

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In the Matter of:)	
)	Docket No. 07-09-C-2000DW
Sherry Byers-Eddy,)	Master Case No. M2008-117885
Certification No. 009687)	
)	FINDINGS OF FACT;
Respondent.)	CONCLUSIONS OF LAW
)	AND FINAL ORDER
_____)	

APPEARANCES:

Respondent, Sherry Byers-Eddy, per
The Gillett Law Firm, by
Michael B. Gillett, Attorney at Law

Department of Health Drinking Water (Program), per
Office of the Attorney General, by
Dorothy H. Jaffe, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

The Presiding Officer, on behalf of the Secretary of the Department of Health convened a hearing on September 15-16, 2008, in Tumwater, Washington. Based upon the testimony and the admitted exhibits, along with argument of counsel and briefing, the Presiding Officer issues the following: **CERTIFICATION SUSPENDED.**

ISSUE

- A. Whether the Respondent's conduct as alleged in the Notice of Intention to Suspend for Six (6) Months constitutes a violation under WAC 246-290-71001(2), WAC 246-290-310(2)(c) and WAC 246-290-71004(1).

FINDINGS OF FACT
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- B. If there was a violation, should the Respondent's certification be suspended for a period of six (6) months pursuant to RCW 70.119.110 and WAC 246-292-100?

SUMMARY OF THE PROCEEDING

The Program issued a Notice of Intention to Suspend for Six (6) Months (Notice to Suspend) seeking to suspend the Respondent's water works operator certification for six months. The Respondent requested an adjudicative proceeding seeking dismissal of this Notice to Suspend.

During the hearing, the Program presented the testimony of Dan Mathias, Rhonda Leatherwood, Mark Steward, Scott Torpie, and Denise Clifford. The Respondent testified on her own behalf.

The Presiding Officer admitted the following Department (D) and Respondent's (R) exhibits (excluding Exhibit Nos. 26 and 27):

- D-1: Water bacteriological analysis from Cascade Analytical, June 6, 2007,
- D-2: Email from Dan Mathias, dated June 8, 2007,
- D-3: Email from Rhonda Leatherwood on Health Advisory Summary, dated June 8, 2007,
- D-4: Email from Mark Steward, dated June 11, 2007,
- D-5: Email from Respondent, dated June 11, 2007, with two (2) attachments,
- D-6: Water bacteriological analysis from Cascade Analytical, dated June 11, 2007,
- D-7: Health Advisory Summary, dated June 12, 2007,

- D-8: Fax from Mark Steward to Respondent, dated June 12, 2007, with attachments,
- D-9: Email from Mark Steward, dated June 13, 2007, with two (2) attachments,
- D-10: Email from Mark Steward, dated June 15, 2007,
- D-11: Email from Respondent, dated June 18, 2007,
- D-12: Email from Rhonda Leatherwood, dated June 19, 2007,
- D-13: Email from Dan Mathias, dated June 19, 2007,
- D-14: Email from Scott Torpie, dated June 20, 2007,
- D-15: Email from Ron Nelson, dated June 20, 2007,
- D-16: Email from Respondent, dated June 20, 2007, with two (2) attachment,
- D-17: Email from Mark Steward, dated June 20, 2007,
- D-18: Email from Respondent, dated June 20, 2007,
- D-19: Email from Scott Torpie, dated June 21, 2007, with two (2) attachments,
- D-20: Email from Mark Steward, dated June 21, 2007, with an attachment,
- D-21: Email chain from Mark Steward, dated June 27, 2007,
- D-22: Email chain from Scott Torpie, dated July 2, 2007,
- D-23: Department of Health, Health Advisory Manual, April 2005,
- D-24: Chronology of Events June 6, 2007 through June 13, 2007,
- D-25: Drinking Water Warning Follow-up, dated July 2, 2007,
- D-26: No exhibit/ withdrawn,
- D-27: No exhibit,

- R-28: Fax from Dan Mathias to Respondent, dated June 8, 2007 (5:35 p.m.),
- R-29: Drinking Water Warning, dated June 9, 2007,
- R-30: Drinking Water Warning, dated June 13, 2007,
- R-31: Department of Health News Release, dated June 13, 2007,
- R-32: Email from Scott Torpie, dated June 13, 2007 (5:47 p.m.),
- R-33: Email from Richard Sarver, dated June 20, 2007 (7:35 a.m.),
- R-34: Email from Mark Steward, dated June 27, 2007 (5:15 p.m.), and
- R-35: Notice of Intention to Suspend, dated June October 9, 2007.

The Respondent adopted and incorporated the above-identified Department (Program) Exhibit Nos. 2, 3, 4, 7, 8, 20 and 23.

I. FINDINGS OF FACT

1.1 Washington Beef LLC Water System (hereinafter referred to as the Water System) is a public water system.¹ This Water System provides water for about 800 employees and is classified as a Group A Water System.² In June 2007,

¹ "Public water system" means any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing piped water for human consumption, including any collection, treatment, storage, or distribution facilities under control of the purveyor and used primarily in connection with the system; and collection or pretreatment storage facilities not under control of the purveyor but primarily used in connection with the system. RCW 70.119.020(8).

² "Group A water system" means a system with fifteen or more service connections, regardless of the number of people; or a system serving an average of twenty-five or more people per day for sixty or more days within a calendar year, regardless of the number of service connections. Group A water system does not include a system serving fewer than fifteen single-family residences, regardless of the number of people. RCW 70.119.020(6).

Sherry Byers-Eddy, the Respondent, was a certified water works operator.³ The Respondent was the Water Distribution Manager 3, Certification Number 009678, for the Water System and was responsible for its daily operational activities.⁴ In addition, under the Program regulations of Group A water systems, chapter 246-290 WAC, the Respondent was the purveyor for the Water System.⁵

1.2 On June 6, 2007, the Respondent, as the Water System's purveyor, collected two routine water samples from the Water System. The Respondent took one sample from the wastewater treatment building's restroom and the other sample from well SO4.⁶ The Respondent sent the water samples to Cascade Analytical, a business that performs water bacteriological analysis.

1.3 On Friday, June 8, 2007, at approximately 5:00 p.m., Cascade Analytical faxed a copy of the June 6, 2007 water sample results to the Department of Health's Eastern Regional Office. Cascade Analytical test results reported that the water sample from the wastewater treatment building tested positive for *E. coli* bacteria.⁷

³ "Certified operator" means a person who has met the applicable requirements of this chapter and holds a valid certificate. WAC 246-292-010. See also RCW 70.119.020(2).

⁴ Owners shall have at least one certified operator in responsible charge of the daily operational activities of their system as follows: . . . (c) A water distribution manager (WDM) shall be responsible for the operation of a Group A water system. WAC 246-292-050(1).

⁵ "Purveyor" means an agency, subdivision of the state, municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or other entity owning or operating a public water system. Purveyor also means the authorized agents of these entities. WAC 246-290-010.

⁶ There are two wells in this Water System (identified as SO3 and SO4).

⁷ "Total coliform, fecal coliform and *E. coli* are all indicators of drinking water quality....**Total coliform bacteria** are commonly found in the environment...and are generally harmless....**Fecal coliform bacteria** are a sub-group of the total coliform group. They appear in great quantities in the intestines and feces of people and animals....*E. coli* is a sub-group of the fecal coliform group....The present of *E. coli* in a drinking water sample almost always indicates recent fecal contamination – meaning that there is a greater risk that pathogens are present." Department's Exhibit 8, p.10-11.

Rhonda Leatherwood, an environmental technician for the Program, and Dan Mathias, a regional engineer for the Program, immediately contacted the Respondent by phone to discuss the positive *E. coli* water sample and to discuss what follow-up action should the Respondent should take.

1.4 During the telephone call on June 8, 2007 (Friday), the Respondent informed Mr. Mathias and Ms. Underwood that employees would be arriving for their next shift at 6:00 a.m. the next day, Saturday, June 9, 2007. Mr. Mathias told the Respondent that this was a serious situation and directed the Respondent to post public notices before 6:00 a.m., Saturday, June 9, 2007, in conspicuous places stating that the Water System is contaminated and instructing employees not to drink the water from the drinking fountains. Ms. Leatherwood informed the Respondent that the public notice was a precautionary boil water advisory.⁸ Mr. Mathias suggested that the Respondent cover all drinking fountains. He directed the Respondent to contact Cascade Analytical to see if she could deliver repeat samples to the lab on Saturday. If the lab was not open on Saturday, he directed the Respondent to collect five repeat samples on

⁸ During the hearing, the Presiding Officer made determinations regarding credibility. RCW 34.05.461(3). The Presiding Officer finds that on June 8, 2007, Rhonda Leatherwood and Dan Mathias told the Respondent that she needed to issue a "precautionary boil water advisory." Rhonda Leatherwood's demeanor included self-confidence when she stated that she was "positive" that she told the Respondent that the term "precautionary boil water advisory" was used to describe to the Respondent the situation, and that she needed to notify the Washington Beef, LLC, employees. In addition to her demeanor, Rhonda Leatherwood has participated in numerous telephone calls in similar situations and she regularly used the terms "precautionary boil water advisory." Further, and that evening after the conference call on June 8, 2007, Ms. Leatherwood prepared and emailed a Health Advisory Summary confirming that this was a Precautionary Bottle (or Boil) Water Advisory situation. Ms. Leatherwood's conduct here supported her testimony. On June 8, 2007, the testimony of both Mr. Mathias and Ms. Leatherwood were consistent with each other, regarding what they told the Respondent and the Respondent's responses.

Monday, June 11, 2007, and to disinfect the well after she had collected the repeat samples.⁹

1.5 During the telephone call on June 8, 2007 (Friday), the Respondent expressed reluctance and was argumentative about posting the notices as directed by Mr. Mathias. The Respondent told Mr. Mathias and Ms. Leatherwood that the positive *E. coli* water sample came from a water line serving only her wastewater treatment building. Mr. Mathias told the Respondent that the Program could not be certain that the contamination was not in the entire distribution system, and therefore all the employees needed to know about the contamination.¹⁰ Mr. Mathias and Ms. Leatherwood repeatedly had to emphasize to the Respondent that she was to post the notices anywhere people had access to water. By the end of the telephone

⁹ During the telephone call on June 8, 2007 (Friday), neither Mr. Mathias nor Ms. Leatherwood stated to the Respondent that this was a “Tier 1 situation.” When talking with operators, the Program does not use the phrase “Tier 1,” because it is a technical term. The term originated from the federal rules that classify public notifications into three tiers (Tier 1, Tier 2 and Tier 3), to take into account the seriousness of the drinking water violations and any potential adverse health effects. Tier 1 is the most serious level of potential health hazard to the public.

¹⁰ During the hearing, the Presiding Officer made determinations regarding credibility. RCW 34.05.461(3). The Presiding Officer finds that the Respondent did not state to Rhonda Leatherwood and Dan Mathias that on June 8, 2007, that the water line to the wastewater treatment building had a “backflow device” and that the water line was “isolated” from the main wells. The testimony of Dan Mathias and Rhonda Leatherwood was credible. Although Dan Mathias questioned his recall, because the conversation was 15 months prior, his demeanor included candor and his voice rose slightly in tone to express with certainty that Respondent did not state that the water line to the wastewater treatment building was an “isolated” line. Mr. Mathias was also credible when he stated that the Respondent did not mention that there was a backflow device. During the telephone call on June 8, 2008 (Friday), the Respondent testified that she informed the Program that there was also a backflow device to prevent contamination from going back into the distribution system. This testimony is questionable, because Mr. Mathias testified that he has no recollection of her mentioning the existence of a backflow device. Nevertheless, even if Mr. Mathias had been aware of a backflow device, he testified that he still would have required the Respondent to post the precautionary notice for all drinking water users, because he did not know with certainty the source of the contamination. The *E. coli* contamination could have come from another part of the water system, whether or not the backflow device worked. In fact, during the hearing, Respondent testified that she was not certain that the backflow device was properly working on June 6, 2007, when she took the sample. She also testified that she did not know for sure (100% certain) where the source of the *E. coli* bacteria came from.

conversation on June 8, 2007, Mr. Mathias and Ms. Leatherwood were both convinced that the Respondent understood their directions and that she would follow them.

Moreover, the Respondent understood that she was to notify all Washington Beef, LLC employees before 6:00 a.m. on June 9, 2007.

1.6 After the telephone call on June 8, 2007 (Friday), Mr. Mathias faxed disinfection instructions to the Respondent. Mr. Mathias also emailed Mr. Scott Torpie, the Program's Regional Manager, to report that he directed the Respondent to post notices in conspicuous places before 6:00 a.m., the following morning, and to instruct employees not to drink the water.¹¹

1.7 On Saturday morning, June 9, 2007, at 5:00 a.m., the Respondent participated in a meeting with an executive management team at the Washington Beef Plant. The purpose of the meeting was to discuss the positive *E. coli* water sample. The executive management team decided that it was necessary to post the precautionary notices only in the wastewater treatment building where the positive sample came from, and that it was not necessary to post the notices throughout the plant.¹²

¹¹ On Monday, June 18, 2007, the Respondent confirmed by email to Scott Torpie, Eastern Regional Office Manager, that she had discussed the *E. coli* sample with Dan Mathias and Rhonda Leatherwood on June 8, 2007, and she confirmed that the summary email Dan Mathias had put together on June 8, 2007 was accurate. The Respondent confirmed that Dan Mathias had given instruction to her to post the important health information to the plant's employees.

¹² The executive management team consisted of Kevin Lawson, Jessie Castanada [spelling], Bruce Gadley, and one or two other individuals who came in and out of the room. The Respondent testified that this was a group decision and the other members were not operators of a public water system.

Respondent's June 9, 2007 Public Notice.

1.8 At 6:00 a.m. on June 9, 2007, the Respondent followed the executive management team's decision. She posted public notices only in the wastewater treatment building, and at the sink where she took the water sample. The Respondent did not post the notice in the Washington Beef, LLC, plant where the employees would be working. By posting notice only in the wastewater treatment building on June 9, 2007, the Respondent made a conscience decision not to comply with the Program's directive; that is, the Respondent intentionally ignored the Program's instructions. Further, by not complying with the Program's directives, the Respondent, by her conduct, endangered the public health.

1.9 On Monday, June 11, 2007, the Respondent emailed copies of the notices she posted (hereinafter referred to as the Respondent's June 9, 2007 Public Notice) to Mark Steward, who is the Department of Health's Eastern Regional Coliform Program Manager. In her June 11, 2007 email to Mr. Steward, the Respondent stated "[h]ere are the notices that I have posted for the employees." *Department Exhibit No. 5* (Emphasis added). She attached two notices, one in English and one in Spanish. The Respondent's June 9, 2007 Public Notice was titled: "Drinking Water Warning." The first three sentences stated:

The Washington Beef, LLC Water System, ID 93061J, located in Yakima County is contaminated with *E. coli* bacteria.

E. coli bacteria was detected in the water supply on June 06, 2007. These bacteria can make you sick and are a

particular concern for people with weakened immune systems.

Department Exhibit No. 5.

1.10 This June 9, 2007 Public Notice also included the following two paragraphs:

Fecal coliforms and *E. coli* are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, some of the elderly, and people with severely compromised immune systems.

Please share this information with all the other people who drink this water, especially those who may not have received this notice directly (for example, people in apartments, nursing homes, schools, and businesses). You can do this by posting this notice in a public place or distributing copies by hand or mail.

Department Exhibit No. 5. The above two paragraphs are mandatory language (the Mandatory Language) and the Department rules require this language.¹³

1.11 Mr. Steward relied upon the representations made by the Respondent to him in her June 11, 2007 email. In this June 11, 2007 email from the Respondent, the Respondent represented to Mr. Steward that on June 9, 2007, she had notified all the Washington Beef, LLC, employees not to drink the water until further instructions. Thereafter, Mr. Steward communicated the Respondent's representations to individuals in the Department. In an email dated June 11, 2007, Mr. Steward reported to a departmental internal health advisory distribution list that the Water System had notified

¹³ WAC 246-290-72012; 40 CFR 141.205 (d)(1) referencing Appendix B; and 40 CFR 141.205 (d)(3).

their employees, in Spanish and in English, not to drink the water until further instructions.¹⁴

1.12 On June 11, 2007, Mr. Steward instructed the Respondent to collect four repeat water samples from the Water System.¹⁵ On June 11, 2007, the Respondent collected four repeat water samples from the Water System, and submitted them to Cascade Analytical for analysis.

1.13 On Tuesday, June 12, 2007, Cascade Analytical notified the Program of the test results, which reported that one of the repeat water samples stated “Unsatisfactory, Coliforms present.” It also stated “*E. coli* absent,” The water sample with the coliforms was taken from well SO3.¹⁶ After receiving this report, Mr. Steward determined that this was an Acute Maximum Contaminant Level (MCL) violation, which is a situation involving serious potential to public health and requiring high public health action. An MCL violation requires the purveyor to follow prescribed steps to ensure that

¹⁴ Later, Mr. Steward began to be concerned about the accuracy of the Respondent's email when on June 13, 2007, Mr. Steward, Ms. Leatherwood and Mike Wilson had a telephone conversation with Dr. Nelson from the United States Department of Agriculture (USDA), who has regulatory jurisdiction over the Washington beef plant. Mike Wilson is the Regional Engineer for Yakima County, Environmental Health, Division of Drinking Water, Department of Health. During the conversation, Dr. Nelson informed the Department that there were USDA employees who had no idea that the Respondent had issued a precautionary boil/bottled water advisory on Friday, June 8, 2007. The USDA employees at Washington Beef Plant were unaware of any problem with the water system until Monday, June 11, 2007.

¹⁵ Although Mr. Mathias has previously instructed the Respondent to take two sets of five water samples, Mr. Steward informed the Respondent that it was only necessary that she collect four water samples from the Water System.

¹⁶ The Respondent admitted during her testimony that since well SO3 was found to be positive for coliforms on June 12, 2007, then her professional judgment was wrong. That is, she erred when she believed on June 8, 2007 that the source of the contamination came only from the isolated line to the wastewater building and that she only had to place public notices in the wastewater treatment building on June 9, 2007.

the purveyor notifies potential water consumers of any risks and recommends precautionary action, including a notice not to drink the water.

Program's June 12, 2007 Public Notice.

1.14 On Tuesday, June 12, 2007, Mr. Steward mailed and faxed a cover letter and a packet of materials relating to the Acute MCL violation to the Respondent. This packet included, among other documents, a Drinking Water Warning, which was to be used to notify users to boil the water or use bottled water. In the first sentence of the cover letter, Mr. Steward stated: “[t]he presence of *E. coli* bacteria has been confirmed in your water supply, resulting in an Acute MCL violation for **June** (WAC 246-290-310).” Department Exhibit No. 8 (No emphasis added).¹⁷ In his cover letter, Mr. Steward directed the Respondent that she is required, among other requirements, to “[n]otify users within *24 hours* to **boil water or use bottle water**. Please use the enclosed “Drinking Water Warning” as a model for your notification form.” Department Exhibit No. 8 (No emphasis added). He also told her of the requirement to send a copy of her notice to the Program within ten days of its distribution.

1.15 In this packet of material sent on June 12, 2007 (Tuesday), Mr. Steward provided a copy of a notice titled “Drinking Water Warning” (hereinafter referred to as the Program's June 12, 2007 Public Notice). The first three sentences of the Program's June 12, 2007 Public Notice stated:

¹⁷ This finding is based upon the Program's experience, technical competency and specialized knowledge made by Mark Steward, Water Quality Specialist for the Drinking Water Program, that the report from Cascade Analysis confirmed the presence of *E. coli* bacteria in the Water System. RCW 34.05.461(5). See also, Department's Exhibit No. 8, p. 11: (“If any of the repeat samples detect coliform bacteria, the initial findings are considered confirmed.”)

The Washington Beef, LLC Water System, ID 93061J, located in Yakima County is contaminated with *E. coli* bacteria.

E. coli bacteria was detected in the water supply on __June 12, 2007__. These bacteria can make you sick and are a particular concern for people with weakened immune systems.

Department Exhibit No 8. The Program's June 12, 2007 Public Notice, which was sent to the Respondent for her distribution, also contained the Mandatory Language as did the Respondent's June 9, 2007 Public Notice.

Respondent's June 13, 2007 Public Notice.

1.16 On June 13, 2007, the Respondent did not post the Program's June 12, 2007 Public Notice, instead the Respondent posted a changed version (hereinafter referred to the Respondent's June 13, 2007 Public Notice). The Respondent posted her June 13, 2007 Public Notice throughout the facility, and she had all the drinking water fountains covered. Mr. Steward did not see the Respondent's June 13, 2007 Public Notice, and was not aware of the changes she made until the Respondent sent it to him on June 20, 2007.¹⁸

¹⁸ The Respondent posted the Respondent's June 13, 2007 Public Notice, because she contended that the changes were made to conform to the Department's News Release, which was issued on June 13, 2007. On Wednesday, June 13, 2007, the Department along with Washington Beef, LLC, issued a News Release informing the public that there was a "Boil-water advisory issued for beef-processing plant in Yakima County." The News Release reported that the "advisory was issued after lab tests confirmed coliform bacteria in the plant's water system." The news release also stated that "[a] precautionary boil water advisory was issued Friday when an initial test showed the presence of *E. coli* bacteria in the water; *E. coli* was not detected in follow-up samples." *Respondent Exhibit No. 31.*

1.17 The first three sentences in the Respondent's June 13, 2007 Public Notice stated:

The Washington Beef, LLC Water System, ID 93061J, located in Yakima County is contaminated with coliform bacteria.

Coliform bacteria was confirmed in the water supply on June 12, 2007. These bacteria can make you sick and are a particular concern for people with weakened immune systems.

Department Exhibit No. 16 (Emphasis added).

1.18 The Respondent's June 13, 2007 Public Notice stated “[c]oliform bacteria was confirmed in the water supply on 6/12/07.” In the next sentence, it stated that “[t]hese bacteria can make you sick.” These two statements considered together in the Respondent June 13, 2007 Public Notice are inaccurate and not true. Coliform bacteria are not known to make people sick; they are just an indicator species of bacteria that indicates that there could be a pathway of contamination. The general public, however, is aware of *E. coli* bacteria and its harmfulness. By only stating that coliform bacteria was confirmed in the water supply, the Respondent’s June 13, 2007 Public Notice defeats the purpose of the notice that the public must not drink the water.

1.19 The Respondent's June 13, 2007 Public Notice also included the following paragraph:

Fecal coliforms and *E. coli* are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, some of the elderly,

and people with severely compromised immune systems.
The symptoms above are not caused only by organisms in drinking water. If you experience any of these symptoms and they persist, you may want to seek medical advice. People at increased risk should seek advice about drinking water from their health care provider.

Department Exhibit No. 16 (No emphasis added). The Mandatory Language consisted of the first three sentences of the immediate paragraph quoted. In addition, the following sentence of the Mandatory Language was also included in a separate part of the Respondent's June 13, 2007 Public Notice:

Please share this information with all the other people who drink this water, especially those who may not have received this notice directly.

Department Exhibit No. 16.

1.20 The Respondent's June 13, 2007 Public Notice failed to state that "*E coli* was confirmed in the water system" and that the "water system was contaminated with *E coli*." By not referencing "*E. coli* bacteria" and by only stating that "coliform bacteria" was found, the Respondent made the Respondent's June 13, 2007 Public Notice internally inconsistent. When it stated that "coliform bacteria," which is not known to make people sick, was confirmed, the Respondent's June 13, 2007 Public Notice created the effect that the Mandatory Language, which described the harmfulness of *E. coli* bacteria, did not apply to this situation. The Respondent's June 13, 2007 Public Notice was changed in a way to defeat the purpose of the notice and contained language which nullified its purpose.

1.21 A week later, on Thursday, June 21, 2007, and after Mr. Steward had received a copy of the Respondent's June 13, 2007 Public Notice, Mr. Steward informed the Respondent verbally, and in writing, that he could not accept her June 13, 2007 Public Notice, because of the changes she made. The Respondent changed the Program's June 12, 2007 Public Notice in a way that defeated the purpose of the notice. That is, the Respondent changed the Program's June 12, 2007 Public Notice so that the Mandatory Language did not seem to apply in this situation. Mr. Steward informed her that the changes resulted in a violation of the public notification requirements. Mr. Steward provided another copy of the Program's June 12, 2007 Public Notice and directed her to make it clear in her next notice that this was a revised version.

Respondent's June 27, 2007 Revised Public Notice.

1.22 On June 27, 2007 (at 3:58 p.m.), the Respondent emailed Mr. Steward and attached a copy of a revised public notice. The Respondent indicated that she wanted to obtain his approval before “we” officially issue it. Department Exhibit No. 21. The Respondent's June 27, 2007 Revised Public Notice was titled “Clarified Drinking Water Warning Posting.” The first three sentences in the Respondent's June 27, 2007 Revised Public Notice stated:

This posting is to clarify and update the information about the acute coliform MLC violation that was issued on June 12, 2007 by the DOH to the Washington Beef, LLC Water System, ID 93061 J, located in Yakima County.

Coliform bacteria was confirmed in the water supply on 6/12/07. An initial tested [sic] showed the presence of *E. coli* in the water but was **not** detected in the follow-up samples.

Department Exhibit No. 21 (No emphasis added). The Respondent's June 27, 2007

Revised Public Notice also included a paragraph incorporating the mandatory language.

E. coli are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, some of the elderly, and people with severely compromised immune systems. **The symptoms above are not caused only by organisms in drinking water.** If you experience any of these symptoms and they persist, you may want to seek medical advice. People at increased risk should seek advice about drinking water from their health care provider.

Department Exhibit No. 21 (No emphasis added). Again, the first three sentences of this paragraph consist of the Mandatory Language.

1.23 After reviewing the Respondent's June 27, 2007 Revised Public Notice, Mr. Steward rejected it for the same reasons he rejected the Respondent's June 13, 2007 Public Notice. On June 27, 2007 (at 5:30 pm), Mr. Steward sent a reply email to the Respondent, in which he commented about the Respondent's June 27, 2007, Revised Public Notice:

The first sentence of the Drinking Water Warning should read: E coli was confirmed in the water supply on 6/12/07. **Not:** Coliform bacteria was confirmed in the water supply on 6/12/07. We consider a drinking water system to be contaminated with *E. coli* if they have an *E. coli* present sample in either their routine samples or repeat samples (even just one sample; if it is confirmed with another Total Coliform present sample – doesn't have to be *E. coli* present). The PN [public notice] that was sent to you on 6/12/07 was intentionally worded this way and shouldn't have been changed without our permission.

Department Exhibit No. 21 (No emphasis added).

1.24 By failing to notify the public in her June 13, 2007 Public Notice, and in the June 27, 2007 Revised Public Notice, the Respondent intentionally ignored the Program's directive to notify the public that *E. coli* bacteria had been confirmed in the Water System. The Respondent formatted the notice to the public in a way to defeat its purpose and she changed the language in the notice to nullify its purpose.¹⁹ By this conduct, the Respondent endangered the public health.

Respondent's June 29, 2007 Revised Public Notice.

1.25 Then between June 27, 2007 and June 28, 2007, Rick Stott, Vice President of Regulatory Affairs of Washington Beef, LLC, and Scott Torpie, Program's Regional Manager, were becoming involved in the correspondence involving this matter. On June 29, 2007, and after Rick Stott sent another suggestion, Scott Torpie provided another Public Notice in light of the circumstances (hereinafter referred to as Program's June 29, 2007 Revised Public Notice). The Program's June 29, 2007 Revised Public Notice was titled: "Public Notice About Your Drinking Water." The first four sentences of this notice stated:

The Washington Beef, LLC Water System, ID 93061J, located in Yakima County was contaminated with *E. coli* bacteria.

The Washington Beef LLC showed evidence of *E. coli* bacteria contamination in a sample result reported on June 8, 2007. A sample result reported on June 12 confirmed bacteriological contamination. *E. coli* bacteria can make you

¹⁹ The Respondent testified that on June 13, 2008, "we" changed the public notice to insert the term "coliform" for the term "*E. coli*."

sick and are a particular concern for people with weakened immune systems.

Department Exhibit No. 22. On July 2, 2007, Mr. Torpie emailed Rick Stott and stated that he may add to the notice information about details concerning steps that Washington Beef, LLC, took between June 8 and June 15, 2007 so long as that information does not diminish or contradict the message concerning contamination of the drinking water system with *E. coli* bacteria.

1.26 On July 2, 2007, the Respondent issued at Washington Beef, LLC, a follow-up public notice, which was titled: “Drinking Water Warning Follow Up” and followed with the statement:

The Washington Beef, LLC Water System, ID 93061J, located in Yakima County was contaminated with *E. coli* bacteria.

The first paragraph (three sentences) of this July 2, 2007 Public Notice stated:

The Washington Beef LLC was contaminated with *E. coli* bacteria. Water sampling results reported on June 8 and June 12, 2007 confirmed bacteriological contamination. *E. coli* bacteria can make you sick and are a particular concern for people with weakened immune systems.

Department Exhibit No. 25. The notice also included a brief description of the action Washington Beef, LLC, took to correct the problem.²⁰

²⁰ On June 13, 2007, after Washington Beef, LLC, had received the positive coliform test result on June 12, 2007, it did temporary close the plant, held an employee meeting to inform employees of the problem, provided bottled drinking water, and covered the drinking fountains. Further, on June 15, 2007, the Program had lifted the boil/bottled water advisory, because 22 coliform samples were taken in two days and all were satisfactory. A Special Purpose Investigation was conducted on June 13, 2007, and the investigation concluded that well SO3 was not adequately protected from contamination – the problem was where the base of the well meets the floor of the well house. Washington Beef, LLC, disconnected this well.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health has jurisdiction over this proceeding.

Chapter 70.119 RCW (Public water supply systems – operators), Chapter 246-292 WAC (Water Works Operator Certification), Chapter 246-290 WAC (Group A Public Water Supplies) and RCW 43.70.115 (Licenses - Denial, suspension, revocation, modification).

2.2 Sherry Byers-Eddy, Respondent, is certified as a Water Distribution Manager 3 under chapter 70.119 RCW and chapter 246-292 WAC. Her Certification Number is 009678. The Respondent is a “certified operator” as defined in WAC 246-292-010. As the certified water works operator for a water system, she must abide by applicable state and federal drinking water laws and regulations.

WAC 246-292-031.

2.3 The Water System at Washington Beef, LLC, is a public water system as defined in RCW 70.119.020(8). The Water System is also classified as a Group A water system. RCW 70.119.020(6) and WAC 246-290-020.

2.4 In this case, the Presiding Officer concludes that the Program has the burden of proof by clear and convincing evidence. *See Prehearing Order No. 4, Order on Motion for Standard of Proof.*

2.5 The rules provide for grounds for suspension of Respondent's certification to practice as a water works operator.

Revocation and suspension.

(1) The department may suspend an operator's certificate for up to a year or revoke an operator's certificate for up to five years if the operator:

- (a) Obtains a certificate by fraud or deceit;
- (b) Performs an act of gross negligence in the operation of a purification plant or a distribution system; or
- (c) Intentionally violates the requirements of this chapter or department statutes, rules or orders.

WAC 246-292-100(1) (Emphasis added). Under RCW 70.119.110, the Program can revoke a water works operator's certification. Here, the Program issued a Notice of Intention for Six (6) Months contending that the Respondent failed to follow the Program's instructions to place public notices throughout Washington Beef, LLC, and failed to provide proper notice to the employees and public.

2.6 The purpose of chapter 246-290 WAC is to define basic regulatory requirements and to protect the health of consumers using public drinking water supplies. WAC 246-290-001(1). The Respondent is the purveyor and her duties include, among others, monitoring the drinking water. WAC 246-290-001(3).

2.7 The Department of Health Drinking Water Program (Program) adopted by reference the rules and regulations of the federal Safe Drinking Water Act.

WAC 246-290-001, WAC 246-290-020, and WAC 246-290-025. Under the Safe Drinking Water Act, the Environmental Protection Agency promulgated the National Primary Drinking Water Regulations (NPDWR) to provide for increased protection against microbial pathogens in public water systems that use ground water sources.

See generally, 40 CFR 141.1 through 40 CFR 141.723.

I. Whether the Respondent's conduct as alleged constitutes a violation under WAC 246-290-71001(2).

2.8 In the state of Washington, when there are serious situations involving the potential for adverse effects on human health, purveyors of public water systems in Washington State are required to comply with the public notification requirements in National Primary Drinking Water Regulations (again the NPDWR). The Washington Administrative code, WAC 246-290-71001, which addresses public notification, states:

(1) The purveyor shall notify the water system users and the owner or operator of any consecutive water system served in accordance with 40 CFR 141.201 through 208. Notice is to be provided when the system violates a National Primary Drinking Water Regulation and when any of the situations listed in Table 1 of 40 CFR 141.201 occur, except for (3)(ii). Public notifications for violations and other situations are categorized into the following Tiers:

(a) Tier 1 as described in Table 1 of 40 CFR 141.202(a);

(b) Tier 2 as described in Table 1 of 40 CFR 141.203(a);
or

(c) Tier 3 as described in Table 1 of 40 CFR 141.204(a).

WAC 246-290-71001 (1).²¹ As described, this federal rule divides public notifications into three tiers, to take into account the seriousness of the violation and any potential adverse health effects.

²¹ Under the NPDWR, 40 CFR 201 is titled general public notification requirements. The rule, 40 CFR 202, is titled Tier 1 Public Notice—Form, manner and frequency of notice.

2.9 The federal rules describe categories and situations requiring Tier 1 Public

Notice, such as a:

Violation of the MCL for total coliforms when fecal coliform or *E. coli* are present in the water distribution system, or when the water distribution system fails to test for fecal coliforms or *E. coli* when any repeat sample tests positive for coliform.

40 CFR 141.202(a), Table 1 (1) (citations omitted). Another category of a Tier 1 public notice situation would include:

Other violations or situations with significant potential to have serious adverse effects on human health as a result of short-term exposure, as determined by the primacy agency either in its regulations or on a case-by-case basis.

40 CFR 141.202(a), Table 1 (9) (emphasis added). Since Washington Beef Water System had a water sample with a positive E coli result, the Program, as the primary agency, correctly determined that this was a situation “with significant potential to have serious adverse effects on human health as a result of short-term exposure” and that the situation warranted the issuance of a precautionary health advisory.²²

2.10 Further, under WAC 246-290-71001(2), if a purveyor learns that there is a situation with significant potential to have serious adverse effects on human health, the purveyor shall consult with the Program as soon as possible. The purveyor shall comply with any additional public notification requirements established as a result of the consultation.

²² During his testimony, Mr. Mathias referred to his reliance on the federal rule citing “CFR 141.202”. This action was not an enforcement of a departmental policy.

WAC 246-290-71001 Public notification.

...

(2) The purveyor shall initiate consultation with the department as soon as possible, but no later than twenty-four hours after they learn their system has a Tier 1 violation or situation in order to determine if additional public notice is required. The purveyor shall comply with any additional public notification requirements established as a result of the consultation.

WAC 246-290-71001(2) (Emphasis added).²³

2.11 Based upon the Findings of Facts, and in particular, Paragraphs 1.1 through 1.8, the Program proved by clear and convincing evidence that the Respondent violated WAC 246-290-71001(2). Further, as set forth in Paragraph 1.8, the Program proved by clear and convincing evidence that she intentionally violated WAC 246-290-71001(2).

2.12 The Washington Administrative Code, WAC 246-292-010, defines gross negligence as follows:

"Gross negligence" means an act or omission performed or not performed in reckless disregard of a legal duty, or without even slight care. In considering whether an act or omission constitutes gross negligence, the department shall consider all relevant factors including, but not limited to:

- (1) The standard of care commonly exercised by operators;
- (2) Whether the legal duty was known or should have been known to the alleged violator; and
- (3) The degree to which the alleged violation endangered public health.

²³ The Program has the authority and the discretion to determine if Tier 1 public notification is required in the absence of a Tier 1 violation. 40 CFR 141.201(a), Table 1 (3)(v); 40 CFR 141.202 (a), Table 1(9).

2.13 In this case, there are standards of care exercised by water works operators. The Respondent is responsible for operating and maintaining the Water System in compliance with all applicable rules and regulations. The Respondent is required to “operate the public water system with due care and diligence for protecting the public health and shall abide by applicable state and federal drinking water laws and regulation.” WAC 246-292-031(1). Further, the Respondent is responsible for providing public notices to all water users for violations and “other situations.” 40 CFR 141.201(a), Table 1(3)(v). The Respondent is required to follow the Program’s instructions in situations where the Program has authority to exercise its discretion on a case-by-case basis. These are situations where the interest of public health and safety, require water systems operators to follow public notification requirements. WAC 246-290-71001(2). These legal duties should have been known to the Respondent. Further, the Respondent, through her conduct, committed a serious violation by failing to notify the employees at Washington Beef, LLC, on the morning of June 9, 2007. This conduct showed a reckless disregard for her duties as a water works operator, and under WAC 246-292-031(1) the Respondent was grossly negligent.

2.14 The Respondent argues that the Program’s assertions are without merit. The Respondent argued that she did not need to comply with the Program's instructions to post public notices throughout Washington Beef, LLC, on the morning of June 9, 2007, because the Program did not inform her that this was a Tier 1 notice situation. She cites no law for this proposition. The law does not require the Program to state to her that this was a “Tier 1” notice situation. She is required to comply with any

additional public notification requirements established as a result of her consultation with the Program. WAC 246-290-71001(2). The Respondent also argued that she did not need to inform the employees about the test results until she received a repeat sample to confirm the results. This argument is also without merit. The lab analysis showed that there was *E. coli* in the Water System, and the Respondent had an obligation to follow the Program's instructions to inform the employees of the situation before they came to work the next morning, even though she had not obtained test results from repeat water samples.

2.15 The NPDWR do allow limited distribution of a public notice.

If a public water system has a violation in a portion of the distribution system that is physically or hydraulically isolated from other parts of the distribution system, the primacy agency may allow the system to limit distribution of the public notice to only persons served by that portion of the system which is out of compliance. Permission by the primacy agency for limiting distribution of the notice must be granted in writing.

40 CFR 141.201(c)(2). Here, the Respondent had a clear directive to post public notices in conspicuous place for all the employees. The Respondent did not have any Program permission, written or orally, to limit the distribution of her notices.

II. Whether the Respondent's conduct as alleged constitute a violation under WAC 246-290-310(2)(c) and WAC 246-290-71004(1).

2.16 On June 12, 2007, the Program (Mr. Steward) informed the Respondent that the presence of *E. coli* bacteria has been confirmed in the water supply at Washington Beef, LLC. The report of the water sample from Cascade Analysis

triggered an acute Maximum Contaminant Level (MCL) violation. The Program's rules define an Acute MCL situation and the public notification requirements:

WAC 246-290-310 Maximum contaminant levels (MCLs). . .

(2) Bacteriological.

. . .

(c) Acute MCL. An acute MCL for coliform bacteria occurs when there is:

. . .

(iii) Coliform presence in any repeat samples collected as a follow-up to a sample with fecal coliform or *E. coli* presence.

Note: For the purposes of the public notification requirements in Part 7, Subpart A of this chapter, an acute MCL is a violation that requires Tier 1 public notification.

WAC 246-290-310(2)(c)(iii) (Emphasis added). Subpart A of Part 7 of

WAC 246-290 addresses public notification and consumer information.

WAC 246-290-71001 through WAC 246-290-71007.

2.17 When the purveyor notifies the public about the water system under an Acute MCL situation, the rules dictate that the purveyor include mandatory language in the public notification.

WAC 246-290-71004 Public notification mandatory language.

(1) Public notice required under WAC 246-290-71001(1) shall contain any specific health effects language set forth in WAC 246-290-72012 in accordance with 40 CFR 141.205 (d)(1) and other standard language in accordance with 40 CFR 141.205 (d)(2) and (3)

WAC 246-290-71004(1). Under WAC 246-290-72012, the following mandatory language was required in the public notice:

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Fecal coliforms and *E. coli* are bacteria whose presence indicates that the water may be contaminated with human or animal wastes. Microbes in these wastes can cause short-term effects, such as diarrhea, cramps, nausea, headaches, or other symptoms. They may pose a special health risk for infants, young children, some of the elderly, and people with severely compromised immune systems.

WAC 246-290-72012. (This is the same mandatory language set forth in 40 CFR 141.205 (d)(1) referencing Appendix B.) In addition, the following standard language is required under 40 CFR 141.205 (d)(3):

Please share this information with all the other people who drink this water, especially those who may not have received this notice directly (for example, people in apartments, nursing homes, schools, and businesses). You can do this by posting this notice in a public place or distributing copies by hand or mail.

2.18 In setting forth the specific language to be included in the public notice, the NPDRW requires that the notice must not be formatted in a way that defeats the purpose of the notice and that the notice must not contain language which nullifies the purpose of the notice.

§ 141.205 Content of the public notice.

...

(c) How is the public notice to be presented?

(1) Each public notice required by this section:

(i) Must be displayed in a conspicuous way when printed or posted;

(ii) Must not contain overly technical language or very small print;

(iii) Must not be formatted in a way that defeats the purpose of the notice;

(iv) Must not contain language which nullifies the purpose of the notice.

40 CFR 141.205(c)(i) through (iv).

2.19 Based upon the above Findings of Facts, in particular Paragraphs 1.1 through 1.3 and Paragraphs 1.9 through 1.26, the Program proved by clear and convincing evidence that the Respondent violated the public notification requirements under WAC 246-290-310(2)(c)(iii) and WAC 246-290-71004(1). Further, as set forth in the above Findings of Fact, in particular Paragraphs 1.13 through 1.24, the Program proved by clear and convincing evidence that she intentionally violated the public notification requirements under WAC 246-290-310(2)(c)(iii) and WAC 246-290-71004(1).

2.20 The Respondent argued that she changed the Program's June 12, 2007 Public Notice to conform with the News Release issued by the Department of Health in conjunction with Washington Beef, LLC. This argument fails. There is no requirement that an Acute MCL violation notices conform to news publications.

2.21 As stated above in Paragraph 2.12, the Washington Administrative Code, WAC 246-292-010, defines gross negligence. And as stated in Paragraph 2.12, there is a standard of care for the Respondent requiring her to comply with rules and regulations and, in particular here, with public notification requirements under WAC 246-290-310(2)(c)(iii) and WAC 246-290-71004(1). These legal duties should have been known to the Respondent. Further, the Respondent, through her conduct, committed a serious violation by changing the Program's June 12, 2007 Public Notice in such a way as to nullify the mandatory health language and to defeat the purpose of the notice. Even after Mr. Steward informed the Respondent that he could not accept the

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Office of Drinking Water
Department of Health
PO Box 47822
Olympia, WA 98504-7822

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

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