

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

In the Matter of:

HILLVIEW WATER ASSOCIATION,
YAKIMA COUNTY,
Identification No. 33365T,

Respondent.

Master Case No. M2009-569

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

APPEARANCES:

Respondent, Hillview Water Association, by
Bruce J. Forenpohar, Mandatory Certified Waterworks Operator, pro se

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

PRESIDING OFFICER: John F. Kuntz, Review Judge

A hearing was held in this matter on November 16, 2009, regarding the allegations that the Hillview Water Association (Respondent) violated state and federal laws or rules regulating public water systems.

ISSUES

- A. Did the Respondent violate a law or rule regulating a public water system under RCW 70.119A.040(1)(a)?

- B. If it did violate a law or rule regulating a public water system under RCW 70.119A.040(1)(a), should the Respondent be assessed a civil penalty?

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SUMMARY OF THE PROCEEDINGS

At the hearing, the Program presented the testimony of Richard Sarver and Denise Clifford. Bruce J. Forenpohar testified on behalf of the Respondent.

The Presiding Officer admitted the following exhibits:

- Exhibit P-1: July 10, 2002 letter to Bruce Forenpohar regarding licensure as a water distribution specialist.
- Exhibit P-2: June 19, 2003 letter to Hillview Water Association acknowledging Bruce Forenpohar as the certified operator for the water system.
- Exhibit P-3: July 22, 2005 Coliform Monitor Violation for June 2005.
- Exhibit P-4: September 8, 2005 non-acute coliform maximum contaminant level violation for August 2005.
- Exhibit P-5: October 28, 2005 major coliform repeat violation for September 2005.
- Exhibit P-6: February 23, 2006 coliform monitoring violation for January 2006.
- Exhibit P-7: March 22, 2006 coliform monitoring violation for February 2006.
- Exhibit P-8: August 22, 2006 coliform monitoring violation for July 2006.
- Exhibit P-9: August 22, 2006 consumer confidence report violation for 2005.
- Exhibit P-10: Nitrate sampling reminder letter.
- Exhibit P-11: April 13, 2007 nitrate annual monitoring and reporting violation.
- Exhibit P-12: July 31, 2007 lead and copper monitoring and reporting violation letter.

- Exhibit P-13: August 6, 2007 Notice of Violation.
- Exhibit P-14: September 21, 2007 coliform maximum contaminant level violation for September 2007.
- Exhibit P-15: October 22, 2007 coliform repeat violation for September 2007.
- Exhibit P-16: October 30, 2007 consumer confidence reporting violation letter.
- Exhibit P-17: January 25, 2008 coliform violation letter for December 2007.
- Exhibit P-18: February 27, 2008 Notice of Violation for nitrate monitoring.
- Exhibit P-19: May 28, 2008 coliform violation letter for April 2008.
- Exhibit P-20: August 27, 2008 Notice of Violation for lead and copper monitoring.
- Exhibit P-21: September 25, 2008 coliform violation letter for August 2008.
- Exhibit P-22: October 23, 2008 Department Order.
- Exhibit P-23: December 2, 2008 Modified Department Order.
- Exhibit P-24: December 29, 2008 coliform violation letter for November 2008.
- Exhibit P-25: March 25, 2009 coliform violation letter for February 2009.
- Exhibit P-26: April 23, 2009 coliform violation letter for March 2009.
- Exhibit P-27: February 17, 2009 Notice of Correction issued to Bruce J. Forenpohar.
- Exhibit P-28: Penalty formula worksheet for Hillview Water Association.

- Exhibit P-29: Program's Policy J.13 on calculations of civil penalties in accordance with RCW 70.119A.
- Exhibit P-30: June 1, 2009 e-mail exchange between the Program and Hillview Water Association.
- Exhibit P-31: Public notice regarding the October 23, 2008 Department Order sent to the Program on June 15, 2009.
- Exhibit P-32: Water sample results submitted to the Program on June 25, 2009.
- Exhibit P-33: 2007 Consumer Confidence Report submitted to the Program by Hillview Water Association on June 15, 2009.
- Exhibit P-34: 2007 Consumer Confidence Report submitted to the Program by Bruce J. Forenpohar on June 16, 2009.
- Exhibit R-1: Bruce J. Forenpohar's Written Statement dated October 8, 2009.

Under the Order on Summary Judgment, the Presiding Officer found the pleadings and evidence showed that there was no genuine issue of material fact related to the Program's allegations against the Respondent. Prehearing Order No. 4. More specifically, there is no genuine issue of material fact that the Respondent failed to:

- A. Notify the Hillview Water Association customers about the October 23, 2008 Order by the required January 23, 2009 deadline.
- B. Take samples for coliform bacteria in November 2008, February 2009 and March 2009, and submit the samples to the Program.
- C. Monitor Source Order No. 1 for herbicides and pesticides by April 1, 2009, and submit the results to the Program.
- D. Submit any yearly consumer confidence reports in 2005, 2006, and 2007.

See Prehearing Order No. 4, Paragraph 3.5.¹

On May 12, 2009, the Program issued a Notice of Imposition of Penalties and Initial Order (2009 Initial Order) jointly and severally to the Hillview Water Association and Bruce J. Forenpohar. The 2009 Initial Order assessed a civil penalty pursuant to RCW 70.119A.040, in the sum of twelve thousand six hundred dollars (\$12,600.00) for the Respondent's failure to comply with the Program's October 23, 2008 Order.

On September 9, 2009, the Program and Hillview Water Association entered into a Stipulation and Agreed Order (September 2009 Order). Under the terms of the September 2009 Order, the matter was dismissed as to Hillview Water Association, and one-third of the total civil penalty, in the amount of four thousand two hundred dollars (\$4,200.00), was apportioned to Hillview Water Association.² The terms of the September 2009 Order (including the dismissal action) were not binding and did not affect the joint and several portion of the civil penalty assessed against Bruce J. Forenpohar, in his capacity as the waterworks operator for Hillview Water Association.

I. FINDINGS OF FACT

1.1 The construction and operation of public water systems are governed by various statutes and regulations implemented and enforced by the Program. These

¹ The Program also contends that waterworks operator Bruce J. Forenpohar engaged in gross negligence regarding his waterworks operator certification responsibilities under WAC 246-292-010, and that his waterworks operator certification is subject to revocation under RCW 70.119.110. A separate order addressed that issue. See *In the Matter of Bruce Forenpohar*, Master Case No. M2009-568.

² The Association agreed to pay one thousand dollars (\$1,000.00) and the Program agreed to dismiss the remaining three thousand two hundred dollars (\$3,200.00) if the Association agreed to comply with certain terms and conditions.

statutes and regulations include: the Federal Safe Drinking Water Act, Title 42, Chapter 6A, subchapter XII; Public water systems – penalties and compliance, chapter 70.119A RCW; and Group A public water supplies, chapter 246-290 WAC. The fundamental purpose of the safe drinking water program is to ensure that public water systems provide safe and reliable drinking water. RCW 43.20.050(2)(a). Where violations of the laws or regulations that regulate public water systems occur, such violations may result in the imposition of penalties. See RCW 70.119A.030 and RCW 70.119A.040. Penalties for such violations may not exceed five thousand dollars per day for every such violation. RCW 70.119A.040(1)(a).

1.2 Public water systems are classified by the number of water service connections and/or by the number of water consumers using that system to obtain water for human consumption. See RCW 70.119A.020(12). In Washington, such classifications are known as groups. See RCW 70.119A.020(4) and (5). Group A water systems are systems with 15 or more water service connections or that regularly serve an average of 25 or more people per day. See RCW 70.119A.020(4). A person, or mutual or cooperative association, that owns or operates a water system is defined as a “purveyor.” RCW 70.119A.010(13). The operator and authorized agent (the waterworks operator) also meets the RCW 70.119A.010(13) definition as a “purveyor.”

1.3 Hillview Water Association owns the Hillview Water System, which is located in Yakima County, Washington. Hillview Water System has 30 residential connections.

1.4 A public water system requires that a person be designated as an operator, which is the individual responsible for the active daily technical operation of the system. See RCW 70.119.020(3). The operator of the Hillview Water System during the period June 19, 2003 through June 1, 2009 was Bruce J. Forenpohar. For ease of reference, Hillview Water System and Mr. Forenpohar will jointly be referred to as the Respondent water system.

1.5 The Respondent water system consistently failed to complete its state and federal duties over a six year period (June 19, 2003 to June 1, 2009). More specifically, the Respondent water system failed to:

- A. Notify its customers about the Program's October 23, 2008 Order in a timely manner.
- B. Take coliform bacteria samples in November 2008, February 2009 and March 2009, and submit the samples to the Program.
- C. Monitor Source Order No. 1 for herbicides and pesticides by April 1, 2009, and submit the monitoring results to the Program.
- D. Submit any yearly consumer confidence reports in 2005, 2006, and 2007.

See Prehearing Order No. 4 (Order on Summary Judgment).

1.6 During this same six-year time period, the Program attempted several informal steps to assist the Respondent water system to bring it into compliance with the state and federal requirements. The Program's attempts to resolve the Respondent water system's violations included:

- A. Nineteen letters requesting the Respondent water system submit water samples, reports or other monitoring test results.

- B. Three Notice of Violation letters to notify the Respondent water system of the information being requested and to notify that failure to comply with the requirements could result in enforcement action (including civil penalties under chapter 70.119A RCW).
- C. One Order dated October 22, 2008 (which constituted a notice of correction) that notified the Respondent water system of the steps it should take to correct the water system, the technical assistance available from the Program and notification that any failure to comply could result in enforcement action (including civil penalties under chapter 70.119A RCW).
- D. One Notice of Correction³ dated February 17, 2009, which notified the Respondent water system that its continued failure to comply with the statutes and rules could result in additional enforcement action, including civil penalties.

1.7 Despite the Program's attempts to contact the Respondent water system and assist it in reaching compliance, the Respondent water system failed to submit any of the required water samples or test reports to the Program during the period June 2003 to June 2009.

1.8 The Respondent water system filed its Request for Adjudicative Proceeding to appeal the 2009 Initial Order on June 16, 2009.

1.9 Bruce J. Forenpohar, in his capacity as the Hillview Water Association waterworks operator, does not dispute that the Respondent water system was required to complete and submit all of the necessary monitoring samples and reports to the Program to ensure the safety of the water system's customers. He admits that he did not perform the water samples or submit the reports. Mr. Forenpohar did not take steps

³ The February 17, 2009 Notice of Correction also refers to itself, within the body of the document, as a Notice of Violation. See Exhibit 27 (previously admitted under Prehearing Order No. 1). A notice of correction or notice of violation is a document in which a regulatory agency may notify a business of violations of law or rule. The goal is to assist that business without immediately issuing a civil penalty. See RCW 43.05.100.

to complete the samples or reports because he assumed that the reports were being completed by other employees of the Hillview Water Association (specifically acting secretaries Pat Daulberg or Stephanie Smith). Mr. Forenpohar remembers performing some of the required water system sample testing but submitted no proof that the tests were, in fact, completed and submitted to the Program. Mr. Forenpohar admits that he did not directly or indirectly contact the Program regarding the Hillview Water System requirements at any time during the relevant six-year period (2003-2009). This is despite receiving the numerous letters, notices and orders issued to him by the Program.

1.10 The Respondent water system's failure to contact the Program during the six-year period placed the health and safety of the customers of the water system in jeopardy.

1.11 Mr. Forenpohar disputes that he is or should be jointly and severally liable for two-thirds of any civil penalty amount calculated in this matter. Mr. Forenpohar feels being responsible for two-thirds of any civil penalty is too high. He did not submit any evidence to dispute the method used to calculate the civil penalty being assessed against him.

II. CONCLUSIONS OF LAW

2.1 The Secretary of Health (and by delegated authority, the Presiding Officer) has jurisdiction over the Respondent and subject of the proceeding.

WAC 246-10-107(1)(d).

2.2 The standard of proof in drinking water system hearings is a preponderance of the evidence. WAC 246-10-606. Unlike the standard of proof in a water works operation certification hearing, the civil penalty hearing does not entail a “professional license,” an individual, nontransferable authorization to carry on an activity based on qualifications as defined in RCW 18.118.020(8). For that reason, it does not: (1) involve any stigma to the water system; (2) rise to the level of a quasi-criminal proceeding; or (3) involve anything more than the mere loss of money. See *Nguyen v. Department of Health*, 144 Wn.2d 516, 524-525 (2001) cert. denied 535 U.S. 904 (2002); see also *Brunson v. Pierce County*, 149 Wn. App. 855, 865 (Division Two Court of Appeals (2009)). Therefore, the preponderance of the evidence standard is the appropriate standard.

2.3 RCW 70.119A.040 authorizes the Program to assess a monetary penalty for the violation of any law or rule regulating public water systems. The relevant subsections provide:

(1)(a) In addition to or as an alternative to any other penalty or action allowed by law, a person who violates a law or rule regulating public water systems and administered by the department of health is subject to a penalty of not more than five thousand dollars per day for every such violation, or, in the case of a violation that has been determined to be a public health emergency, a penalty of not more than ten thousand dollars per day for every such violation. Every such violation shall be a separate and distinct offense. The amount of fine shall reflect the health significance of the violation and the previous record of compliance on the part of the public water supplier. In case of continuing violation, every day's continuance shall be a separate and distinct violation.

....

(c) Every person who, through an act of commission or omission, procures, aids, or abets a violation is considered to have violated the provisions of this section and is subject to the penalty provided in this section.

(2) The penalty provided for in this section shall be imposed by a notice in writing to the person against whom the civil penalty is assessed and shall describe the violation. The notice shall be personally served in the manner of service of a summons in a civil action or in a manner that shows proof of receipt. A penalty imposed by this section is due twenty-eight days after receipt of notice unless application for an adjudicative proceeding is filed as provided in subsection (3) of this section.

....

(9) Except in cases of public health emergencies, *the department may not impose monetary penalties under this section unless a prior effort has been made to resolve the violation informally.*

RCW 70.119A.040 (Emphasis added).

2.4 The Program did not declare a public health emergency in this case. It did make an effort by its correspondence and notices to the Respondent water system to resolve the violation in a more informal manner before issuance of the Notice of Imposition of Penalties and Initial Order on May 12, 2009. For those reasons, the Presiding Officer concludes the Department may impose a monetary penalty in this case.

2.5 In determining what monetary penalty is appropriate, the Program has created a penalty formula for the use of drinking water cases. This penalty formula is set forth in Program Policy J-13. See Exhibit P-29. This policy is adopted by the Presiding Officer.⁴ It assigns values to the risk factors created by the water system violations. The values include the public health risk, the previous record of compliance, the population served by the water system, and a “daily” factor (a value or factor that addresses violations that might occur on a daily basis). These factors are multiplied to

⁴ The Respondent water system (Mr. Forenpohar) did not dispute the calculation of the civil penalty.

reach a numeric score, which is then multiplied by ten dollars to reach the amount of the civil penalty.

2.6 The Presiding Officer concludes the Respondent water system failed to complete water samples, or submit any of the required reports or samples regarding the operation of the water system, to the Program. The Respondent water system made no contact at all during the six-year period. The failure to do so placed the health and safety of the customers of the water system in jeopardy. The Presiding Officer concludes that Mr. Forenpohar (who met the definition as a “purveyor” under RCW 70.119A.010(3) during the relevant period because he was the certified waterworks operator of the Hillview Water Association public water system) is jointly and severally liable for the civil penalty along with the Hillview Water System.

2.7 The penalty formula calculation set forth in Exhibit 28 is incorporated as a part of this final order. The civil penalty amount is \$12,600.00.

2.8 The Hillview Water Association negotiated a Stipulation and Agreed Order for a portion of the civil penalty, in the amount of \$4,200.00. Mr. Forenpohar is jointly and severally liable for the remainder of the civil penalty, in the amount of \$8,400.00.

III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Bruce J. Forenpohar, being jointly and severally liable for the civil penalty as certified waterworks operator for the Hillview Water Association water system, must pay

the civil penalty assessed against Hillview Water Association water system in the amount of eight thousand four hundred dollars (\$8,400.00).

Dated this __13__ day of January, 2010.

_____/s/_____
JOHN F. KUNTZ, Review Judge
Presiding Officer

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:

Department of Health Drinking Water Program
P.O. Box 478322
Olympia, WA 98504-7822

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-10-704. The petition is denied if the Adjudicative Service Unit 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).

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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).

For more information, visit our website at <http://www.doh.wa.gov/hearings>.