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

Creekwood Park Limited Partnership, Requestor, v. Alaska Department of Environmental Conservation, Division of Environmental Health, Respondent.	)	OAH No. 13-1738-DEC

NOTICE TRANSMITTING FINAL DECISION

Attached is the administrative law judge's decision in this matter, which became the final agency decision on October 30, 2017 by operation of AS 44.64.060(f).

A. Notice of Right to Reconsideration

A party may request reconsideration of the decision by filing a petition under AS 44.62.540 within 15 days after delivery or mailing of the decision. Send the petition requesting reconsideration to the following address:

Office of Administrative Hearings
Attn. Commissioner of Environmental Conservation
550 W. 7th Avenue, Suite 1940
Anchorage, Alaska 99501

At the same time, send a copy of the petition to the opposing parties' legal counsel.

B. Notice of Appeal Rights

Judicial review of the decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 31st day of October, 2017.

By: *Signed*
Law Office Assistant
Office of Administrative Hearings

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DECISION

I. Introduction

This case involves a dispute between Creekwood Park Limited Partnership (Creekwood) and the Alaska Department of Environmental Conservation, Division of Environmental Health (DEC) over an administrative penalty in the amount of $219,200 assessed against Creekwood on July 5, 2013 regarding the water system for Creekwood Apartments located in Palmer, Alaska. The parties settled a portion of the case, however there remained an issue regarding whether DEC was entitled to a recovery against Creekwood, in the amount of $147,200, under the terms of the parties' settlement, because Creekwood had unplanned water system outages.

The evidence shows, however, that although there were unplanned water outages, they were of short duration, were due to unforeseeable mechanical/electrical issues, were immediately rectified, and did not result in compromised water quality. Accordingly, the administrative penalty is vacated in its entirety. Creekwood has no remaining financial obligation to DEC arising from the 2013 penalty.

II. Background Facts and Procedural History

Creekwood is the owner of an apartment complex located in Palmer, Alaska. The water for the apartments was supplied by a private well. That well started to fail in 2009. Creekwood made attempts to resolve the issue. In 2010, DEC issued a notice of violation to Creekwood regarding the water system. It subsequently assessed an administrative penalty of $18,600 against

Creekwood in 2011.[1] The record contains considerable correspondence between Creekwood and DEC regarding issues with Creekwood's water system.[2]

DEC preliminarily assessed a second penalty against Creekwood in the amount of $219,200 on May 28, 2013. The allegations underlying the assessment were that Creekwood had failed to rectify the concerns raised by DEC in its earlier notices of violations: failing to correct deficiencies noted during an earlier sanitary survey, "construction, installation, alteration, renovation, or improvement of a public water system without" the required approval, "[o]peration of a public water system without a valid final or interim approval to operate," and failure to meet the regulatory standards for maximum contaminant levels for turbidity.[3]

After correspondence with Creekwood, DEC issued its notice on July 5, 2013, assessing the $219,200 penalty. The penalty assessed was based upon the same violations listed in the May 28, 2013 preliminary assessment notice.[4] Creekwood requested a hearing. The Commissioner of DEC referred this case to the Office of Administrative Hearings on December 3, 2013.

DEC and Creekwood entered into a settlement agreement in February 2015. They placed the terms of the settlement on the record. They did not reduce the settlement terms to writing. The material terms of the settlement were:

a. Creekwood was to have an approved and operating water system for the apartments. That process involved an initial water storage system, where water would be hauled and stored in tanks for the residents to use, and a final operating (non-storage) water system installed.[5]

b. The initial administrative penalty assessed by DEC was $219,200.[6] Creekwood would be given a credit against that amount consisting of $2 for every gallon of water storage constructed. The maximum credit allowed would be for 75,000 gallons, not counting the 4,500-gallon tank already in place.[7]

c. If the apartments went for a one-year period, from July 1, 2015 to June 30, 2016, without any unplanned water system outages, then the remainder of the penalty,

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1 The $18,600 penalty is not an issue in this case. Creekwood confessed judgment in DEC's favor on that penalty in 2012. *See* Administrate Record, pp. 629 – 633.

2 *See, e.g.,* Administrative Record, pp. 508 – 513, 637 – 641.

3 Administrative Record, pp. 437 – 438.

4 Administrative Record, pp. 423 – 425.

5 *See* Transcript of February 12, 2015 hearing, p. 4, lines 20 – 22; p. 5, lines 8 – 22; p. 6, lines 12 – 16; p. 9, lines 1 – 7.

6 *See* DEC May 28, 2013 Notice of Preliminary Determination to Assess Administrative Penalty (Ex. 9 to DEC's Motion for Summary Judgment).

7 *See* Transcript of February 12, 2015 hearing, p. 7, lines 10 – 24.

> after allowing credit for water storage, would be forgiven.[8] Although not explicitly discussed in the parties' remarks during the February 12, 2015 proceeding, the corollary would be that if there was an unplanned water system outage during the specified year time frame, Creekwood would be liable for the balance of the penalty.

This case was then stayed to allow the parties time to fully effectuate the terms of that settlement. Although the parties stated that the agreement would be reduced to writing, it was not.

In March 2017, DEC moved that the stay be lifted, arguing that the parties never entered into a binding settlement agreement, and requesting that the case move forward. Alternatively, DEC argued that the terms of the oral settlement agreement needed to be enforced. Creekwood opposed lifting the stay, arguing that the case had been settled.

An order was entered confirming the settlement and setting out its terms as stated above. This, however, did not completely dispose of the case. DEC maintained that there were unplanned water system outages which rendered Creekwood financially liable to DEC under the terms of the settlement. Creekwood had installed a 36,000-gallon water storage tank, which gave it a credit of $72,000 against the original $219,200 assessed penalty – leaving a remaining balance of $147,200.[9] The stay was lifted to address this remaining issue.

An evidentiary hearing was held on July 28, 2017 to address the question of whether Creekwood was financially liable to DEC due to the apartments having unscheduled water outages from July 1, 2015 through June 30, 2016.

DEC's primary witness was Amy Hill. Ms. Hill was an environmental program manager with DEC, who was familiar with Creekwood's water system and its problems.[10] Creekwood's primary witnesses were Guy Miller with Alaska Water Solutions, which hauled water to the tank storage system in 2015 and 2016; David Kranich with Northern Utility Services, which provided installation and support to the system; and Ed Cornforth, part of the management team for Creekwood.[11]

III. Facts

In the summer of 2015, the apartments were operating using a hauled water system. Water was hauled to the apartments, where it was stored in tanks on the property, and was then

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8 *See* Transcript of February 12, 2015 hearing, p. 9, lines 15 – 21; p. 10, lines 9 – 20.

9 DEC's pleadings use the figure of $146,000. *See* DEC's Hearing Brief, dated July 21, 2017, p. 1; DEC's Closing Brief, dated August 4, 2017, p. 2.

10 Ms. Hill's testimony.

11 Mr. Miller's testimony; Mr. Kranich's testimony; Mr. Cornforth's testimony.

available for the residents' use. Alaska Water Solutions was the business that hauled water to the storage tank system in 2015 and 2016.[12] At the time, Creekwood was in the process of transitioning to a non-hauled water system. While Creekwood was transitioning to the permanent water system, there were six unscheduled system water outages between July 1, 2015 through June 30, 2016, each of which lasted for between one-half hour and three hours.[13]

Guy Miller with Alaska Water Solutions was the person who reported most of these outages. During each of these outages, there was water in the system, however it could not be accessed by the individual apartments.[14] All of the water samples from the system were satisfactory.[15] Those six outages were as follows:

- **July 25, 2015.** Northern Utility Systems was adding a 36,000-gallon water store tank to the apartments to supplement the 4,500-gallon tank already in place. During the course of the construction, the electrical controls for the pumps (variable frequency drive) had to be relocated. When the wiring was put back together, there was a malfunction where a wire nut melted and there was a water system outage. The wire nut was replaced. A water sample was subsequently taken, which tested negative for contaminants.[16]
- **August 4, 2015.** This was a repeat of the July 25, 2015 incident. The wire nut again melted, which led to a water system outage. A water sample was taken which tested negative for contaminants.[17]
- **August 12, 2015.** This was caused by a wiring issue related to the pumps that transferred water between storage tanks. The outage lasted for approximately an hour. Samples were again taken, which tested negative for contaminants.[18]
- **August 14, 2015**. There was an approximately one-hour outage, apparently related to the electronic controls for the water pumps.[19]
- **August 22, 2015.** There was an approximately one-hour outage with an unknown cause. Neither Alaska Water Solutions or Northern Utility Systems were working onsite at the time.[20]

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12 Mr. Miller's testimony.

13 Mr. Kranich testified the outages lasted from between one-half hour to three hours. Mr. Miller, the person who reported most of the outages, testified the outages last from between one-half hour to two hours.

14 Mr. Miller's testimony.

15 Ms. Hill's testimony.

16 Ex. 2, p. 1; Ex. 3; Ms. Hill's testimony; Mr. Kranich's testimony; Mr. Miller's testimony.

17 Ex. 2, p. 2; Ex. 4; Ms. Hill's testimony; Mr. Kranich's testimony; Mr. Miller's testimony.

18 Ex. 2, p. 2; Ex. 5; Ms. Hill's testimony; Mr. Kranich's testimony; Mr. Miller's testimony.

19 Ex. 2, p. 3; Ex. 6; Ms. Hill's testimony; Mr. Kranich's testimony; Mr. Miller's testimony.

- **February 1, 2016**.[21] This was a pump failure in the 4,500-gallon tank. It was resolved by abandoning the use of the 4,500-gallon tank and using the 36,000-gallon tank instead. A water sample was taken, which tested negative for contaminants.[22]

IV. Discussion

The settlement agreement recited on the record contemplates that an unscheduled water outage during the target period, July 1, 2015 to June 30, 2016, would trigger Creekwood being liable for the $147,200 balance of the $219,200 penalty. The settlement agreement does not define the term "unscheduled water outage." It is undisputed that there were six unscheduled water system outages. DEC argues that under the terms of the settlement agreement, any unscheduled outage, no matter how minor and regardless of cause, renders Creekwood liable. Creekwood, on the other hand, argues that, given the context of the settlement agreement, none of the six disruptions of the water system were sufficient to render it liable.

Settlement agreements are interpreted as contracts.[23] "The objective of contract interpretation is to determine and enforce the reasonable expectations of the parties."[24]

The settlement agreement discussion placed on the record on February 12, 2015 reveals the following:

- The hauled water system is to stay in effect until the new utility water system is operational.[25]
- Creekwood is to test both systems, keep an operator log, and take monthly coliform samples in addition to any other testing required by DEC.[26]
- "We [Creekwood] cannot have any unscheduled water outages" and if there is any outage to the water utility system, the apartments will "immediately revert back to the haul water system so that there will be no discontinuation."[27]
- "If we [Creekwood] go a year and we've basic – we've said July 1st, 2015 to June 30th, 2016, * * * but if we go a year without any incident or degradation of the water quality in the distribution system" then the remaining portion of the penalty will be forgiven.[28]

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20 Ex. 2, p. 3; Ex. 7; Ms. Hill's testimony; Mr. Miller's testimony; Mr. Kranich's testimony.

21 Although Ms. Hill's notes indicate that the water outage was on February 2, 2016, the chain of custody documents on the water sample show that the outage was on February 1, 2016. Ex. 2, p. 4 (Ms. Hill's notes); Ex. 11, p. 5 (test lab form stating outage on February 1, 2016).

22 Ex. 2, p. 4; Exs. 10 – 11; Ms. Hill's testimony; Mr. Kranich's testimony; Mr. Miller's testimony.

23 *Chilkoot Lumber Co., Inv. V. Rainbow Glacier Seafoods, Inc.*, 252 P.3d 1011, 1014 (Alaska 2011).

24 *Knoxville v. Carry-Gottstein Foods Co.*, 84 P.3d 996, 1004 (Alaska 2004).

25 Transcript of February 12, 2015 hearing, p. 9, lines 4 – 7.

26 Transcript of February 12, 2015 hearing, p. 9, lines 8 – 14.

27 Transcript of February 12, 2015 hearing, p. 9, lines 15 – 21.

- DEC agreed that those were the terms: "I think that's the basic plan . . ."[29]

When reviewing this settlement agreement as a whole, DEC's argument that "any" unplanned interruption in water service causes Creekwood to be liable is unreasonable. For instance, a power outage or what are deemed acts of god (forest fire, flood, earthquake, etc.), or other acts that are completely beyond the control of Creekwood would make it responsible for the payment of the remaining penalty. Similarly, the settlement agreement contemplates a switch over from the water utility system to the hauled water system in the event of an outage. Under DEC's position, an unplanned interruption in the service, while the system is being switched over from the water utility system to the hauled water system would render Creekwood liable, even though the settlement agreement clearly contemplates such an interruption.

The reasonable interpretation of the settlement agreement is that a triggering event would be an unplanned interruption in service that was either more than a minimal interruption or that negatively impacted the water quality. Examples of situations that might have caused Creekwood to be liable would be outages that caused loss of water for more than a couple hours, perhaps eight hours or more, or that resulted in contaminated, discolored, or cloudy water, or outages caused by Creekwood disregarding its obligation to maintain and operate the system. Instead, the evidence shows that the outages were caused by unanticipated electrical or mechanical issues, that none of the outages lasted more than two or three hours, that Creekwood acted promptly to resolve the issues, and that the water quality was not negatively impacted. Accordingly, it is more likely true than not true that there were not any unplanned water system outages during the target period that were significant enough to make Creekwood liable for the remaining $147,200 balance of the penalty that was assessed against them on July 8, 2013.

V. Conclusion

Creekwood has substantially complied with the terms of the February 2015 settlement agreement. The remaining portion of the penalty assessed against Creekwood on July 8, 2013 is forgiven in its entirety.

DATED this 13th day of September, 2017.

Signed
Lawrence A. Pederson
Administrative Law Judge

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[28] Transcript of February 12, 2015 hearing, p. 10, lines 7 – 20.
[29] Transcript of February 12, 2015 hearing, p. 10, lines 21 – 22.