

BEFORE THE STATE OF OREGON
PUBLIC HEALTH DIVISION
OREGON HEALTH AUTHORITY

IN THE MATTER OF) FINAL ORDER
)
)
FISH MILL LODGES)
Judy Bedsole, Owner)

HISTORY OF THE CASE

On October 27, 2010, the Oregon Health Authority (Authority) issued a Notice of Intent to Impose Civil Penalty (Notice) to Judy Bedsole of Fish Mill Lodges.¹ Ms. Bedsole timely requested a hearing and the matter was referred to the Office of Administrative Hearings (OAH) on November 18, 2010. It was assigned to Administrative Law Judge (ALJ) Rick Barber. Hearing was scheduled for March 17, 2011.

Summary Determination. On January 5, 2011, the Authority filed a Motion for Summary Determination in the case. Ms. Bedsole filed a response on January 25, 2011, but the ALJ did not receive it before issuing his letter ruling of January 25, 2011, denying the motion. On January 27, 2011, after reviewing Ms. Bedsole's response, the ALJ again denied the motion.

Hearing. Hearing was held by telephone on March 17, 2011, with ALJ Barber presiding. Ms. Bedsole was present and represented herself, who testified. Charles and Shawn Bedsole also testified. The Department was represented by Senior Assistant Attorney General Shannon O'Fallon. Lane County Environmental Health employee Katrinka Danielson and Drinking Water Program (DWP) Enforcement Coordinator Brad Daniels testified for the Authority. The hearing record closed on March 17, 2011.²

On April 15, 2011, the Proposed Order was issued. On April 21, 2011, the initial Proposed Order was amended to correct the information concerning where exceptions should be sent. The only substantive change in the document was the exceptions language.

¹ An Amended Notice was sent out on March 2, 2011, and is the notice at issue in this case.

² Ms. Bedsole sent additional documents to the OAH after the hearing record closed. Because there was no agreement to hold the record open for additional evidence, the ALJ did not and OHA did not review or consider any additional information.

ISSUE

1. Whether Judy Bedsole as the owner and operator of Fish Mill Lodges failed to perform follow-up water testing after a positive test for coliforms, thereby violating OAR 333-161-0036(6)(s) and OAR 333-161-0025(1).
2. Whether Judy Bedsole as the owner and operator of Fish Mill Lodges failed to take immediate corrective action after a positive test for coliforms, thereby violating OAR 333-161-0025(2).
3. Whether, if the violations above are shown, Judy Bedsole as the owner and operator of Fish Mill Lodges should be required to pay civil penalties in the aggregate amount of \$1,000.

EVIDENTIARY RULINGS

Exhibits A1 through A18, offered by the Authority, were admitted into evidence without objection. Ms. Bedsole offered Exhibits C1 through C14 before the hearing, and then indicated her intent to additionally rely on the exhibits she had submitted for the Motion for Summary Determination. The summary determination documents are marked as Exhibit C15.

The Authority objected to Exhibits C1-3 and C6-10 on relevance grounds, and Exhibit C11, an audio recording, because it was recorded illegally. The relevance objections were overruled, and the objection to Exhibit C11 was sustained. Therefore, all offered documents other than Exhibit C11 have been admitted into evidence.

FINDINGS OF FACT

1. Fish Mill Lodges operates a public water system with approximately 23 connections, serving water to the Lodge's renters and to three residences nearby in Lane County. The water originates in a spring (groundwater) with a pump house some distance from Fish Mill Lodge's location. (Test. of Daniels, Ex. A1).

2. On September 16, 2010, a routine water sample was taken from Fish Mill Lodges Cabin 5. When tested, the sample showed that total coliforms were present but *E. coli* was absent. (Ex. A2). Four additional samples taken on September 21, 2010 confirmed the presence of both total coliforms and *E. coli* in Fish Mill Lodge's water supply. (Ex. A3-A6).

3. Lane County Environmental Health administers the Drinking Water Program in Lane County under state contract. Katrinka Danielson is the primary drinking water specialist for the county. When Judy Bedsole contacted Danielson about the positive samples, Danielson told her she needed to immediately take five confirmation samples from the water source. Bedsole told her she could not afford to take the samples, so Danielson offered to take the samples at Lane County's expense. Bedsole initially

agreed to allow the samples to be taken, and the visit to take samples was scheduled for October 4, 2010. (Test. of Danielson).

4. On September 30, 2010, Bedsole sent an email to Danielson, stating:

Hi Katrinka,

I do appreciate your time and effort trying to help me with this situation.

After digesting our conversation and your email I have decide[d] not to take the 5 repeat samples. I looked up the attached water use agreement; I am not responsible for the Water System expenses and can not be held responsible for its lack of funds.

I want to cancel the water systems inspection arranged for Monday October 4, 2010. I will not be available.

(Ex. A9 at 1). As a result, the water samples were not taken by Lane County or Ms. Bedsole, and the matter was referred to the Authority to address. (*Id.*; Test. of Danielson).

5. The repeat samples are supposed to be done within 24 hours of a positive test. In practice, the Authority gives the water provider 14 days to do repeat tests. (Test. of Danielson, Daniels).

6. Brad Daniels is the Enforcement Coordinator for the Authority's Drinking Water Program; it is his job to conduct investigations and, if appropriate, issue notices to water suppliers for rule violations. After Ms. Bedsole informed the Authority of the contamination in the tests on September 24, 2010, Daniels office informed Ms. Bedsole that she needed to do three things: 1) collect the five confirmation samples; 2) issue and post "boil water" notices immediately; and 3) take immediate action to isolate and correct the contamination. (Test. of Daniels).

7. Ms. Bedsole posted the "boil water" notices and contacted those relying on system water about the problem. Ms. Bedsole did not perform the five confirmation tests, and had not corrected or isolated the source of the contamination as of November 22, 2010, almost two months after the contamination was found. (Test. of Danielson; Test. of J. Bedsole).

8. In the process of setting the appointment to take samples and to otherwise inform Ms. Bedsole about how to resolve the problem, Danielson provided several documents with written suggestions about identifying and repairing the source of contamination. Ms. Bedsole received them. The recommendations included clearing away brush from the source, making sure no animal carcass had made its way into the water supply, and closing up any avenues of ingress into the source. (Ex. A8, A9). When Danielson visited the water source on November 22, 2010, she found several

possible reasons why *E. coli* might be present. None of her recommendations had been followed by Ms. Bedsole. (Test. of Danielson).

CONCLUSIONS OF LAW

1. Ms. Bedsole failed to perform follow-up water testing after a positive test for coliforms, thereby violating OAR 333-161-0036(6)(s) and OAR 333-161-0025(1).
2. Ms. Bedsole failed to take immediate corrective action after a positive test for coliforms, thereby violating OAR 333-161-0025(2).
3. Ms. Besole as the owner and operator of Fish Mill Lodges must pay civil penalties in the aggregate amount of \$1,000.

OPINION

The Authority contends that Ms. Bedsole violated two of her responsibilities under the Drinking Water Program, and proposes to assess an aggregate civil penalty of \$1000 against her. As the proponent of those positions, the Authority has the burden to present evidence in support of its case. The Authority must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Fish Mill Lodges, a "transient non-community water system" under OAR 333-061-0020(197),³ has various responsibilities under the laws of the Drinking Water Program, OAR 333-061-0025 sets forth the responsibilities of water suppliers, including the following:

Responsibilities of Water Suppliers

Water suppliers are responsible for taking all reasonable precautions to assure that the water delivered to water users does not exceed maximum contaminant levels, to assure that water system facilities are free of public health hazards, and to assure that water system operation and maintenance are performed as required by these rules. This includes, but is not limited to, the following:

³ That rule states:

(197) "Transient Non-Community Water System (TNC)" means a public water system that serves a transient population of 25 or more persons.

(1) *Routinely collect and submit water samples* for laboratory analyses at the frequencies prescribed by OAR 333-061-0036;

(2) *Take immediate corrective action* when the results of analyses or measurements indicate that maximum contaminant levels have been exceeded and report the results of these analyses as prescribed by OAR 333-061-0040[.]

(Emphasis added). The emphasized portions of the rule are the portions the Authority accuses Ms. Bedsole and Fish Mill Lodges of violating.

The Water Samples. Subsection (1) of the rule quoted above requires the water system to routinely collect water samples “at the frequencies prescribed in OAR 333-061-0036. That rule, in turn, describes what is expected when there has been a positive coliform/*E. coli* test:

Beginning on December 1, 2009, if the Department does not require corrective action as prescribed by OAR 333-061-0032(6)(b) for an *E. coli*-positive source water sample collected in accordance with subsection (6)(r) of this rule and not invalidated as prescribed by subsection (6)(x) of this rule, *the water system must collect five additional source water samples from the same groundwater source within 24 hours of being notified of the E. coli-positive sample.*

OAR 333-061-0036(6)(s)(emphasis added). Interestingly, although the rule requires a retest within 24 hours, the standard in the industry is to retest within 14 days.

Therefore, combining the rule and the industry standard, Judy Bedsole as the owner and operator of Fish Mill Lodges was required to take five additional source water samples within 14 days of the positive *E. coli* sample. She did not do so.

Bedsole told Danielson that she did not have the financial ability to pay for the additional testing, and Danielson offered to do the testing at no charge. Ms. Bedsole initially agreed, but Ms. Bedsole later inexplicably declined to allow the county to take the five additional samples.

Consequently, the Authority has established that Fish Mill Lodges and Judy Bedsole violated the administrative rule and failed to take the five additional samples required.

Immediate Corrective Action. The phrase “immediate corrective action” is not defined in the administrative rules, so the words in the phrase are given their plain meaning in the English language. The word “immediate” signifies that what occurs must occur right away, while the word “corrective” indicates that the action must be intended to resolve the problem—in this case, the contamination problem. Finally, the word “action” refers to the necessity to “act.” To act is to do something.

In this case, Ms. Bedsole took no apparent action, immediate or otherwise. Ms. Bedsole did not correct the contamination problem despite Danielson's offer to assist and despite the wealth of information she provided to Ms. Bedsole. When Danielson visited the water source on November 22, 2010, the possible sources of *E. coli* were evident but none of her recommendations to resolve the problems had been implemented by Fish Mill Lodges.

One of Bedsole's sons testified that the brush had been cleared away from the water source, but Danielson's testimony demonstrates that it was still there in November. Judy Bedsole testified that efforts were made to resolve the problems, but there are two problems with her testimony. First, she testified that she was unable to go to the site because of a physical condition. If that is true, then she did not have personal knowledge of the conditions at the source and her testimony is suspect.

Second, it was apparent from Bedsole's testimony that she was unclear about when changes were made at the water source. She testified about changes being made, but the context suggests that those changes took place after Danielson's November 22 visit, if at all. Those changes, if they in fact occurred, were not immediate enough to meet the terms of the administrative rule. Consequently, Ms. Bedsole violated this provision as well.

The Sanction. ORS 448.285 states in part:

Penalty schedule; factors to be considered in imposing penalty; rules.

(1) The Director of the Oregon Health Authority shall adopt by rule a schedule or schedules establishing the amount of civil penalty that may be imposed for a particular violation. No civil penalty shall exceed \$500 per day, except that a violation at any water system that serves more than 10,000 people shall be subject to a civil penalty not to exceed \$1,000 for each day of violation.

(2) The director may impose the penalty without hearing but only after the notice required by ORS 448.280 (2). In imposing a penalty pursuant to the schedule or schedules adopted pursuant to this section, the director shall consider the following factors:

(a) The past history of the person incurring a penalty in taking all feasible steps or procedures necessary or appropriate to correct any violation.

(b) Any prior violations of statutes, rules, orders and permits pertaining to the water system.

(c) The economic and financial conditions of the person incurring the penalty.

(3) The penalty imposed under this section may be remitted or mitigated upon such terms and conditions as the Oregon Health Authority considers proper and consistent with the public health and safety.

(4) In adopting rules or imposing penalties under this section for violations of ORS 448.280 (1)(b), the director shall collaborate with the accrediting authority.

This statute provides the basis for civil penalties in this case, allowing for daily penalties for continued violations.

Under the administrative rules interpreting this statute, the amount of civil penalties is based upon the population served by the water system. For systems serving between 10 and 100 customers daily, the maximum civil penalty for a violation is \$50 per day. OAR 333-061-0290(5).

The Authority determined that Ms. Bedsole violated both of its noted responsibilities under the rules (water sampling and immediate correction) each day, for a total of \$100 in penalties each day. The Authority limited its assessment of penalties to ten days, although the violations clearly continued beyond that ten-day period. The Authority's assessment of civil penalties is reasonable, and is supported by the law and the facts.

EXCEPTIONS

Ms. Bedsole filed timely "objections" to the proposed order on May 16, 2011. The Authority will treat the objections as exceptions.

In her objections, Ms. Bedsole makes various statements that Fish Mill Lodges is private property, that the state has no beneficial interest in the property, that it has no easements, that she has been compelled to provide water, that she has since been deregulated, and that she could not afford an attorney and was disadvantaged, and that she has no money with which to pay the civil penalty. None of these points address the violations listed above and thus are not a basis upon which the proposed order should be amended or overruled.

The remainder of Ms. Bedsole's statements attempt to attack sworn testimony that was given at the hearing and exhibits that were entered into evidence at the hearing. The Authority will not alter the factual findings of the Administrative Law Judge based on unsworn statements by Ms. Bedsole that are contrary to the record that was created at the hearing. Ms. Bedsole had an opportunity to testify at the hearing, call witnesses, and present documentary evidence in support of her case. The testimony and documentation she provided did not overcome the evidence presented by the Authority that Ms. Bedsole and Fish Mill Lodges violated two provisions of the state drinking water regulations and as such is subject to civil penalties.

Ms. Bedsole's exceptions are denied.

ORDER

The Amended Notice of Intent to Impose a Civil Penalty, dated March 2, 2011, is **AFFIRMED** and Judy Bedsole as the owner and operator of Fish Mill Lodges, shall pay a civil penalty of \$1,000.



Gail Shibley, JD
Administrator

Office of Environmental Public Health, Oregon Health Authority

DATE of Service: May 31, 2011

APPEAL PROCEDURE

You are entitled to judicial review of this order in accordance with ORS 183.482. You may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon within 60 days from the date of this order.

GENERAL PROVISIONS

Civil penalty amounts are established in Oregon Administrative Rule 333-061-0090. If unpaid, civil penalties may be assigned liquidated and delinquent civil penalties to the Department of Revenue, as provided in ORS 293.250, not later than 90 days after the Notice becomes final.

Reasonable administrative costs, collection costs, attorney's fees, and all other costs and charges necessary for the collection of any amount not paid when due, including but not limited to collection charges assessed by the Department of Revenue may be added to the amount due.

If unpaid, civil penalties, may also be recorded and filed with county clerks as liens against property 10 days after the expiration of the statutory appeals period. Make Checks payable to the DHS-Drinking Water Program.

CERTIFICATE OF MAILING


On the 31ST day of May 2011, I mailed the foregoing FINAL ORDER

BY CERTIFIED AND FIRST CLASS MAIL:

Judy Bedsole
Fish Mill Lodges
PO Box 95
Westlake, OR 97493

BY ELECTRONIC MAIL:

Shannon O'Fallon, AAG
Oregon Department of Justice
1515 SW 5th Avenue #410
Portland, OR 97201



Brad K. Daniels
Enforcement Coordinator

