

800 NE Oregon St.
Portland, Oregon 97232-2162
Voice (971) 673-0405
FAX (971) 673-0694
TTY (971) 673-0372

BEFORE THE STATE OF OREGON
OREGON HEALTH AUTHORITY
CENTER FOR HEALTH PROTECTION

In the Matter of

FINAL ORDER IMPOSING
CIVIL PENALTY

West Coast Real Estate Holdings, LLC,
dba
Dunn Court Duplexes
Public Water System #OR4100962

OAH Reference No. 2018-OHA-09407

To: Alex Labunsky, Authorized Representative
25030 SW Parkway Avenue, Suite 110
Wilsonville, OR 97070

HISTORY OF THE CASE

On August 20, 2018, the Oregon Health Authority (Authority) issued West Coast Real Estate Holdings, LLC (Company) a Notice of Violation of Settlement Agreement / Intent to Order Payment of Remaining Civil Penalty (August 2018 Notice). On August 30, 2018, the Company requested a hearing to contest the decision.

The Authority referred the matter to the Office of Administrative Hearings (OAH) on September 18, 2018. The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matter.

On October 8, 2018, ALJ Fair convened a telephone prehearing conference. The Company appeared and was represented by Alex Labunsky, the owner of West Coast Home Solutions, LLC. The Authority appeared and was represented by Senior Assistant Attorney General Shannon O'Fallon. Brad Daniels, an enforcement and rules coordinator with the Authority, also appeared. ALJ Fair scheduled the hearing for November 14, 2018 and set deadlines for submission of witness lists and exhibits.

On October 15, 2018, the Authority issued the Company an Amended Notice of Violation of Settlement Agreement / Intent to Order Payment of Remaining Civil Penalty / Termination of Settlement Agreement (October 2018 Notice).

On October 25, 2018, the Company submitted a notice, dated October 1, 2018, authorizing Mr. Labunsky to represent the Company in the pending matter.¹

On November 14, 2018, ALJ Fair convened an in-person hearing in Tualatin, Oregon. The Company appeared and was represented by Mr. Labunsky, who testified. The Authority appeared and was represented by Ms. O'Fallon. Mr. Daniels testified on behalf of the Authority. The record closed on November 14, 2018, at the conclusion of the hearing.

On November 20, 2018, the ALJ issued a Proposed Order finding that the Company was in violation of the Settlement Agreement and Final Order and recommending that the Authority impose a civil penalty of \$4,050. The Authority had also proposed to terminate the Settlement Agreement and Final Order but the ALJ found that the terms of the Agreement did not permit that.

No exceptions were filed to the Proposed Order.

ISSUES

1. Whether the Company violated the terms of the January 18, 2018 Settlement Agreement and Final Order. OAR 333-061-0030(1) and OAR 333-061-0040(1)(b)(A).

2. If so, whether the Company must pay a \$4,050 civil penalty. ORS 448.280(1)(a) and OAR 333-061-0090(2).

¹ ORS 413.041 allows a limited liability company (LLC) to be represented by officers or employees of the LLC or an authorized agent of the LLC in proceedings involving the Authority.

3. Whether the Authority may terminate the January 18, 2018 Settlement Agreement and Final Order.

EVIDENTIARY RULINGS

Exhibits A1 through A4, offered by the Authority, were admitted into the record without objection. The ALJ re-marked P3, submitted by the Authority, as exhibit A5 and admitted it into the record without objection.

FINDINGS OF FACT

1. The Company is the owner of Dunn Court Duplexes, a multi-unit residential complex that services low-income housing residents located in Woodburn, Oregon. The approximately 90 year-round Dunn Court Duplexes residents receive their water from an on-site well and sanitation system owned by the Company. (Test. of Daniels and Labunsky.) The original well and sanitation system was old and dilapidated. Approximately five years ago, the Company looked into alternative systems with the lowest bid at \$35,000, a cost the Company found unfeasible. Mr. Labunsky, with the assistance of an engineer, designed and installed a more economical resin sterilization system with various self-flushing filters to sanitize the well water prior to its distribution to the residents. (Test. of Labunsky.)

2. Arsenic is a naturally-occurring mineral that is known to occur in the groundwater located in Woodburn, and the levels of arsenic are known to fluctuate. Arsenic is a carcinogen, and in addition to causing cancer, can cause damage to an individual's circulatory system and have adverse dermatological effects. Because of these threats to human health, the Authority considers arsenic to be a public health hazard when its concentration levels in water exceed 0.010 milligrams per liter (mg/L). (Test. of Daniels.)

3. Arsenic levels in the Dunn Court Duplexes system can rise with increased residential water consumption, such as during summer when residents' use increases or when a water pipe bursts, or during periods of drought that occur during the summer. Dunn Court Duplexes' well house has also been subject to vandalism in which the power is shut down. When the power is turned off, arsenic levels in the well water may increase. To maintain the system, the Company periodically replenishes the resin bed and flushes out the system. The Company also had a Dunn Court Duplexes resident occasionally visibly check the well house for any signs of damage. (Test. of Labunsky.)

4. On December 27, 2017, the Authority issued a Notice of Intent to Impose a Civil Penalty (2017 Notice) against the Company for violations of the Oregon Drinking Water Quality Act² and its associated Oregon Administrative Rules. (Ex. A5 at 1.) The Authority issued the 2017 Notice based upon allegations of noncompliance with a 2013 Administrative Order, ongoing excessive arsenic levels, and failure to take reasonable measures to resolve the excessive levels. (Test. of Daniels.) On January 3, 2018, the Company requested a hearing. On January 18, 2018, the Authority issued a Settlement Agreement and Final Order (Agreement), signed by the Company and the Authority, that resolved the 2017 Notice. As part of the terms of the Agreement, the Company agreed to pay \$450 of a \$4,500 civil penalty and the Authority agreed to suspend the remaining \$4,050 of the civil penalty “as long as the Company complies with the terms of this Settlement Agreement and Final Order.” (Ex. A5 at 1.) The Agreement provides, in part:

Agreement Article No. 3: The Company agrees to conduct monthly arsenic monitoring at the Dunn Court Duplexes water system and report the sample results to the Authority within 10 calendar days of the end of the month * * *.

* * * * *

Agreement Article No. 4: The Company agrees to maintain and operate the arsenic treatment at the Dunn Court Duplexes water system such that drinking water produced and delivered to water users at all times contains concentrations of arsenic below the maximum containment level (MCL) of 0.010 mg/L * * *.

Agreement Article No. 5: If any sample collected according to Agreement Article No. 3 exceeds the MCL the Company agrees to immediately collect a confirmation sample and report the results of the confirmation sample upon receipt to the Authority.

* * * * *

Agreement Article No. 7: The company will be in violation of this Agreement if:

- The concentration of arsenic in more than one confirmation

² The Oregon Drinking Water Quality Act includes ORS 448.119 to 448.285, 454.235 and 454.255. See ORS 448.127.

- sample exceeds the MCL; or
- The Company does not comply with the terms of this Agreement.

* * * * *

Agreement Article No. 9: If the Authority determines that the Company is in violation of this Agreement it will notify the Company of the violation. The Company will be given the opportunity to contest in a contested case proceeding whether or not it is in violation of this Agreement but shall have no right to contest the underlying violations or the amount of the civil penalty. If the Company is found to be in violation of the Agreement, it agrees to pay the remaining civil penalty of \$4,050. Payment of the civil penalty shall be due and payable within 10 calendar days of a Final Order of Violation of Settlement Agreement being issued.

Agreement Article No. 10: This Agreement is terminated when either of the following occurs, whichever is soonest:

- The Authority or it's representative verifies by physical inspection that the Dunn Court Duplexes water system no longer delivers drinking water to customers or is being provided by the City of Woodburn; or
- The Company reports two years of monitoring data that does not exceed the arsenic MCL[.]

(*Id.* at 2-3; emphasis in original.)

5. The purpose of the confirmation sample was for the Authority to verify that the problem that caused the excessive arsenic level had been resolved. The Authority did not intend to penalize the Company for the occasional excessive arsenic level if the confirmation sample demonstrated that the problem had been resolved. (Test. of Daniels.)

6. The Company hired Alexin Analytical Laboratories (AAL) to perform the well water sample collection and testing for the Dunn Court Duplexes. The Company provided a copy of the Agreement to AAL, which indicated that it understood the testing requirements for the Agreement. (Test. of Labunsky.)

7. AAL took water samples for testing from the Dunn Court Duplexes water system once per month from January through October 2018. The water samples tested positive for arsenic at or below 0.010 mg/L except for the following (Ex. A4 at 1.):

- On January 25, 2018, AAL took a sample. On January 30, 2018, the Authority received the tests results that showed a positive arsenic test with a level of 0.014 mg/L. (Ex. A4 at 1.)
- On July 26, 2018, AAL took a sample from the well house. On July 31, 2018, the sample tested positive for arsenic with a level of 0.014 mg/L. (Ex. A1 at 1.)
- On September 27, 2018, AAL took a sample from the well house. On October 2, 2018, the sample tested positive for arsenic with a level of 0.013 mg/L. (Ex. A2 at 1.)
- On October 10, 2018, AAL took a sample from the well house. On October 11, 2018, the sample tested positive for arsenic with a level of 0.012 mg/L. (Ex. A3 at 1.)

8. The Authority received the results of each test before the 10th day of the following month for every sample except for the June 2018 sample. AAL took the sample on June 28, 2018 and forgot to forward the test results to the Authority until September 21, 2018. (Ex. A4 at 1; test. of Labunsky.)

9. During the period January through August 2018, AAL failed to do any confirmatory tests after a water sample tested positive for arsenic at a level greater than 0.010 mg/L. (Test. of Labunsky.)

10. After receiving the August 2018 Notice, the Company flushed the entire sanitation system and replenished the resin bed; performed a shock treatment; arranged for the Dunn Court Duplexes resident to visibly check the sanitation system once per day for any damage; and arranged for Mr. Labunsky to perform a more thorough examination of the sanitation system once per week. The Company is exploring changing the testing laboratory company or paying the high cost to connect to the City of Woodburn's water system. (Test. of Labunsky.)

11. There are additional actions that can be taken to monitor arsenic levels in the water sanitation systems, including testing arsenic levels of the water prior to entering the

sanitation system, more frequent monitoring, and changing the chemical treatment mechanism of the system. (Test. of Daniels.)

CONCLUSIONS OF LAW

1. The Company violated the terms of the January 18, 2018 Settlement Agreement and Final Order.
2. The Company must pay the remaining \$4,050 civil penalty.
3. The Authority may not terminate the January 18, 2018 Settlement Agreement and Final Order.

OPINION

The Authority proposes to impose the suspended civil penalty of \$4,050 and terminate the Agreement, based on allegations that the Company violated the terms of the Agreement. As the proponent of the allegations, the Authority has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to impose the civil penalty and terminate the Agreement. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *Reguero v. Teachers Standards and Practices Commission*, 312 Or 402, 418 (1991) (burden is on Commission in disciplinary action); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, burden of proof is by a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Violations of the Agreement

Pursuant to ORS 448.131, the Authority promulgated a series of administrative rules implementing water quality standards. OAR 333-061-0020(25) defines community water systems to include a public water system that regularly serves 25 or more year-round residents. OAR 333-061-0020(107) defines a public water system as a system that provides piped water for human consumption or water to at least 25 individuals daily at least 60 days of the year. Because the Company provided water to approximately 90 year-round residents at the Dunn Court Duplexes, the Company operates a public and community water system.

Pursuant to OAR 333-061-0030(1) and its incorporated Table 1, the MCL for arsenic is 0.010 mg/L for all community water systems. OAR 333-061-0040(1)(b)(A) requires the analytical report of water samples from an accredited laboratory be reported to the Authority within 10 days of the end of the month or required monitoring period. Based upon the terms of the Agreement, the Company is required to complete arsenic testing of water samples every month and report such results within the same time period as provided by OAR 333-061-0040(1)(b)(A). The Agreement further provides that, if a test result exceeds the arsenic MCL, the Company must immediately collect a confirmation sample and report the results of such test to the Authority.

On June 28, 2018, AAL, on behalf of the Company, obtained a water sample and tested it for arsenic. AAL failed to forward the results of that test to the Authority until September 21, 2018. Even though AAL was the business entity that failed to forward the results of the test to the Authority, the responsibility for reporting the test results lies with the Company. The fact that the Company delegated that responsibility to AAL does not relieve the Company from its reporting responsibility under the Agreement and its equivalent legal responsibility under OAR 333-061-0040(1)(b)(A). The Company violated the Agreement's Article No. 3 when it failed to ensure that the June 2018 sample's test results were delivered to the Authority by the July 10, 2018 deadline.

On July 26, 2018 and September 27, 2018, AAL obtained and tested samples of water from the Dunn Court Duplexes water system. These samples tested positive for arsenic at levels of 0.014 mg/L and 0.013 mg/L respectively. Article No. 4 of the Agreement required the Company to operate the Dunn Court Duplexes water system such that the drinking water "delivered to water users *at all times*" contained arsenic at levels below the MCL of 0.010 mg/L. Exhibit A5 at 2 (emphasis added). Although the Authority intended to use its discretion in pursuing the Company for violations of the arsenic levels, the Agreement still provided that the Company *always* deliver water with arsenic levels below the arsenic MCL. Arsenic levels fluctuate and can be unpredictable. Mr. Labunsky argued that it was impossible to never have an excessive test result, and the Company took some steps to alleviate the arsenic levels. However, the Agreement did not require a specific mental intent before the Company could be found in violation of its terms. Therefore, a mental intent, such as intentionally or negligently, does not have to be found to determine that the Company is in violation of the Agreement's Articles. *See Topaz v. Oregon Bd. of Examiners for Engineering*, 255 Or App 138, *rev den*, 353 Or 714 (2013). The Agreement required that the arsenic level remain below the MCL, and on these two occasions, the arsenic level exceeded the MCL. The Company violated the

Agreement's Article No. 4 when the July and September 2018 samples exceeded the MCL.³

Following the July 2018 test result for excessive arsenic, AAL failed to take a confirmation sample and test it. As noted above, even though AAL was the business entity that failed to take and test a confirmation sample, the responsibility for ensuring compliance with the terms of the Agreement, including the obtaining and testing of confirmation samples, lies with the Company. Therefore, the Company violated the Agreement's Article No. 5 when it failed to obtain and test a confirmation sample following the July 2018 test result that exceeded the arsenic MCL.

The Company violated the Agreement by failing to comply with Article Nos. 3, 4 and 5.

Assessment of a Civil Penalty

In its October 2018 Notice, the Authority proposes to assess the remaining \$4,050 of the Agreement's civil penalty. ORS 448.280(1)(a), ORS 448.285(1) and OAR 333-061-0090(2) grant the Authority the power to impose a civil penalty for violations of the Oregon Drinking Water Quality Act and its associated administrative rules. Pursuant to Article No. 9 of the Agreement, the Company agreed to pay the remaining \$4,050 of the civil penalty upon violation of the terms of the Agreement. Because, as shown above, the Company violated the terms of the Agreement, the Company must pay the remaining \$4,050 of the previously-assessed civil penalty to the Authority. Pursuant to Article No. 9 of the Agreement, ORS 448.290(1) and ORS 183.745(2), the civil penalty is due and payable 10 days after the final order imposing the civil penalty becomes final by operation of law or on appeal.

Termination of the Agreement

In its October 2018 Notice, the Authority proposes to terminate the Agreement. The Agreement's Article No. 10 provides for the termination of the Agreement either when the Company ceases using the Dunn Court Duplexes water system to provide water to the residents or when the Company's monthly arsenic monitoring results do not exceed the MCL for a two-year period. Neither of those circumstances has occurred. Therefore, the parties must continue to comply with the terms of the Agreement until one of those two circumstances occurs or the parties mutually agree to the termination of the

³ The Company's January and October 2018 samples also exceeded the arsenic MCL. However, the Authority did not allege those test results as violations in its October 2018 Notice.

Agreement.⁴

ORDER

Based on the foregoing, West Coast Real Estate Holdings, LLC, IS HEREBY ORDERED to pay a civil penalty in the amount of \$4,050. The civil penalty is due and payable 10 days after the final order imposing the civil penalty becomes final by operation of law or on appeal.

APPEAL PROCEDURE

You are entitled to a judicial review of this Order in accordance with ORS 183.482. To appeal, you must file a petition for judicial review with the Court of Appeals within 60 days from the date of service of this Order.

GENERAL PROVISIONS

Civil penalty amounts are established in Oregon Administrative Rule 333-061-0090. If unpaid, civil penalties may be recorded and filed with county clerks as liens against property 10 days after the expiration of the statutory appeals period. DWS may assign liquidated and delinquent civil penalties to the Department of Revenue, as provided in ORS 293.250.

If you have any questions about payment, or wish to make payment arrangements, please call the Drinking Water Services at 971-673-0405. Make Checks payable to the Oregon Heath Authority, Drinking Water Services. Mail checks to the Oregon Heath Authority, Drinking Water Services, PO Box 14450, Portland, Oregon 97293-0450.

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⁴ The Agreement included language indicating that its terms did not constitute a waiver of the Oregon Drinking Water Quality Act and the related administrative rules, and the Company must continue to comply with such statutes and administrative rules. (Ex. A5 at 3-4.) There is nothing in the terms of the Agreement that would prohibit the Authority from initiating any enforcement action regarding any other violations of the Oregon Drinking Water Quality Act and the related administrative rules.

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.

Dated this 12th day of December, 2018.



David Emme, Manager
Drinking Water Services
Oregon Health Authority

CERTIFICATE OF MAILING

On the 12th day of December 2018, I served the foregoing FINAL ORDER in Reference No. **2018-OHA-09407** to the following parties:

BY CERTIFIED AND FIRST CLASS MAIL:

West Coast Real Estate Holdings, LLC
cC/o Alex Labunsky
25030 SW Parkway Ave, Ste 110
Wilsonville OR 97070

BY ELECTRONIC MAIL:

Jeff Carlson, Oregon Health Authority, Center for Health Protection
Greg DeBlase, County Environmental Health
Shannon O'Fallon, Oregon Department of Justice



Signature

Bradley K. Daniels

Printed Name