BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

In the Matter of:)
)
RONALD ROCKSTAD on behalf of)
CENTRE PARK APARTMENTS &)
MT. HAYES PROPERTIES LLC,)
)
Requestor.) OAH No. 08-0282-DEC
)

DECISION AND ORDER

I. Introduction

Mt. Hayes Properties LLC ("Mt. Hayes"), the owner of a class A public water system, appeals an order of the Department of Environmental Conservation ("DEC") assessing a penalty of $1000 for failure to conduct routine sampling. Commissioner Hartig granted Mt. Hayes a hearing by order dated June 2, 2008 and directed that the matter be referred to the Office of Administrative Hearings ("OAH").

Administrative Law Judge Christopher Kennedy conducted a telephonic hearing on August 14, 2008. The chief executive of Mt. Hayes testified in the hearing, as did the Compliance and Monitoring Manager of DEC's Drinking Water Program. The only documents taken into evidence were those in the 66-page agency record that had been filed on July 9, 2008.

Because the penalty is within the range permitted by law for the violations proven and is a reasonable exercise of the agency's enforcement discretion, it should be affirmed.

II. Facts

There are no evidentiary conflicts regarding the factual background of this case. The only disputed matter is the appropriate penalty for the events that occurred.

At all times relevant to this decision, Ronald D. Rockstad has been the sole member and the self-described "Managing Agent" and "President" of Mt. Hayes Properties LLC.[1] For the last six to eight years, Mt. Hayes has owned and operated a group of four 4-plexes in Delta Junction, Alaska known as the Centre Park I Apartments, as well as an associated community water system.[2] The water system, designated Public Water System # AK2-371532, has at all relevant times been a class A public water system within the meaning of 18 AAC 80.1990(a)(12)

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[1] Testimony of Mr. Rockstad; R. 50, 54.

[2] Testimony of Mr. Rockstad; R. 50.

(although in December of 2007 Mt. Hayes gave formal notice of intent to seek reclassification).[3] It is a groundwater system with four service connections.[4] Centre Park Apartments I has had a high vacancy rate in recent years, but there were some residents using the system until at least April, 2008.[5] No evidence has been presented that Mt. Hayes has ever received a Notice of Violation ("NOV") prior to the one connected with this case.

The parties do not dispute that the owner or operator of Public Water System # AK2-371532 was required in 2005, 2006, and 2007 to sample annually for nitrate and monthly for total coliform bacteria and to submit the results to DEC.[6] Nitrate and coliform are acute contaminants that can make users ill quickly if they are present in excessive quantities.[7]

No nitrate test result was submitted for the Centre Park system for 2005 or 2006.[8] In March of 2007, a manager named Vince McKissic was operating the system for Mt. Hayes.[9] On March 15, 2007, DEC notified Mr. McKissic of the missing nitrate samples as well as various other alleged violations not relevant to this proceeding.[10] In late April and early May, McKissic made preparations to collect a nitrate sample; it is probable that he did so and that the sample reached the lab then used by Mt. Hayes, Analytica.[11] However, Mt. Hayes was in arrears on its payments to Analytica and the lab declined to test the sample until the financial issue was resolved.[12] Eventually, the sample apparently went stale and was unusable.[13] In the meantime, the Centre Park system fell behind on its monthly coliform sampling as well, failing to submit results after March of 2007.[14]

On July 17, 2007, a DEC employee spoke with Mr. Rockstad on the telephone and told him that an "NOV is impending unless he can collect nitrate and TC [total coliform] sample this week."[15] Mr. Rockstad said he needed to hire a new manager and that he might not be able to collect samples until the following week. DEC told him "no later than that."[16] Nothing further was submitted. DEC provided an additional telephone warning on July 26, and Mr. Rockstad

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3 Testimony of Cindy Christian, Compliance and Monitoring Manager, Drinking Water Program; R. 50.
4 R. 4.
5 Testimony of Mr. Rockstad.
6 *See* 18 AAC 80.310, 80.315(d)(1)(A), 80.405(b); R. 3.
7 Testimony of Ms. Christian.
8 *Id.*; R. 6.
9 Testimony of Mr. Rockstad; R. 1-2.
10 R. 1-2.
11 R. 10-11; testimony of Mr. Rockstad.
12 Testimony of Mr. Rockstad.
13 *Id.*
14 *E.g.*, R. 17.
15 R. 12.

"said he would take care of it."[17] On August 1, 2008, with the violations still unresolved, the agency issued a Notice of Violation for the violations that are the subject of the present appeal.[18]

The NOV informed Mr. Rockstad that Centre Park I had not submitted its required monthly total coliform results since March of 2007, and had not submitted its required annual nitrate results for 2005 and 2006.[19] It required the system to submit one sample of each by August 30, 2007.[20]

On September 14, 2007, with the sampling results not having been submitted, the department issued a Notice of Preliminary Determination to Assess an Administrative Penalty.[21] This notice included a penalty calculation purporting to apply the penalty formula in 18 AAC 80.1220 and calculating a combined penalty of $10,224.50. Notable features of this calculation were:

- It assessed the sampling failure as two violations, one for nitrate and one for coliform (thus, the missed 2005 and 2006 nitrate samples and the missed April, May, June, July, and August coliform samples were not treated as seven separate violations)
- In assessing the points in Subtotal A (corresponding to 18 AAC 80.1220(b)), it gave two for "failure to perform routine sampling . . . *other* than a failure described in (4)(A) or (4)(B) of this subsection," [italics added] and then assessed four more points in line (4)(B), for a total of six.[22]
- It assessed total economic savings from the failure to sample as required as $147 for coliform and $73.50 for nitrate (the derivation of these figures is not clear; testimony at the hearing indicated that each coliform sample should cost $50-$75 and each nitrate sample about $60[23]).
- It calculated the "Number of Days of Noncompliance" to be 38 for each of the two violations (in fact, 36 days had passed since the NOV).[24]

Next, because AS 46.03.761(g) limits penalties against water systems of this size to $100 per day

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16 *Id.*

17 *Id.*

18 *Id.*; R. 13-15. The NOV was issued to "Ron Rockstad, Owner, Centre Park I Apartments." R. 14. A more accurate formulation would have been to issue the NOV to Mr. Rockstad in his capacity as Managing Agent for Mt. Hayes Properties LLC, which in turn was the owner of the Centre Park I Apartments.

19 R. 14.

20 *Id.*

21 R. 19-26.

22 R. 22-24.

23 Testimony of Ms. Christian.

24 R. 25. In the context that it appears in the calculation, this number represents an application of 18 AAC 80.1220(e) and 18 AAC 80.1290(5), and as such it should presumably be the number of days between Mt. Hayes' receipt of the NOV (August 9—*see* R. 15) and the date of the Notice of Preliminary Determination (September 14). The actual time between these events is 36 days.

per violation and the Drinking Water Program believed the number of days of violation to be 38, the notice reduced the preliminary penalty to 38 x $100 x 2, or $7600.

Mr. Rockstad was given ten days from receipt of the notice to request reconsideration.[25] In an undated letter mailed eleven days after he received the notice, Mr. Rockstad requested ten additional days.[26] He promised in the request to "submit the . . . required samples in a timely manner."[27] In response to the letter, Division of Environmental Health Director Kristin Ryan extended the time to seek reconsideration to October 18, 2007.[28]

On November 14, 2007, having received nothing further from Mr. Rockstad,[29] the Division of Environmental Health issued a final notice assessing a penalty of $7,184.50.[30] The final notice included a worksheet recalculating the penalty. The only change from the prior worksheet was that 2 points were no longer assessed in subsection A for "failure to perform routine sampling . . . *other* than a failure described in (4)(A) or (4)(B) of this subsection," which had been incorrectly added even though these were violations under (4)(B). Elimination of this double-counting had the effect of reducing the presumptive daily penalty for each violation by $40 and reducing the bottom line by $40 x 38 x 2, or $3040. The new calculation of $7,184.50 was below the $7600 cap the agency believed to apply to this assessment, and hence there was no further adjustment.

On November 20, 2007, an Anchorage lab submitted a report of nitrate and coliform sampling for the Centre Park I water system, bringing the system into compliance.[31] The system remained in compliance through December, returning to noncompliance in January and thereafter.[32]

On behalf of Mt. Hayes, Mr. Rockstad asked for reconsideration of the November 14 penalty assessment.[33] Director Ryan granted reconsideration and reduced the penalty to $1000. She gave three bases for the reduction: that the violations did not prevent the system from supplying drinking water to the public; that they did not reduce the quality of the drinking water;

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25 R. 19.
26 R. 21, 28-29.
27 R. 28.
28 R. 30-31.
29 R. 32; testimony of Ms. Christian.
30 R. 32-39.
31 R. 42-44; testimony of Ms. Christian.
32 Testimony of Ms. Christian.
33 R. 48-49.

and that they did not negatively impact the integrity of the source.[34] Mt. Hayes requested a formal hearing, seeking a reduction of the penalty to zero.[35]

III. Discussion

A. Scope of Review

The Commissioner is authorized by regulation to affirm, modify, or rescind the Director's penalty assessment.[36] Nothing in the applicable regulations or statutes restricts the nature of any modification of the penalty. The Commissioner may increase or decrease the amount.

As is the case in most Alaska administrative appeals, the decision to affirm, modify, or rescind is made with new evidence (in this case, consisting entirely of testimony) that was not presented to the original decisionmaker, and therefore it is effectively a *de novo* review of the penalty decision. The decision at the end of the appeal will be a more rigorously tested version of the first decision. If it differs from the first, the difference may not stem from any "errors" in the initial round. Instead, it is simply a new decision made with a different and more complete body of evidence. The task is to make the best decision possible at the executive branch level.

In the course of making the best decision possible, the Commissioner may, for a variety of reasons, find it appropriate to defer to judgments made by the Director, particularly those that are based on specialized expertise or administrative experience in the field.[37] A commissioner is never bound to defer to subordinates in this context, however.[38]

B. Violations at Issue

As noted previously, there is no dispute that the owner or operator of Public Water System # AK2-371532, which draws from a groundwater source, is required to sample annually for nitrate and to arrange for a certified laboratory to report the results to DEC.[39] No nitrate

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[34] R. 51-53.

[35] R. 54.

[36] 18 AAC 80.1250(a).

[37] *See, e.g., Quality Sales Foodservice v. Dep't of Corrections,* OAH No. 06-0400-PRO (Commissioner of Administration, Sept. 21, 2006) at 11, 16 ("While there is no automatic deference . . . , the commissioner may, in appropriate circumstances, wish to extend some practical latitude to the judgments of agency staff;" giving deference "in recognition of the need to give procurement staff some latitude to manage a complex procurement").

[38] *See Blasting v. New Jersey Dep't of Labor & Workforce Dev.*, 2005 WL 3071509, *4-5 (N.J. Super. App. Div. 2005) (under New Jersey's standard administrative process, similar to Alaska's, deference to staff's preliminary decisions is not required in administrative appeal process; administrative appeal is not like court review, where deference is indeed required); *Baffer v. Dep't of Human Serv.*, 553 A.2d 659, 662-3 (Maine 1989) ("the Commissioner [is] the final repository of discretion;" where final administrative decisionmaker thinks he "must defer" to prior exercises of discretion, "[t]his thwarts the purpose of the hearing procedure"); *In re Service Oil Delta Fuel Co.* (Commissioner of Administration, May 26, 1998), at 4 ("the Commissioner is not obligated to defer to the interpretation advanced by [the Division of General Services]").

[39] *See* 18 AAC 80.310, 80.315(d)(1)(A), 80.355(a).

sampling was reported between November 2004 and November 2007, meaning that two annual sampling cycles were missed.

Likewise, the parties agree that the owner or operator of Public Water System # AK2-371532 must sample monthly for total coliform bacteria and arrange for a certified laboratory to report the results to DEC.[40] No coliform sampling was reported between March 2007 and November 2007, meaning that seven monthly samples were missed.

Before assessing an administrative penalty for a violation of this kind, the department is required to provide the responsible entity with notice of the violation.[41] In so doing in this case, the department has characterized the two missed nitrate samples as a single violation, "Failure to conduct routine monitoring for Nitrate," and the seven missed coliform samples as a single violation, "Failure to conduct routine monitoring for Total Coliform Bacteria."[42] Because the NOV is a necessary predicate for any penalty assessed in this order, this order will follow the same approach.

The NOV and the present proceeding encompass the two "failure to conduct routine monitoring" violations until Mt. Hayes returned to compliance and the Director made her final penalty determination on December 28, 2007. Any sampling violations that occurred in 2008 are not within the ambit of this process and could be the subject of a future NOV and assessment.

C. Presumptive Penalty for Failure to Sample for Nitrate

The department has a complex regulatory formula, set out over the course of four pages in 18 AAC 80.1220(a) – (e), for calculating the base penalty to be assigned for a violation under 18 AAC 80. In general, points area assigned for "A," the public health risk factor; "B," previous violation record; and "C," population served. A dollar figure, "D," is also generated to recover any economic savings from the violations together with the department's enforcement cost, allocated over the duration of the violation. The presumptive penalty per day of violation is generated by taking the product of A times B times C times $10, and then adding D to the result.

In this case, the regulation prescribes four points under A for "failure . . . to conduct nitrate . . . monitoring as required by 18 AAC 80.315(d) – (e)."[43] It prescribes one point under B where, as here, there is no history of prior NOVs.[44] It prescribes two points under C for

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40 *See* 18 AAC 80.310, 80.405(b), 80.355(a).
41 AS 46.03.761(b); 18 AAC 80.1210.
42 R. 14.
43 18 AAC 80.1220(b)(4)(B).
44 18 AAC 80.1220(c)(3).

community water systems with fewer than 100 service connections.[45] The product of these three factors is eight. Eight times $10 is $80.

The first component of D is the savings the regulated entity achieved through noncompliance.[46] Mt. Hayes avoided two $60 tests, or a total of $120. The second component of D is the department's costs of detection, investigation, and attempted correction.[47] In this case, $442 in costs has been recorded in connection with the nitrate violation, and Mt. Hayes has not challenged the figure.[48] The total, $562, must then be divided by the number of days of noncompliance to yield the "D" component of the daily penalty. The "number of days of violation" in this context is the number of days between Mt. Hayes's receipt of the NOV (August 9) and the date of the preliminary penalty determination (September 14), or 36 days.[49] "D" is therefore $562 ÷ 36, or $15.61.

Under 18 AAC 80.1220(a), the daily penalty is $80 plus $15.61, or $95.61. Multiplying this figure by 36 days of violation yields a presumptive penalty of $3441.96.

D. Presumptive Penalty for Failure to Sample for Total Coliform

The same regulatory formula discussed above applies to the coliform violation as well. The formula prescribes four points under A for "failure to monitor for coliform bacteria, as required under 18 AAC 80.405."[50] It prescribes one point under B in light of the lack of prior NOVs.[51] It prescribes two points under C for community water systems with fewer than 100 service connections.[52] The product of these three factors is again eight, which when multiplied by $10 yields $80.

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[45] 18 AAC 80.1220(d)(2).

[46] 18 AAC 80.1220(e).

[47] *See* i*d.*

[48] R. 38.

[49] *See* 18 AAC 80.1290(5). The cited regulation could be read instead to allow the department to use—in the context of setting "D" and, much more significantly, in the final penalty calculation—the number of days between the date of the NOV (August 9) and the date the entity came into compliance (November 20), which is 103 days. 103 or more days could also arguably be used as the number of days in violation when applying the overall penalty cap in AS 46.03.761(g). When fed into the final penalty calculation under 18 AAC 80.1220(a), a violation period of 103 days would yield a penalty almost three times higher than any that has ever been broached with Mr. Rockstad in the course of this proceeding. Because of that history, and because no party has advocated doing so, this decision will not consider applying the regulation to his corporation in that less favorable manner. However, this decision should not be read to preclude such a construction of 18 AAC 80.1290(5) or AS 46.03.761(g) in an appropriate case in the future.

[50] 18 AAC 80.1220(b)(4)(B).

[51] 18 AAC 80.1220(c)(3).

[52] 18 AAC 80.1220(d)(2).

The first component of D, the savings the regulated entity achieved through noncompliance,[53] is different for coliform: Mt. Hayes avoided seven $50 tests, or a total of $350. The second component of D, the department's costs of detection, investigation, and attempted correction,[54] has been recorded at $442 in connection with the coliform violation, again an unchallenged figure.[55] The total is $792; when divided by 36 violation days this yields a value for "D" of $22.00.

Under 18 AAC 80.1220(a), the daily penalty is $80 plus $22, or $102. However, for a water system serving 1000 or fewer persons DEC is prohibited by statute from assessing a penalty of more than $100 daily.[56] The presumptive penalty is therefore 36 times $100, or $3600.

E. Adjustment Factors

The final step in setting a penalty is to apply eight factors listed in 18 AAC 80.1220(f). The department may increase or decrease the presumptive penalty based on consideration of these factors. The starting point for applying these factors is the combined presumptive penalty of $7041.96 that was calculated above. Apart from the overall statutory cap for penalties just mentioned, there is no statutory or regulatory limit on how much the factors may increase or decrease the presumptive penalty.

The eight factors are summarized and evaluated below for both violations together:

1. *Whether the violation prevented the entity from supplying drinking water to the public:* As Director Ryan noted, the supply was uninterrupted.

2. *Extent to which quality of water was reduced:* As the Director noted, there is no evidence that quality was reduced. Of course, since there was no sampling, it is possible that nitrate or coliform was elevated at some point during the unsampled period.

3. *Extent to which the violation negatively impacted the integrity of the source:* Again, as the Director noted, a failure to sample does not itself affect the source's integrity; it affects only the ability to monitor its integrity.

4. *Likelihood that the penalty amount will deter future violations by the entity:* According to the evidence at the hearing, the cost of monitoring this system for nitrate and

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53 18 AAC 80.1220(e).
54 *See id.*
55 R. 38.
56 AS 46.03.761(g).

coliform should be between $660 and $960 per year.[57] A combined penalty of $7041.96 is probably considerably higher than is needed to deter Mt. Hayes from ignoring these obligations in the future.

5. *Whether the entity achieved compliance in the shortest feasible time:* This is an aggravating factor in the case of Mt. Hayes; its chief executive simply did not take the many warnings he received seriously enough, and he allowed several additional monthly reporting periods to elapse before he resumed sampling.

6. *Whether the expenditures that would have prevented or minimized the violation are relatively small in comparison to the overall investment in the system:* No evidence was received on Mt. Hayes's overall investment in the Centre Park I system. The cost of sampling is small in absolute terms.

7. *Whether any delay in compliance was out of control of the entity:* See factor 5. The delay was within the control of Mt. Hayes.

8. *Whether the entity knowingly violated the regulations:* The failure to complete sampling over the summer and fall was a knowing violation.

Director Ryan focused on factors 1, 2, and 3 in reducing the combined penalty from approximately $7000 to $1000. She indicated that these factors might have persuaded her to eliminate the penalty entirely, except that the entity's failure to act promptly in response to the NOV indicates that a measure of deterrence is required in this instance.[58]

At least three of the eight factors weigh against Mt. Hayes, and a decision by the Director or Commissioner to maintain the presumptive penalty at $7041.96 or to reduce it only modestly would be legally supportable. The Director has chosen, instead, a reduction to one-seventh the presumptive amount, to a level that recovers Mt. Hayes's savings from noncompliance and the department's enforcement costs but goes little beyond that. This is an instance where some deference to the Director's judgment and experience in administering the program seems appropriate, despite the size of the discount. Her judgment that this is an adequate penalty in the circumstances is supportable: She and her staff have a long history of working with this tiny water system, and their assessment on the best enforcement approach to keep it functioning safely can be given some weight.

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[57] These annual estimates are extrapolated from the sample costs given by Ms. Christian.
[58] R. 52.

At first glance, one might challenge the Director's view that a $1000 penalty is an adequate deterrent in view of the fact that, just one month after she assessed it, Mt. Hayes fell back into noncompliance. The administrative law judge's impression from the pre-hearing conference and the hearing, however, is that Mr. Rockstad simply did not believe the $1000 penalty was real: he thought that by continuing to talk about the small size of the system and the fact that it is presently receiving little or no use, he could work his way to a zero penalty. If the $1000 penalty is upheld contrary to his original expectation, it is not unreasonable to suppose that compliance will greatly improve to avoid the assessment of a similar or much larger penalty in the future.

IV. Conclusion and Order

Pursuant to 18 AAC 80.1250, the administrative order of December 28, 2007 assessing a penalty of $1000 against Mt. Hayes Properties LLC is affirmed.

DATED this 3rd day of October, 2008.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Notice (18 AAC 80.1250(a)): This administrative order is the final agency decision. The respondent may obtain judicial review of this administrative penalty order by filing a notice of appeal in the superior court in the fourth judicial district at 101 Lacey Street, Fairbanks, Alaska 99701 within 30 days from the date that the decision appealed from is mailed or otherwise distributed as provided by Alaska Rule of Appellate Procedure 602. An administrative penalty order becomes final and is not subject to review by a court if an appeal is not timely filed with the superior court.

DATED this 17th day of November, 2008.

By: *Signed*
Signature
Larry Hartig
Name
Commissioner ADEC
Title

[This document has been modified to conform to technical standards for publication.]