

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of the Public)	OPS No. 96-08-19-463 DW
Water System of:)	Prog. Nos. 96-031 & 96-043
)	
MEADOW RIDGE WATER SYSTEM,)	FINDINGS OF FACT,
- Snohomish County,)	CONCLUSIONS OF LAW,
)	AND FINAL ORDER
ID #53213D,)	
Respondent.)	
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An adjudicative hearing was held in this matter before Senior Health Law Judge Eric B. Schmidt, Presiding Officer for the Secretary of the Department of Health, pursuant to RCW 70.119A.040, WAC 246-10-102 and WAC 246-10-107, on May 5, 1997, and on June 4, 1997, in the Department of Health hearing room, Melbourne Tower, Room 314, 1511 Third Avenue, Seattle, Washington. The Respondent, Meadow Ridge Water System, appeared through its owner, Tom McDermott, who waived the right to be represented by counsel. The Drinking Water Division of the Department of Health (the Division) was represented by Lilia Lopez, Assistant Attorney General. Having heard the testimony presented and having considered the evidence presented and the pleadings filed in this matter, the Presiding Officer hereby issues the following:

I. PROCEDURAL HISTORY

1.1 On May 22, 1996, the Division issued an Order in Docket No. 96-021, regarding the Meadow Ridge Water System (the Order). The Order made findings regarding the failure of the purveyor of the system, Tom McDermott, to comply with State Board of Health regulations pertaining to public water systems. The Order directed

Mr. McDermott to notify consumers of the lack of monitoring, to install disinfection equipment, to monitor free chlorine levels, to comply with monitoring and contamination follow-up requirements, to submit a water system plan, to obtain source approval, to submit construction documents, to install facilities, and to employ a professional engineer to prepare the water system plan, project report, construction documents and certification of completion.

1.2 On July 17, 1996, the Division issued a Notice of Imposition of Penalties in Docket No. 96-031 (the First Notice) against Tom McDermott for failure to comply with the Order. The Division imposed a penalty of \$2,100 payable within 28 days, unless an application for an adjudicative proceeding was submitted within that time.

1.3 On August 1, 1996, Mr. McDermott submitted an application for adjudicative proceeding challenging the First Notice.

1.4 On September 4, 1996, the Office of Professional Standards issued a Scheduling Order, which scheduled a prehearing conference for January 6, 1997, and a hearing date of February 5, 1997.

1.5 On December 18, 1996, the Division issued a Notice of Imposition of Penalties in Docket No. 96-043 (the Second Notice) against Tom McDermott for failure to comply with the Order. The Division imposed a penalty of \$6,300 payable within 28 days, unless an application for an adjudicative proceeding was submitted within that time.

1.6 On January 6, 1997, a telephonic prehearing conference was held. The Respondent requested a continuance of the prehearing conference and hearing dates

because of the issuance of the Second Notice, which was granted by the Presiding Officer.

1.7 On January 13, 1997, Mr. McDermott submitted an application for adjudicative proceeding challenging the Second Notice.

1.8 On January 31, 1997, the Office of Professional Standards issued a new Scheduling Order, which scheduled a prehearing conference for February 25, 1997, and a hearing date of March 31, 1997.

1.9 On February 12, 1997, the Presiding Officer issued Prehearing Order No. 1: Order Extending Time for Prehearing Conference and Hearing, which continued the prehearing conference to April 2, 1997, and the hearing to May 5, 1997, upon the Respondent's motion.

1.10 A prehearing conference was held on April 8, 1997. On April 18, 1997, the Presiding Officer issued Prehearing Order No. 2: Final Prehearing Order, which established the witness and evidence lists for the hearing.

1.11 All Prehearing Orders issued in this case are incorporated by reference into this Final Order.

1.12 The following witnesses were called to testify by the Division: Nancy Feagin, P.E.; John Aden, Barbara Jacobsmeyer, Dwayne Shafer, Thomas Bridges and Ellen Winningham. The following witnesses were called to testify by the Respondent: Mark Spahr, Brian Boye, Jennifer Prodzinski, Ethan Moseng, P.E.; Curtis Koger, and Elden McCall.

1.13 The following exhibits were offered by the Division and admitted by the Presiding Officer:

- Exhibit 1: Departmental Order, Docket No. 96-021.
- Exhibit 2: Certified Mail Return Receipt for Departmental Order, Docket No. 96-021.
- Exhibit 3: Certified Mail Return Receipt for Notice of Imposition of Penalties, Docket No. 96-021, dated July 17, 1996.
- Exhibit 4: Determination of Penalty Procedure for Notice of Imposition of Penalties, Docket No. 96-021, dated July 17, 1996.
- Exhibit 5: Penalty formula worksheet for Notice of Imposition of Penalties, Docket No. 96-021, dated July 17, 1996.
- Exhibit 6: Modified Order dated July 17, 1996.
- Exhibit 7: Letter from Ellen Winningham to Tom McDermott, dated July 30, 1996.
- Exhibit 8: Modified Order dated August 26, 1996.
- Exhibit 9: Certified Mail Return Receipt for Modified Order.
- Exhibit 10: Certified Mail Return Receipt for Notice of Imposition of Penalties, Docket No. 96-043, dated December 18, 1996.
- Exhibit 11: Penalty formula worksheet for Notice of Imposition of Penalties, Docket No. 96-043, dated December 18, 1996.
- Exhibit 12: Complaint Form of complaint from Marianne Boyle to the Division, dated September 3, 1996.

1.14 The following exhibits were offered by the Respondent and admitted by the Presiding Officer:

- Exhibit 13: Letter from Nancy Feagin to Tom McDermott, dated December 18, 1996.
- Exhibit 14: Letter from Nancy Feagin to Tom McDermott, dated January 8, 1997.
- Exhibit 15: Memorandum - Meadow Ridge - Summary of Site Visit, dated May 14, 1996.
- Exhibit 16: Letter from Tom McDermott to Nancy Feagin, dated August 1, 1996.
- Exhibit 17: Letter from Tom McDermott to Nancy Feagin, dated November 26, 1996.
- Exhibit 18: Letter from Ethan Moseng to Tom McDermott, dated February 18, 1997.
- Exhibit 19: Letter from Mark Spahr to Tom McDermott, dated

- February 28, 1997.
- Exhibit 20: Letter from Charles W. Lean to Tom McDermott, dated January 22, 1997.
- Exhibit 21: Letter from Nancy Feagin to Tom McDermott, dated August 7, 1996.
- Exhibit 22: Letter from Elden McCall to Nancy Feagin, dated September 5, 1996.
- Exhibit 23: Letter from Elden McCall to Nancy Feagin, dated July 30, 1996.
- Exhibit 24: Letter from Ellen Winningham to Tom McDermott, dated January 24, 1997. [Handwritten notes on letter stricken].
- Exhibit 25: Letter from Tom McDermott to Ethan Moseng, dated July 28, 1996.
- Exhibit 26: Letter from Brian Boye to Tom McDermott, dated March 4, 1996.
- Exhibit 27: Agreement for Establishing Water Utility Service Area Boundaries.
- Exhibit 28: Thomas Water Service Company billings for Water System Repair and Upgrade.

II. FINDINGS OF FACT

2.1 Meadow Ridge Water System is a public water system in Snohomish County, Washington. There are approximately 63 residences connected to the system.

2.2 Tom McDermott has been the owner of the Meadow Ridge Water System since October 1995.

2.3 On May 22, 1996, the Division issued an Order in Docket No. 96-021, regarding the Meadow Ridge Water System (the Order). (Exhibits 1 and 2). The Order made findings regarding the failure of the purveyor of the system, Tom McDermott, to comply with State Board of Health regulations pertaining to public water systems, including failure to monitor for bacteriological quality standards, exceeding maximum contaminant levels, failure to take follow-up action, failure to monitor for complete

inorganic chemical and physical standards, failure to monitor for nitrate/nitrite, failure to monitor for volatile organic chemicals and for organics other than volatile organic chemicals, failure to submit water system plan, failure to provide construction documents, and failure to obtain source approval. The Order directed Mr. McDermott to notify consumers of the lack of monitoring, to install disinfection equipment, to monitor free chlorine levels, to comply with monitoring and contamination follow-up requirements, to submit a water system plan, to obtain source approval, to submit construction documents, to install facilities, and to employ a professional engineer to prepare the water system plan, project report, construction documents and certification of completion.

2.4 On July 17, 1996, the Division issued a Notice of Imposition of Penalties in Docket No. 96-031 (the First Notice) against Mr. McDermott for failure to comply with the Order. The Division found three violations of the Order: failure to submit a project report and construction documents for a disinfection system within 45 days of the Order, failure to submit a coliform monitoring plan within 30 days of the Order, and failure to perform required routine and repeat sampling for June 1996. The Division imposed a penalty of \$2,100 payable within 28 days, unless an application for an adjudicative proceeding was submitted within that time.

2.5 The penalty was calculated under a Department policy, which sets out a formula that considers the public health risk factor, the previous record of compliance, and the size of the system for each violation. The formula multiplies these three levels together to determine the “total factor” for each violation, then adds the total factors together, and then multiplies by \$10. (Exhibit 4). For all three violations, the Division used a factor of 3 for the size of the system, because the Meadow Ridge Water System

has less than 100 connections, and used a factor of 7 for the previous record of compliance, because the system had more than four non-acute violations in the past three years. The public health risk factors were set in accordance with the list set forth in the Department policy: a factor of 4, for the failure to submit disinfection equipment plans, a factor of 1 for the failure to submit a coliform monitoring plan, and a factor of 5 for failing to perform follow-up sampling. The total factors for the three violations totaled 210, which after being multiplied by \$10. made the total penalty \$2,100. (Exhibit 5).

2.6 On July 17, 1996, the Division issued a Modified Order to add a violation of the duty to provide water at adequate pressure, and to add requirements to maintain minimum water pressure and to install a continuous pressure recorder. (Exhibit 6). Dates contained in the Modified Order were corrected in a letter dated July 30, 1996. (Exhibit 7).

2.7 On August 1, 1996, Mr. McDermott submitted an application for adjudicative proceeding challenging the First Notice.

2.8 In response to a request from Mr. McDermott, the Division further modified the Modified Order on August 26, 1996, to extend the deadlines for compliance with the following requirements: operation and maintenance of disinfection equipment (extended to September 25, 1996), submission of coliform monitoring plan (extended to September 25, 1996), submission of water system plan (extended to December 24, 1996), submission of source approval documents (extended to October 25, 1996), submission of construction documents for new water system (extended to May 23, 1997), and installation of all facilities (extended to August 21, 1997). (Exhibit 8).

2.9 On December 18, 1996, the Division issued a Notice of Imposition of Penalties in Docket No. 96-043 (the Second Notice) against Mr. McDermott for failure to comply with the Order. The Division found seven violations of the Order: failure to properly operate the disinfection system, failure to perform bacteriological monitoring for October and November 1996, failure to submit the coliform monitoring plan within 30 days of the Order, failure to perform required routine and repeat sampling for July and September 1996, failure to obtain source approval, failure to maintain system pressure, and failure to submit charges from a continuous pressure recorder. The Division imposed a penalty of \$6,300 payable within 28 days, unless an application for an adjudicative proceeding was submitted within that time.

2.10 The penalty was calculated under the same Department policy as described in Finding 2.5. For all seven violations, the Division used a factor of 3 for the size of the system, because the Meadow Ridge Water System has less than 100 connections, and used a factor of 7 for the previous record of compliance, because the system had more than four non-acute violations in the past three years. The public health risk factors were set in accordance with the list set forth in the Department policy: a factor of 5 for the failure to properly operate disinfection equipment, a factor of 4, for the failure to perform bacteriological monitoring, a factor of 1 for the failure to submit a coliform monitoring plan, factors of 6 for failing to perform follow-up sampling, for failing to obtain source approval and for failing to maintain system pressure, and a factor 2 for failure to submit the pressure charts. The total factors for the seven violations totaled 630, which after being multiplied by \$10., made the total penalty \$6,300. (Exhibit 11).

2.11 On January 13, 1997, Mr. McDermott submitted an application for adjudicative proceeding challenging the Second Notice.

2.12 Mr. McDermott's major objection to both the First Notice and the Second Notice is that he was making a good faith effort to correct the problems with the Meadow Ridge Water System, was keeping the Division apprised of his efforts, and therefore should not be penalized. He noted the Division had never issued an order or a notice of imposition of penalties to the prior owner of the system, even though the system had some of the same deficiencies for which he was being penalized, specifically the lack of source approval for wells 2, 4, and 5.

2.13 The Presiding Officer finds that while Mr. McDermott was making efforts to correct the problems with the Meadow Ridge Water System, those efforts do not excuse him from penalties for the violations of the Order. The exhibits submitted by Mr. McDermott indicate that the primary focus of his efforts was on establishing a new water source and system, rather than remedying problems with the existing system. While Mr. McDermott may well be correct that the long-term solution to the problems with the Meadow Ridge Water System requires a new water source, that does not mean he can defer short-term solutions to the problems identified in the Order. The customers of the system are entitled to a safe, reliable drinking water system now and in the future, and Mr. McDermott has the obligation to provide such a system. The requirements imposed in the Order are reasonably related to providing the customers of the system with safe and reliable drinking water. The Division did not err in imposing penalties for violations of the Order.

2.14 The Presiding Officer finds the absence of orders or penalties issued to the prior owner of Meadow Ridge Water System does not preclude the imposition of penalties against Mr. McDermott, and does not show any bias against Mr. McDermott. The Division's witnesses testified there were only infrequent positive total coliform tests (only one or two per year) when the prior owner operated the system, but the positive tests have become more frequent since Mr. McDermott acquired the system. The public health risk associated with those positive total coliform tests warrants more stringent action against the system now than was warranted in the past.

2.15 Mr. McDermott contended the imposition of penalties against him was unfair because of the infrequency with which penalties are imposed against other water systems in Snohomish County. The Presiding Officer finds the propriety of the imposition of penalties depends on each system's individual situation, not on its condition relative to other system's. The Presiding Officer also finds Mr. McDermott has not demonstrated that other water systems in worse condition than his were imposed lesser penalties than was he.

2.16 Mr. McDermott specifically challenged the imposition of the penalty in the First Notice for failure to submit a project report and construction documents for a disinfection system within 45-days of the Order, because that period of time was unreasonably short. The Division witnesses testified that a 45-day period for submission of disinfection system documentation is typical, that Mr. McDermott did not request an extension of the deadline, and that Mr. McDermott did submit the documentation approximately 60 days after the Order (two weeks after the First Notice was issued). The Presiding Officer finds that the 45-day period was not unreasonable.

2.17 Mr. McDermott specifically challenged the imposition of the penalty in the Second Notice for failure to obtain source approval, because the Division has known that wells 2, 4, and 5 have been unapproved for more than 15 years, but has not taken action before. The Presiding Officer finds the prior owner's failure to obtain source approval does not excuse Mr. McDermott from now obtaining source approval, and finds Mr. McDermott was given a reasonable extension of time (to October 25, 1996) to obtain source approval. The Presiding Officer finds the lack of source approval to be a more acute problem now than in the past because of the increasing frequency of positive total coliform tests.

2.18 Mr. McDermott specifically challenged the imposition of penalty in the Second Notice for failure to maintain system water pressure, because the outages were the result of vandalism of some of the system's electrical equipment, not the result of deficiencies of the system. The Presiding Officer finds the penalty was appropriate because some of the outages occurred after Mr. McDermott reported on August 1, 1996, that he had installed locks on the electrical boxes. (Exhibit 16). According to the Second Notice, additional outages occurred on August 20, August 27, and during the week of October 7, 1996. Further, the reports from Mr. McCall to Ms. Feagin (Exhibits 22 and 23) show that inadequate booster pumps were contributing to the inadequate system pressure. The Presiding Officer finds Mr. McDermott has the duty of maintaining adequate system water pressure, including safeguarding the system from vandalism, and that the imposition of the penalty for the outages was appropriate.

2.19 Mr. McDermott specifically challenged the imposition of penalty in the Second Notice for failure to operate and maintain disinfection equipment, specifically the

assertions that sample tap design documentation had not been submitted and that the system was using unapproved sample taps. Mr. McDermott stated that the plumber who installed the taps told him most systems had installed the same frost-free taps. However, paragraph 2.3 of the Order (Exhibit 1) required “the design of the sample taps shall be submitted for review and approval” to the Division. Had Mr. McDermott done so, the Division would have informed him that frost-free taps were not acceptable because of their risk of contamination through the weep hole. The Presiding Officer finds Mr. McDermott’s reliance on the plumber was inappropriate, and that the imposition of the penalty for the unapproved sample taps was warranted.

2.20 Mr. McDermott did not specifically challenge the imposition of penalties in the First Notice for failure to submit a coliform monitoring plan or for failure to perform routine and repeat follow-up samples for June 1996. Mr. McDermott’s general challenges are addressed and rejected above. The Presiding Officer finds the record supports the imposition of penalties for these failures.

2.21 Mr. McDermott did not specifically challenge the imposition of penalties in the Second Notice for failure to collect bacteriological monitoring samples in October and November 1996, for failure to submit a coliform monitoring plan, for failure to perform routine and repeat follow-up samples for July 1996, or for failure to submit continuous pressure recorder charts for September, October, and November 1996. Mr. McDermott’s general challenges are addressed and rejected above. The Presiding Officer finds the record supports the imposition of penalties for these failures.

2.22 In reviewing the reasonableness of the penalties imposed in the First Notice and the Second Notice, the Presiding Officer finds that the record does not

support the factor of 7 assigned for Mr. McDermott's previous record of compliance. According to the Division policy (Exhibit 4), this factor is to be calculated by combining two sub-factors. First, a value of 1 or 2 should be assigned based on "the number and nature of department contacts regarding non-compliance; the period of time department efforts to effect compliance have extended; and the nature and extent of the responsible party's efforts to effect compliance, if any." The record does not support assigning the higher value of 2 to Mr. McDermott, given that he acquired the system in October 1995 and the Order was issued in May 1996, and given that he was providing information to the Division about his efforts on the disinfection equipment and other system changes. The second sub-factor assigns a value from 1 to 5, based on the number of acute, non-acute or major repeat violations in the past three years. The record does not support assigning the highest value of 5 to Mr. McDermott. The Division's witnesses testified this sub-factor was assigned because of four prior failures to perform follow-up action. According to paragraph 1.5 of the Order, these failures occurred in February 1996, May 1994, September 1993, and September 1992. Since Mr. McDermott acquired the system in October 1995, only the latest of those failures is properly attributable to him; the other failures were the responsibility of the prior owner. Thus, the Presiding Officer finds there were only two violations attributable to Mr. McDermott at the time of the First Notice (February 1996 and June 1996), and that the second sub-factor for the First Notice should have been 2. The Presiding Officer further finds there were only four violations attributable to Mr. McDermott at the time of the Second Notice (February 1996, June 1996, July 1996, and September 1996), and that the second sub-factor for the Second Notice should have been 4. When combined with the first sub-factor, the factor

for previous record of compliance in the First Notice should have been 3, and the factor for previous record of compliance in the Second Notice should have been 5.

III. CONCLUSIONS OF LAW

3.1 The Presiding Officer shall conduct the hearing and shall issue findings of fact, conclusions of law, and an order resolving the proceeding. WAC 246-10-602 and 246-10-605.

3.2 The Meadow Ridge Water System is a "public water system," as defined in RCW 70.119A.020(4) and WAC 246-290-010. (See Finding of Fact 2.1).

3.3 Tom McDermott is the "purveyor" of the Meadow Ridge Water System, as defined in RCW 70.119A.020(6) and WAC 246-290-010. (See Finding of Fact 2.2).

3.4 The Meadow Ridge Water System is characterized as a "Class A community water system," as defined in WAC 246-290-020(3). (See Finding of Fact 2.2).

3.5 The Department of Health has the authority to adopt regulations relating to the operation of public water systems, pursuant to RCW 43.20.050 and 70.119.050. Regulations so adopted are contained in chapter 246-290 WAC.

3.6 The Department may impose penalties for failure to comply with an order of the Department, when the order requires a purveyor to cease violating any regulation pertaining to public water systems or to take specific actions within a specified time to place a public water system in compliance with such regulations. RCW 70.119A.030(2)(c). The amount of the penalty shall be not less than \$500 nor more than \$5,000 per violation per day. RCW 70.119A.040(1). The amount of the fine shall reflect

the health significance of the violation and the purveyor's previous record of compliance.
Id.

3.7 Based on Findings 2.1 through 2.21, the Presiding Officer concludes the Division acted properly in imposing the Order and in finding the violations contained in the First Notice and the Second Notice. The Division acted within its statutory mandate, and acted consistent with its policy in imposing the penalties. The Presiding Officer concludes Mr. McDermott has not shown the actions taken toward him were disproportionate or were motivated by any improper motive. With the exception of the recalculation of the previous record of compliance, as addressed below, the Presiding Officer concludes the violations and penalties contained in the First Notice and the Second Notice should be affirmed.

3.8 For the reasons stated in Finding of Fact 2.22, the penalties contained in the First Notice should be recalculated with a factor of 3 for previous record of compliance. Thus, the Presiding Officer concludes the amount of the penalty in the First Notice should be modified to \$900.

3.9 For the reasons stated in Finding of Fact 2.22, the penalties contained in the Second Notice should be recalculated with a factor of 5 for previous record of compliance. Thus, the Presiding Officer concludes the amount of the penalty in the Second Notice should be modified to \$4,500.

IV. DECISION AND ORDER

Based on the above Findings of Fact and Conclusions of Law, the Presiding Officer hereby issues the following ORDERS:

4.1 The penalty of \$2,100, imposed in the July 17, 1996, Notice of Imposition of Penalties, is MODIFIED to \$900. In all other regards, the July 17, 1996, Notice of Imposition of Penalties is AFFIRMED.

4.2 The penalty of \$6,300 imposed in the December 18, 1996 Notice of Imposition of Penalties, is MODIFIED to \$4,500. In all other regards, the December 18, 1996, Notice of Imposition of Penalties is AFFIRMED.

“Filing” means actual receipt of the document by OPS. RCW 34.05.010(6). This Order was “served” upon you on the day it was deposited in the United States mail. RCW 34.05.010(18).

As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed within ten days of service of this Order with the Office of Professional Standards, 2413 Pacific Avenue, PO Box 47872, Olympia, WA 98504-7872. The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the Office of Professional Standards has not acted on the petition or served written notice of the date by which action will be taken on the petition.

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, Judicial

Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

DATED THIS ____ DAY OF JUNE, 1997.

ERIC B. SCHMIDT, Senior Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record:

TOM McDERMOTT, LILIA LOPEZ by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS _____ DAY OF JUNE, 1997.

Office of Professional Standards

cc: DAVE CLARK