

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

In the Matter of:)	OPS No. 96-05-01-354 DW
)	Prog. No. 96-B01
SEVENTH GENERATION SYSTEMS, INC.,)	
and JAMES G. SACKETT,)	FINDINGS OF FACT,
San Juan County,)	CONCLUSIONS OF LAW,
Respondent.)	AND FINAL ORDER
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Seventh Generation Systems, Inc., through James G. Sackett (the Respondent) seeks approval of a proposed Class B water system. The Division of Drinking Water (the Division) denied approval on or about March 4, 1996. The Respondent requested an administrative proceeding contesting the denial of approval. BAP Presiding Officer David G. Jennings conducted a brief adjudicative proceeding and issued his Brief Adjudicative Proceeding Initial Order on October 3, 1996. That initial order affirmed the denial of approval for the Respondent's Class B water system. The Respondent requested review of the initial order on October 22, 1996. Having considered the Initial Order, the Respondent's request for review, and the Response to Request for Administrative Review submitted by Lilia Lopez, Assistant Attorney General representing the Division of Drinking Water (the Division), and the additional document submitted by the Respondent on November 6, 1996, Senior Health Law Judge Eric B. Schmidt, serving as Reviewing Presiding Officer for the Secretary of the Department of Health, issues the following:

I. FINDINGS OF FACT

1.1 The Division of Drinking Water of the Department of Health denied the Respondent's request for approval of a Class B water system on March 4, 1996, on the grounds that the proposed water system was within the Town of Friday Harbor's water supply service area, pursuant to WAC Chapter 246-293, and the grounds that the well could not be approved because it did not have a sufficient sanitary control zone, pursuant to WAC Chapter 246-290. The Respondent timely requested a brief adjudicative proceeding to appeal from the denial of his application.

1.3 BAP Presiding Officer Jennings conducted the brief adjudicative proceeding, made findings of fact and conclusions of law, and issued an Initial Order on October 3, 1996. The Reviewing Presiding Officer concurs with and adopts those findings of fact, which are incorporated by reference.

1.4 The Respondent timely requested review of the Initial Order by a letter received on October 22, 1996, pursuant to RCW 34.05.491. The Respondent requested an appeal of the Town of Friday Harbor's conditions for providing water, and requested approval of the proposed Class B water system.

II. CONCLUSIONS OF LAW

2.1 The Reviewing Presiding Officer, as the designate of the Secretary of the Department of Health, has jurisdiction over the Respondent's request for review of the Initial Order affirming the denial of approval of the proposed Class B water system. RCW 34.05.491 and WAC 246-10-701.

2.2 As found in the Initial Order's findings of fact, which have been adopted by the Reviewing Presiding Officer, the Respondent's proposed water system falls within the external boundaries of the critical water supply service area for San Juan County and the Town of Friday Harbor. Therefore, the Respondent must comply with WAC 246-293-190(1):

No new public water system shall be approved within a critical water supply service area subsequent to establishment of external boundaries unless specifically authorized by the department. Authorization shall be based upon compliance with the following:

(a) If unanticipated demand for water supply occurs within a purveyor's future service area, the following shall occur in the listed sequence:

(i) The existing purveyor shall provide service in a timely and reasonable manner consistent with state board of health regulations; or

(ii) A new public water system may be developed on a temporary basis. Before authorization, a legal agreement will be required which includes a schedule for the existing purveyor to assume management and/or connect the new public water system to the existing system; or

(iii) A new public water system may be developed. Before authorization, a revised service area agreement establishing the new purveyor's future service area will be required.

(b)

2.3 As found in the Initial Order's findings of fact, which have been adopted by the Reviewing Presiding Officer, there is no evidence that the existing purveyor, the Town of Friday Harbor, is presently unable to provide water service to the Respondent in a timely and reasonable manner. Therefore, WAC 246-293-190(1)(a)(i) has not been satisfied, and no other water system within the external boundary of the critical water supply service area served by the Town of Friday Harbor can be approved by the Department. The fact that a moratorium on new connections to the Town of Friday Harbor's water system existed at one time does not satisfy this requirement. That

moratorium was subsequently lifted by the Town of Friday Harbor. If the Town of Friday Harbor is able to provide timely and reasonable water service to the Respondent, it is required to use that water system and is precluded from creating a new water system. If the Town is unable to provide timely and reasonable water service to the Respondent, then the Respondent may apply for approval of a new water system. The Reviewing Presiding Officer affirms the BAP Presiding Officer's conclusions of law on this issue.

2.4 The Respondent also challenges the Division's decision that the well drilled by the Respondent could not be approved because the well did not have a 100 foot radius sanitary control area around it. The Respondent contends he has obtained engineering justification supporting a smaller sanitary control area, pursuant to WAC 246-291-100(4)(b). The BAP Presiding Officer found that the Respondent had not submitted that engineering justification to the Division. However, the BAP Presiding Officer concluded the Division erred in denying approval for the well because it did not consider whether there was engineering justification to support a sanitary control area smaller than 100 feet in radius.

2.5 The Reviewing Presiding Officer concludes the BAP Presiding Officer's conclusions of law on the sanitary control area were premature. The Division did not have any engineering justification before it supporting a reduction in the 100 foot radius sanitary control area, and therefore could not have approved any reduction. The burden of providing such engineering justification rests with the Respondent, not the Division. Further, and more importantly, any decisions on approval of a sanitary control area, either by the Division or by the BAP Presiding Officer, were premature. Unless the Respondent

first meets the requirements of WAC 246-293-190(1) for a new water system, the Division cannot approve any new water system within the critical water supply service area served by the Town of Friday Harbor.

2.6 The Reviewing Presiding Officer concludes that the Division's denial of approval was correct, because the Respondent has not met the requirements of WAC 246-293-190(1)(a)(i). In the event the Respondent does meet those requirements, then the Division will consider all required elements of a new water system plan, including the sanitary control area.

2.7 The Reviewing Presiding Officer also concludes the BAP Presiding Officer should not have included his own "Observations" in the Initial Order. The role of the BAP presiding officer is to consider the issues raised by the parties, not to add his observations of the understandings of the parties or his opinions as to how the parties should have acted. Further, the BAP Presiding Officer should not be engaging in subsequent discussions with the parties. Meetings by a BAP presiding officer with only one party constitute ex parte communications, which is prohibited by RCW 34.05.455. The BAP presiding officer's authority over the proceeding ends when a party requests administrative review of the initial order. RCW 34.05.491.

III. ORDER

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

3.1 The October 3, 1996 Initial Order, which affirmed the Division's refusal to approve the Class B water system proposed by the Respondent, is hereby AFFIRMED. The Respondent's request for approval of the Class B water system is DENIED.

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.

"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).

DATED THIS _____ DAY OF NOVEMBER, 1996.

ERIC B. SCHMIDT
Senior Health Law Judge
Reviewing Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record:
__by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF NOVEMBER, 1996.

Office of Professional Standards

cc: ____