

IN THE MATTER OF TISASHA TRUST

Respondent

**NEW HAMPSHIRE DEPARTMENT OF
ENVIRONMENTAL SERVICES**

**ADMINISTRATIVE FINE:
DOCKET NO.: 11-047**

DECISION

Presiding Officer: Peter Demas, Commissioner's Designee

Appearances: Kerry D. Barnsley, Compliance Attorney, appearing on behalf of the New Hampshire Department of Environmental Services, Water Division

Frederick Korn, Trustee, appearing on behalf of Respondent

I. INTRODUCTION

By Notice of Proposed Administrative Fine No. AF 11-047, issued on August 25, 2011, ("NPF") the New Hampshire Department of Environmental Services, Water Division ("**Division**"), seeks to impose administrative fines against the Tisasha Trust in the amount of \$16,000 for allegedly violating Env-Dw 709.07, Env-Dw 711.19, and Env-Dw 711.25 by failing to monitor a public water system for bacteria, nitrate, and nitrite, for allegedly violating Env-Dw 801.11 by failing to provide public notice of monitoring violations, and for allegedly failing to comply with an Administrative Order issued by the Division on July 28, 2009.

The Division entered an appearance and request for hearing September 6, 2011. Tisasha Trust did not enter a written appearance or otherwise respond to the NPF. In accordance with the New Hampshire Administrative Procedures Act, RSA 541-A, a formal adjudicative hearing was held on December 5, 2011. Frederick Korn, Trustee appeared at the hearing on behalf of the Tisasha Trust.

Based on the evidence and testimony presented at the hearing, the Department concludes that a fine of \$16,000 is justified and that \$8,000 shall be suspended in accordance with the Findings of Fact and Conclusions of Law below.

II. APPLICABLE STATUTES AND RULES

1. Pursuant to RSA 485, the New Hampshire Department of Environmental Services ("DES") regulates public water supplies. Pursuant to RSA 485:3, the Commissioner of DES has adopted NH CODE ADMIN. RULES Env-Ws 300 ("Drinking Water Rules") to implement this program. Beginning in 2007 the Drinking Water Rules are being redesignated as "Env-Dw," as each chapter is readopted.
2. RSA 485:58, IV authorizes the Commissioner of DES to impose administrative fines of up to

\$2,000 per offense for violations of RSA 485 or any rule adopted pursuant thereto.

3. Env-Ws 302.83 defines “transient non-community water system” to mean “a non-community water system that serves at least 25 persons in a transitory setting such as a restaurant for more than 60 days each year.”
4. Env-Dw 709.07(a)(1) requires all non-community water systems to monitor for coliform bacteria every quarter.
5. Env-Dw 708.02 requires all public water systems to conduct monitoring at the time designated by DES within each compliance period.
6. Env-Dw 709.07(e) requires the owner of a transient non-community water system who fails to submit a routine bacteria sample during an assigned month to submit a make-up sample upon discovering the monitoring failure or upon notification by DES of the monitoring failure.
7. Env-Dw 801.11 requires the owner of a non-community water system who fails to comply with a bacteria monitoring requirement to notify persons served by the system of the violation within 30 days of learning of the violation and to submit to DES proof of public notice within 10 days of performing such public notice.
8. Env-Dw 709.10 requires a water system owner to submit four repeat samples within 24 hours following notification from DES of a coliform positive routine sample, and Env-Dw 709.11 requires the water system owner to submit five routine samples during the month following a total coliform positive routine sample.
9. Env-Dw 711.19 requires transient non-community water systems to monitor for nitrate annually.
10. Env-Dw 711.25 requires transient non-community water systems to monitor for nitrite once in each three-year compliance period.

III. BACKGROUND AND FACTUAL ALLEGATIONS

The Division asserts the following allegations, which the Trust does not dispute:

1. The Department of Environmental Services, Water Division (“Division”), is a duly-constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive in Concord, New Hampshire.
2. Tisasha Trust under declaration of trust dated June 5, 2002 is an unregistered trust having a mailing address of 2 Old Coach Road, Kingston, NH 03848. Frederick Korn is a Trustee of Tisasha Trust.
4. Tisash Trust is the owner of a public water system known as Rick’s A Café and Grille water system that serves a restaurant that serves more than 25 persons for more than 60 days each year. Rick’s A Café and Grille water system is located at 143 Main Street in Kingston, New Hampshire (the “**Water System**”).

5. The Water System is a transient non-community water system as defined in Env-Ws 302.83. Frederick Korn is the designated representative of Tisasha Trust for the Water System and related drinking water issues.

Bacteria Monitoring

6. At all relevant times Tisasha Trust was required to conduct bacteria monitoring of the Water System during the months of January, April, July, and October of each year.

7. Tisasha Trust failed to monitor the Water System for bacteria in April 2007.

8. On May 24, 2007, DES issued a Notice of Violation (“**NOV**”) to Frederick Korn for failing to monitor for bacteria in April 2007. In the NOV, DES requested that a bacteria make-up sample be submitted immediately, explained the public notice requirement associated with the monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

9. Tisasha Trust failed to submit a make-up bacteria sample and proof of public notice for the April 2007 bacteria monitoring violation.

10. Tisasha Trust failed to monitor the Water System for bacteria in July 2007.

11. On August 30, 2007, DES issued another NOV to Frederick Korn for failing to monitor for bacteria in July 2007. In the NOV, DES requested that a bacteria make-up sample be submitted immediately, explained the public notice requirement associated with the monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

12. Tisasha Trust failed to submit a make-up bacteria sample and proof of public notice for the July 2007 bacteria monitoring violation.

13. On September 17, 2007, DES issued Letter of Deficiency (“**LOD**”) No. DWGB 07-200 to Frederick Korn for failing to monitor the Water System for bacteria in April and July 2007, and for failing to submit proof of public notice for the two bacteria monitoring violations. In the LOD, DES requested that he submit a make-up bacteria sample to a state-certified laboratory by September 28, 2007, and to submit proof of public notice to DES for the April and July 2007 bacteria monitoring violations by October 10, 2007.

14. LOD No. DWGB 07-200 was returned to DES on October 22, 2007, marked by the Postal Service as “Unclaimed.”

15. Tisasha Trust submitted the Water System’s routine October 2007 bacteria sample, which was found to be total coliform positive.

16. On October 23, 2007, DES sent a letter to Frederick Korn stating that the Water System’s October 2007 sample was total coliform positive, that four repeat bacteria samples were required to be collected within 24 hours, and that five additional bacteria samples were required to be collected

in November 2007.

17. Tisasha Trust failed to submit the four October 2007 repeat bacteria samples.

18. On November 27, 2007, DES issued an NOV to Frederick Korn for the failure to submit the four October 2007 repeat samples. In the NOV, DES explained the public notice requirement associated with the bacteria monitoring violation and included a public notice template to assist Frederick Korn in performing public notice.

19. Tisasha Trust failed to submit proof of public notice to DES for the October 2007 bacteria repeat sampling violation.

20. Tisasha Trust failed to submit the five required November 2007 bacteria samples.

21. On December 20, 2007, DES issued another NOV to Frederick Korn for failing to collect five bacteria samples in November 2007. In the NOV, DES requested that five bacteria make-up samples be submitted immediately, explained the public notice requirement associated with the November bacteria monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

22. Tisasha Trust failed to submit the five make-up bacteria samples and proof of public notice for the November 2007 bacteria monitoring violation.

23. On January 17, 2008, DES reissued LOD No. DWGB 07-200 as Amended LOD No. DWGB 07-200. In addition to the violations referenced in the original LOD, the amended LOD included references to the October and November 2007 bacteria monitoring violations and the failure to submit proof of public notice for the October and November 2007 bacteria monitoring violations. In the LOD, as amended, DES requested 11 make-up bacteria samples to be submitted to a state-certified laboratory and proof of public notice for the April, July, October and November 2007 bacteria monitoring violations to be sent to DES by January 28, 2008. The amended LOD was sent to Frederick Korn by both certified mail and first class mail.

24. The amended LOD sent by certified mail was returned to DES on February 8, 2008, marked by the Postal Service as "Unclaimed." The copy of the amended LOD sent by first class mail was not returned to DES and was presumed to have been received.

25. Tisasha Trust failed to monitor the Water System for bacteria in January 2008.

26. On February 21, 2008, DES issued another NOV to Frederick Korn for failing to monitor the Water System for bacteria in January 2008. In the NOV, DES requested that a bacteria make-up sample be submitted immediately, explained the public notice requirement associated with the monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

27. Tisasha Trust failed to submit a make-up bacteria sample and proof of public notice for the January 2008 bacteria monitoring violation.

reminding him of the requested actions specified in the LOD, as amended. In the letter, DES stated that it was reviewing its enforcement action options to pursue against him for failing to comply with the Drinking Water Rules and that his response to the reminder letter would be factored into any decision.

29. The reminder letter dated April 9, 2008 sent by certified mail was returned to DES on April 30, 2008, marked by the Postal Service as "Unclaimed." The copy of the reminder letter sent by first class mail was not returned to DES and was presumed to have been received.

30. The Trust did not respond to the reminder letter.

31. The Trust failed to monitor the Water System for bacteria in April 2008.

32. On May 28, 2008, DES issued another NOV to Frederick Korn for failing to monitor for bacteria in April 2008. In the NOV, DES requested that a bacteria make-up sample be submitted immediately, explained the public notice requirement associated with the monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

33. The Trust failed to submit a make-up bacteria sample and proof of public notice for the April 2008 bacteria monitoring violation.

34. On October 15, 2008, DES issued Administrative Order No. 08-042 WD (the "**Order**") to Tisasha Trust for failing to monitor the Water System for bacteria in April 2007, July 2007, January 2008, and April 2008; for failing to collect four repeat bacteria samples in October 2007 and five routine bacteria samples in November 2007; and, for failing to submit proof of public notice for the April 2007, July 2007, October 2007, November 2007, January 2008, and April 2008 bacteria monitoring violations. The Order was not appealed.

35. Tisasha Trust failed to monitor the Water System for bacteria in January 2009. Tisasha Trust failed to submit a make-up bacteria sample and proof of public notice for the January 2009 bacteria monitoring violation.

36. Tisasha Trust submitted the January 2009 make-up sample in March of 2009 and proof of public notice for the January 2009 violation in May of 2009.

37. On August 26, 2009, DES issued a Notice of Closure and Release of Recordation of the Order to Tisasha Trust.

38. Tisasha Trust failed to monitor the Water System for bacteria in July 2010. Tisasha Trust submitted the July 2010 make-up sample in August 2010. Public notice was timely completed.

39. Tisasha Trust failed to monitor the Water System for bacteria in October 2010. Tisasha Trust submitted the October 2010 make-up sample in November 2010. Public notice was timely completed.

40. Tisasha Trust failed to monitor the Water System for bacteria in April 2011.

41. On June 30, 2011, DES issued a NOV to Frederick Korn for failing to monitor for bacteria in April 2011. In the NOV, DES requested that a bacteria make-up sample be submitted immediately, explained the public notice requirement associated with the monitoring violation, and included a public notice template to assist Frederick Korn in performing public notice.

42. Tisasha Trust failed to submit a make-up bacteria sample and proof of public notice for the April 2011 bacteria monitoring violation.

43. Tisasha Trust failed to monitor the Water System for bacteria in July 2011.

Chemical Monitoring

44. At all relevant times the Water System was designated to conduct nitrate monitoring during the first calendar quarter (“Q1”) of each year.

45. At all relevant times the Water System was designated to conduct nitrite monitoring during the first calendar quarter (“Q1”) within the three-year compliance period.

46. Env-Ws 302.13 defines a compliance period as each three-year calendar period beginning on January 1, 1993. During the compliance period from January 1, 2011 through December 31, 2013, the Water System was designated to conduct nitrite monitoring during Q1-2011.

47. Tisasha Trust failed to conduct nitrate and nitrite monitoring of the Water System during Q1-2011.

48. As of the date of the hearing, Tisasha Trust has failed to submit the nitrate and nitrite make-up samples for the Q1-2011 chemical monitoring violations.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Korn stated at the hearing that he does not dispute the Division’s allegations. He asserts that as a “one man operation” it is difficult to stay on top of his business obligations. He also asserts that the restaurant was leased to a third party in 2011 and did not believe that he remained responsible for the monitoring and reporting obligations. He further asserts that he was unaware that he could be fined for violations after the violation had been corrected.

The Division’s undisputed testimony and documentary evidence demonstrate that Tisasha Trust was repeatedly advised 1) of the requirements and deadlines necessary to comply with the statute and rules, 2) that violations had occurred, and 3) of the steps necessary to correct the violations. Furthermore, each of the notices provided to Tisasha Trust unambiguously state that “failure to sample and or failure to notify the public may result in the *imposition of an administrative fine*, the issuance of an administrative order, or referral to the NH Department of Justice for imposition of appropriate penalties.”(emphasis added) Despite being advised of the potential for fines and penalties, Tisasha Trust, nonetheless, continued to ignore its obligation to sample in a timely manner and to provide public notice as required. Moreover, even after receipt of the NPF, when directly faced with the possibility of fines being imposed, Tisasha Trust failed to remedy violations by providing make up samples for the Q1-2011 chemical monitoring violations.

The Department notes that even if Tisasha Trust eventually remedied some violations, that does not mitigate the fact that its failure to comply with the sampling schedule already constituted a violation. Such failure is a *per se* violation, regardless of any remedial action subsequently taken. In addition, Tisasha Trust, as the owner of the Water System, remains obligated to perform the required monitoring and reporting even if the business is leased to a third party.

Based on the foregoing undisputed evidence, the Department finds that the Division has proven by a preponderance of the evidence that Tisasha Trust committed the following violations as alleged by the Division:

1. Tisasha Trust failed to monitor the Water System for bacteria in January 2009, as required by Env-Dw 709.07.
2. Tisasha Trust failed to monitor the Water System for bacteria in July 2010, as required by Env-Dw 709.07.
3. Tisasha Trust failed to monitor the Water System for bacteria in October 2010, as required by Env-Dw 709.07.
4. Tisasha Trust failed to monitor the Water System for bacteria in April 2011, as required by Env-Dw 709.07.
5. Tisasha Trust failed to provide public notice of the April 2011 bacteria monitoring violation, as required by Env-Dw 801.11.
6. Tisasha Trust failed to monitor the Water System for nitrate in Q1-2011, as required by Env-Dw 711.19.
7. Tisasha Trust failed to monitor the Water System for nitrite in Q1-2011, as required by Env-Dw 711.25.
8. Tisasha Trust failed to monitor the Water System for bacteria in July 2011, as required by Env-Dw 709.07.

For each of the foregoing violations, RSA 485:58 specifies a fine of up to **\$2,000**. Based on Tisasha Trust's history of non-compliance the Division is seeking the maximum statutory fine of \$2,000 for each of the eight violations. The Department finds that Tisasha Trust has a significant history of non-compliance and, at least through the date of the hearing, has continued to disregard its obligations to sample the public water system and post notices of violations for the benefit of the public.

Accordingly, a total fine of **\$16,000** is justified and supported by the evidence presented. It is undisputed that the violations occurred and the Department is constrained to impose fines, as directed by the Legislature, for such violations. Therefore, the fine shall be imposed as follows. A fine in the amount of **\$8,000** is hereby immediately assessed against Tisasha Trust. An initial installment of \$2,000 shall be paid within 60 days of the date of this decision. Thereafter, a monthly installment of \$500 shall be paid on or before the first day of each calendar month, beginning on

July 1, 2013, until such time as a total payment of \$8,000 has been made.

The remainder of the fine, in the amount of **\$8,000** shall be suspended, provided that Tisasha Trust:

1. Pays the immediately assessed portion of the fine, in the amount of \$8,000 in accordance with the installment schedule set forth above;
2. Corrects all outstanding sampling, reporting, and notice violations within 30 days of the date of this decision; and
3. For a period of 3 years from the date of this decision, maintains strict compliance with all statutory and regulatory monitoring and reporting requirements, including but not limited to compliance with any outstanding administrative orders and sampling schedules.

If Tisasha Trust fails to make timely payment or comply with the foregoing terms and conditions the suspended portion of the fine, in the amount of \$8,000 shall be imposed and, together with any unpaid installments set forth above, shall become immediately due and payable with no further motions or filings required by the Division. If Tisasha Trust satisfies the foregoing requirements, the suspended portion of the fine shall be dismissed.

Fine payments shall be made by certified check or money order payable to "Treasurer- State of NH" and sent to the attention of the Legal Unit, DES, Office of the Commissioner, P.O. Box 95, Concord, NH 03302-0095.

Any party aggrieved by this decision may file a motion for reconsideration within 30 days of the date of this decision, in accordance with NH RSA 541 and Env-C 206.

COMMISSIONER OF
ENVIRONMENTAL SERVICES

Date: April 10, 2013

By:

COPY

Peter Demas, Legal Coordinator
Presiding Officer

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

(d) The presiding officer shall terminate any comments, questions, or discussions that are not relevant to the subject of the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.08 Closing the Hearing and the Record.

(a) The presiding officer shall close the oral public hearing when s/he determines that no one has further questions or comments that are relevant to the subject of the hearing.

(b) At an oral public hearing other than a rulemaking hearing, if additional time is requested to submit written testimony as specified in Env-C 205.07(b) or supplemental information which the presiding officer determines to be relevant to the subject of the hearing, the presiding officer shall designate a specific time period for the record to remain open to receive such information.

(c) For rulemaking hearings, the record shall remain open until the date specified in the notice published pursuant to Env-C 205.04(a).

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 205.09 Continuances.

(a) Hearings on proposed rules shall be continued only in accordance with RSA 541-A.

(b) At any oral public hearing other than a hearing on proposed rules, if anyone requests a continuance and the presiding officer determines that the public will be best served by continuing the hearing and that any prejudice caused to any person as a result of the continuance is outweighed by the benefit to the public of granting the continuance, the presiding officer shall order that the hearing be continued to a later date, time, and place.

(c) If such later date, time, and place are known at the time of the hearing that is being continued, the presiding officer shall state the date, time, and place on the record.

(d) If such later date, time, and place are not known at the time of the hearing that is being continued, the presiding officer shall state how notice will be given of the date, time, and place of the continued hearing.

Source. #8851-A, eff 3-25-07

PART Env-C 206 MOTIONS FOR RECONSIDERATION

Env-C 206.01 Purpose. The rules in this part are intended to supplement any statutory provisions, such as RSA 541, that require or allow a person to request reconsideration of a decision of the department prior to appealing the decision. These rules do not create the right to request reconsideration of a decision where it does not otherwise exist under law.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.02 Applicability. The rules in this part shall apply whenever any person has a right under applicable law to request a reconsideration of a decision prior to filing an appeal of the decision with the applicable court or council having appellate jurisdiction.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

NEW HAMPSHIRE CODE OF ADMINISTRATIVE RULES

Env-C 206.03 Time for Filing. Any motion for reconsideration shall be filed no later than 30 days after the date the decision that is the subject of the motion was issued.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.04 Filing.

(a) Any person wishing to request reconsideration of a department decision shall file the original and 2 copies of a motion for reconsideration at the following address:

Office of the Commissioner, Legal Unit
Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095

(b) For purposes of this section, a “department decision” means a decision that is signed by the commissioner, by the assistant commissioner on behalf of the commissioner, or by a division director, alone or in any combination.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

Env-C 206.05 Format and Content of Motion. The person filing a motion for reconsideration shall provide the following information:

(a) The exact legal name of each person requesting reconsideration and the mailing address of the person and, if available, a fax number and e-mail address for the person;

(b) If the person making the request is other than an individual, the name and daytime telephone number of the individual who can be contacted regarding the motion and, if available, a fax number and e-mail address for that individual;

(c) A clear and concise statement of the reason(s) why the person believes the decision to be in error;

(d) A clear and concise statement of the facts upon which the department is expected to rely in granting relief;

(e) A clear and concise statement of the specific relief or ruling requested;

(f) A copy of the decision that is the subject of the motion; and

(g) Such other information as the party filing the motion deems pertinent and relevant, including sworn written testimony and other evidence that was not available for the hearing.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07

PART Env-C 207 RULEMAKING PETITIONS

Env-C 207.01 Applicability. The rules in this part shall apply to any petition submitted to the department pursuant to RSA 541-A:4.

Source. #6960, eff 3-25-99; ss by #8851-A, eff 3-25-07