Drinking and Groundwater Protection Branch of the Water Management Division, U.S. EPA, Region III, and of David R. Thomas, District Engineer, Office of Health Services, West Virginia Department of Health and Human Resources. Messrs. Lange and Thomas each essentially state that, within their respective agencies, they are responsible for and familiar with the Duo Water Works enforcement matter, that they have never received, and have no knowledge of their respective agencies ever receiving, remedial plans and compliance reports as required by the administrative order, that they have visited the community of Duo and inspected Duo Water Works and found no evidence of Duo having treated its water or of anyone having sampled or analyzed its water as required

by the administrative order, and that there is no evidence of Duo having taken any action to comply with the order.

The foregoing recitation constitutes my findings of fact in this matter. Duo has not responded to Complainant's motion.

DISCUSSION

Whether 13 of the 21 houses in Duo are occupied and thus, presumably there are 13 connections to the Duo water system as indicated in the memorandum, dated July 26, 1985, or 19 occupied houses and thus, presumably 19 connections to the system as indicated in the letter from Duo's counsel, dated February 14, 1991, is not crucial to EPA's jurisdiction in this matter. The regulation, 40 CFR § 141.2 (supra note 2), defines a "community water system" 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. The cited memorandum states that there were 31 people using the water and the February 14 letter states that there were 47 residents of Duo. These numbers prima facie exceed the "25 year-round residents" requirement. It is true that neither the memorandum nor the letter state that the users and residents were "year-round". It is also true that the critical date for jurisdictional purposes is September 30, 1988, the date the administrative order was issued. Nevertheless, there is no evidence the residents did not reside in Duo "year-round" and no evidence to suggest that the number of residents or users of the system did not equal or exceed 25 at the

time of the issuance of the administrative order. It is concluded that Duo was a community water system as defined by 40 CFR § 141.2 and that EPA had jurisdiction to issue the administrative order identified in the complaint.

The findings recited above establish that Duo has not complied with the administrative order and that a finding of liability is appropriate. The only question is whether the unincorporated cooperative association known as "Duo Water Works", which acquired title to the Water Plant Lot and improvements thereon in the Town or community of Duo in 1959, still exists.^{6/} The answer filed on Duo's behalf denied the existence of an entity known as "Duo Water Works". The apparent difficulties in serving the complaint, the several individuals purportedly representing Duo to whom correspondence concerning compliance with the Act and regulations was addressed, and the fact that the water system is in a state of disrepair and partial abandonment tend to support a finding that Duo Water Works no longer exists. Moreover, Complainant has acknowledged that at the time the administrative order was issued, no one was officially responsible for operation of the system (ante at 9). Be that as it may, Complainant has obliquely indicated that it does not intend to seek a penalty and the fact that the association against whom the action was instituted may no longer exist, is not a bar to a finding of

^{6/} It is noted that a list of property owners in Duo, West Virginia (CPH Ex. 36) states that water source and treatment facilities are on properties owned by Westvaco, Rupert, West Virginia.

liability. Complainant's motion for an accelerated decision as to liability will be granted.

Order

It having been determined that Respondent, Duo water Works, has violated an administrative order as alleged in the complaint, Complainant's motion that Respondent be found liable for the violation alleged is granted.

Dated this 16th day of August 1996.


Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING MOTION FOR PARTIAL ACCELERATED DECISION**, dated August 16, 1996, in re: Duo Water Works, Dkt. No. SDWA-III-006, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon

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Legal Staff Assistant

DATE: August 16, 1996

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