

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

VILLAGE OF SEBRING :
Appellant, :
v. : Case No. ERAC 506363
: SCOTT NALLY, DIRECTOR
OF ENVIRONMENTAL PROTECTION :
Appellee. :

DECISION

Rendered on March 6, 2012

Andrew L. Zumbar, for appellant Village of Sebring

*Mike DeWine, Attorney General, L. Scott Helkowski and
Bridget Coontz*, for appellee Director of Environmental
Protection

ESCHLEMAN, COMMISSIONER

This matter comes before the Environmental Review Appeals Commission (“ERAC,” “Commission”) upon the July 7, 2009 Notice of Appeal filed by Appellant Village of Sebring (“Sebring,” “Village”). The action underlying the instant appeal is the Director of Ohio Environmental Protection Agency’s (“Ohio EPA,” “Director”) June 18, 2009 Director’s Final Findings and Orders (“2009 DFFOs”) addressing deficiencies in Sebring’s public water system (“PWS”).¹ A de

¹ Although Appellant’s Notice of Appeal does not identify specific assignments of error, Sebring’s prehearing brief addressed four issues it contends are in dispute: (1) installation of alternative means to obtain backwash water, (2) submission of a Distribution System Optimization Plan to reduce discharge of Trihalomethanes (“TTHM”), (3) replacement of the

novo hearing was held before the Commission on October 5, 2011. Based upon the testimony and evidence admitted at the de novo hearing² and applicable laws and regulations, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order finding that the Director acted lawfully and reasonably when he issued the 2009 DFFOs to Sebring for non-compliance with Ohio statutes and Ohio EPA regulations.

FINDINGS OF FACT

{¶1} Sebring owns and operates a PWS that is also a “community water system” as defined by Ohio Revised Code (“R.C.”) 6109.01 and Ohio Administrative Code (“Ohio Adm.Code”) 3745-81-01. Testimony Maschak.

{¶2} Sebring’s PWS, ID No. 5001911, is located at 135 East Ohio Avenue, Sebring, Ohio 44672. Ohio EPA Exhibit 1.

{¶3} Sebring’s PWS serves a population of approximately 8,100 and obtains water from the Mahoning River, a “surface water” source as defined by Ohio Adm.Code 3745-81-01. Testimony Maschak.

{¶4} When addressing issues arising from a PWS that is not in compliance with Ohio statutes and regulations, Ohio EPA initially sends a Notice of Violation (“NOV”) that identifies the nature and scope of non-compliance and lists actions required to bring the PWS into compliance. Testimony Sherron.

four-inch water lines that serve fire hydrants; and (4) payment of the administrative penalty. At the de novo hearing, the parties stipulated that only two issues, replacement of the four-inch water lines and payment of the administrative penalty, remain for the Commission’s decision. Case File Items A, GG, LL; Stipulation.

² The Certified Record (“CR”) submitted by the Director contains only one document, the 2009DFFOs.

{¶5} If circumstances demonstrate that a PWS is in “significant non-compliance,” the United States Environmental Protection Agency requires Ohio EPA to initiate an enforcement action. Ohio EPA’s lowest level of enforcement action is a bi-lateral enforcement agreement. In a bi-lateral enforcement agreement, the owner or operator of a PWS acknowledges the non-compliance and agrees to take corrective action. Testimony Sherron.

{¶6} The second level of enforcement action is Agreed DFFOs. Agreed DFFOs allow the Director to negotiate terms and conditions by which the owner or operator of the PWS agrees to complete all actions required to address and resolve non-compliance issues. Agreed DFFOs also may require the owner or operator of the PWS to pay an administrative penalty, assessed to deter future non-compliance. During negotiation of an administrative penalty in Agreed DFFOs, the owner or operator of the PWS may present evidence regarding its ability to pay. Testimony Sherron.

{¶7} Unilateral DFFOs are the third level of enforcement and are drafted by the Director without negotiating terms and conditions with the owner or operator of the PWS. Like Agreed DFFOs, Unilateral DFFOs also may require the owner or operator of the PWS to pay an administrative penalty. Testimony Sherron.

{¶8} Finally, if the owner or operator of a PWS does not comply with Unilateral DFFOs, the Director may refer the matter to the Ohio Attorney General requesting that legal action be commenced. Testimony Sherron.

{¶9} On May 12, 2006, David Maschak, Environmental Specialist, Ohio EPA, Division of Drinking and Groundwater (“DGW”) sent correspondence to

Doug Burchard, City Manager, Village of Sebring summarizing an April 5, 2006 evaluation of Sebring's PWS undertaken to "determine the ability of the facility to provide adequate, safe, and potable water that meets the requirements of [Ohio Adm.Code] Chapter 3745" ("2006 Evaluation"). The 2006 Evaluation identified the "regulatory requirements for which action must be taken to return to compliance, and recommendations to address deficiencies that have the potential to cause future violations or contamination." In particular, the 2006 Evaluation addressed "eight major elements * * * [including] source, treatment, distribution system, finished water storage, pumps/pump facilities and controls, monitoring/reporting/data verification, water system management/operation, and operator compliance with State requirements." Relative to the remaining issues in the instant Appeal, the 2006 Evaluation stated:

REQUIREMENTS

Per [Ohio Adm.Code] 3745-81-60(D), a responsible official of the public water system must respond in writing * * *, in regard to the following requirement. A schedule, where applicable, must be included as part of your response.

* * *

Four Inch Distribution Piping

Mr. Sanor indicated there is some existing 4-inch distribution system piping which is provided with fire hydrants. Per Ten States Standards section 8.2.2, the minimum size of water main for fire hydrants is 6-inches. We understand these lines have been identified and are targeted for replacement. Replacement of these lines should become a priority for the Village.

RECOMMENDATIONS

The following deficiencies are not regulatory violations, but are actions that are recommended by [Ohio EPA] for optimum operation and to reduce the potential for future violations or contamination:

* * *

Maple Ridge Dead-End Mains: Per Ten States Standards section 8.2.4. dead-end mains shall be minimized. Where dead-end mains cannot be avoided, provisions to permit adequate flushing of the main * * * must be available. * * * We recommend the dead ends be eliminated by tying in a line for looping. * * *

Ohio EPA Exhibit 1; Testimony Maschak.

{¶10} Sebring has approximately 15,000 linear feet of four-inch water lines that service fire hydrants in the Village. Testimony Sanor.

{¶11} The Ten States Standards for Water Works (“Ten States Standards”) were developed by the Great Lakes-Upper Mississippi River Board of State and Provincial Public Health and Environmental Managers as recommended standards regarding how water works systems should be designed, constructed, and maintained. The Ten States Standards include, among others, system design recommendations for the diameter of water mains serving fire hydrants stating as follows:

8.2.2. Diameter

Minimum size of water main which provides for fire protection and serving fire hydrants shall be six-inch diameter. Larger size mains will be required if necessary to allow the withdrawal of the required fire flow while maintaining the minimum residual pressure specified in Section 8.1.1.

The minimum size of water main in the distribution system when fire protection is not to be provided should be a minimum of three (3) inch diameter. Any departure from minimum requirements shall be justified by hydraulic analysis and future water use, and can be considered only in special circumstances. * * *

8.2.4. Dead ends

- a. Dead ends shall be minimized by making appropriate tie-ins whenever practical, in order to provide increased reliability of service and reduced head loss.

- b. Dead end mains shall be equipped with a means to provide adequate flushing. Flushing devices should be sized to provide flows which will give a velocity of at least 2.5 feet per second in the water main being flushed. They may be provided with a fire hydrant if flow and pressure are sufficient. No flushing devices shall be directly connected to any sewer.

Ohio EPA Exhibit 2; Testimony Maschak.

{¶12} At the hearing, Mr. Maschak explained that the Ten States Standard requiring six-inch water lines is important for fire protection because it ensures that water pressure throughout the water distribution system does not fall below 20 pounds per square inch. Ten States Standard 8.2.4, which requires tie-ins of dead end water lines, is intended to minimize accumulation of stagnant water that may negatively impact water quality. Testimony Maschak.

{¶13} On May 9, 2008, Sebring and the Director entered into Agreed DFFOs (“2008 DFFOs”). Terms and conditions in the 2008 DFFOs were developed with Sebring’s input and made, among others, the following findings:

- 19. On April 5, 2006, Ohio EPA inspected the PWS and found numerous deficiencies in the operations and maintenance of the PWS, including, but not limited to, the following:

* * *

- b) Respondent indicates that the PWS has existing 4-inch distribution system piping which serves fire hydrants. Ten State Standards, part 8.2.2, requires “the minimum size of water main which provides fire protection and serving fire hydrants shall be six-inch diameter.”

* * *

- d) Respondent’s PWS has dead end lines located on either side of the railroad tracks in the Maple Ridge area. Ten States Standards, part 8.2.4, requires “dead ends shall be minimized by making appropriate tie-ins whenever

practical, in order to provide increased reliability of service and reduce head loss.”

Ohio EPA Exhibit 4; Testimony Maschak.

{¶14} Relative to the issues in this appeal, in response to the findings, the 2008 DFFOs ordered Sebring to:

17. Within one hundred eighty (180) days of the effective date of these Orders, Respondent shall submit detail plans to Ohio EPA for:
 - a) The replacement of the existing 4-inch fire hydrants’ distribution system piping with a minimum of 6-inch water mains per Ten State Standards section 8.2.2; and
 - b) Minimizing the dead end lines located on either side of the railroad tracks in the Maple Ridge area, per Ten States Standards section 8.2.4.
18. Within sixty (60) days of detail plan approval for the correction of the 4-inch fire hydrant lines and the dead end lines, in accordance with detail plans approved by Ohio EPA and [Ohio Adm.Code] Chapter 3745-91 and the schedule contained within the detailed plans, Respondent shall commence construction and corrective measures for the distribution piping system.

* * *
21. Respondent shall pay the amount of two thousand eight hundred dollars (\$2800.00) in settlement of Ohio EPA’s claim for civil penalties * * *.

Ohio EPA Exhibit 4.

{¶15} As more fully addressed below, R.C. 6109.07 and Ohio Adm. Code 3745-91-02(A) prohibit construction or installation of, or substantial change to a PWS that is not in accordance with plans approved by the Director. Ohio EPA regulations also set forth specific requirements for the application, plan drawings, and supporting documentation that must be approved by the Director

prior to construction of or substantial changes to a PWS. If public funds are used, the plans must be prepared by a licensed professional engineer. Testimony Maschak.

{¶16} On behalf of the Director, Mr. Maschak testified that the Ten States Standards are incorporated into Ohio Adm.Code 3745-91-08 and are used by Ohio EPA as guidelines for the technical review of plans for construction of and significant changes to a PWS. Notably, Mr. Maschak testified that a schedule for construction or installation, including a completion date for the proposed project, is included in the plans filed by the Applicant. Testimony Maschak.

{¶17} After review of the application, plans, and other documentation necessary to evaluate the proposed construction or substantial change, the Director issues an approval letter authorizing the owner or operator of the PWS to complete construction (“Approval Letter”). The Approval Letter also sets forth a deadline by which authorized project must be completed. Generally, the Approval Letter states that the authorized project must be completed within five years. If the project is not completed in the time period specified in the Director’s Approval Letter, the owner or operator of the PWS may request an extension. Testimony Maschak.

{¶18} During negotiation of the 2008 DFFOs, the Village did not present Ohio EPA with any documentation regarding its inability to pay the settlement of Ohio EPA’s claim for civil penalties. Testimony Sherron.

{¶19} Sebring did not submit detail plans to Ohio EPA for replacement of the four-inch water lines or minimization of the dead end lines as required in the 2008 DFFOs. Testimony Maschak, Sherron, Burchard.

{¶20} Ohio EPA advised Sebring that if it did not comply with deadlines set forth in the 2008 DFFOs, the Director would commence additional enforcement action. Testimony Sherron.

{¶21} On June 18, 2009, the Director issued Unilateral DFFOs to Sebring (“2009 DFFOs”). The 2009 DFFOs terminated the 2008 DFFOs and incorporated “the outstanding requirements of the previous DFFOs.” Ohio EPA Exhibit 5; Testimony Burchard.

{¶22} The 2009 DFFOs found that Sebring failed to complete certain requirements of the 2008 DFFOs including replacing the existing four-inch water lines and minimizing dead end water lines. At the hearing, Mr. Burchard acknowledged that Sebring failed to comply with all the requirements of the 2008 DFFOs before they were terminated. Though subsequently paid, the 2009 DFFOs also found that Sebring failed to timely pay \$2,800 in settlement of Ohio EPA’s claim for civil penalties. Testimony Burchard; Ohio EPA Exhibit 5.

{¶23} Relevant to the instant appeal, the 2009 DFFOs contained the following orders:

19. Within one hundred twenty (120) days of the effective date of these Orders, Respondent shall submit detail plans to Ohio EPA for:
 - a) The replacement of the existing 4-inch fire hydrants’ distribution system piping with a minimum of 6-inch water mains per Ten State Standards section 8.8.2; and
 - b) Minimizing the dead end lines located on either side of the railroad tracks in the Maple Ridge area, per Ten State Standards section 8.2.4.
20. Within sixty (60) days of detail plan approval for the correction of the 4-inch fire hydrant lines and the dead end lines, *in accordance with detail plans approved by Ohio*

EPA and [Ohio Adm.Code] Chapter 3745-91 and the schedule contained within the detailed plans, Respondent shall commence construction and corrective measures for the distribution piping system.

* * *

23. Within thirty (30) days of the effective date of these Orders, Respondent shall pay to Ohio EPA the amount of \$8250.00 in administrative penalties pursuant to [R.C.] Chapter 6109. * * * Emphasis added.

Ohio EPA Exhibit 5.

{¶24} On behalf of the Director, Mr. Maschak testified that the timeline for submission of detail plans and commencement of construction as set forth in 2009 DFFOs Paragraphs 19 and 20 was reasonable. Testimony Maschak.

{¶25} No deadline or construction schedule for replacement of the four-inch water lines and minimization of dead end water lines was stated in the 2009 DFFOs. Testimony Maschak.

{¶26} At the time of the hearing, Sebring had not submitted detail plans to Ohio EPA for replacement of the four-inch water lines and minimization of dead end lines nor had it paid the \$8,250 administrative penalty as ordered by the Director in the 2009 DFFOs. Testimony Maschak, Burchard.

{¶27} Because Sebring did not present any documentation regarding its financial inability to pay penalties during negotiation of the 2008 DFFOs, Ms. Sherron testified that Ohio EPA did not have any evidence that the Village did not have financial resources to pay the administrative penalty calculated for the 2009 DFFOs. Testimony Sherron.

{¶28} Sebring timely filed its Notice of Appeal on July 17, 2009 alleging that the 2009 DFFOs were unlawful and unreasonable. Although no specific

Assignments of Error were stated, Sebring acknowledges it “admittedly did not meet certain deadlines imposed by the Agreed [2008 DFFOs]” but contends its “failure to meet those dates was not due to willful refusal or intent to violate orders but rather, due to financial conditions, time schedules and delays beyond the control of the Village of Sebring, Ohio.” In particular, the Notice of Appeal contends, “[f]or cause, the Village of Sebring states that the time schedule imposed by the Director is impossible to comply with” and “therefore asserts defenses of impossibility as well as lack of adequate funding and third party intervening and superseding causes.” The Village’s Notice of Appeal further contends that “the time periods imposed for compliance by the Director failed to adequately recognize the current situation of the economic state of the Village of Sebring, the State of Ohio and the United States.” The Village also objected to the \$8,250 administrative penalty. Case File Item A.

{¶29} At the de novo hearing, the Village presented evidence in support of its position that the 2009 DFFOs are unlawful and unreasonable. Although Sebring estimated that the material cost to replace the four-inch water lines is approximately \$10,000 per 500 feet, at the time of the hearing, no analysis had been completed regarding the total cost to replace the four-inch water lines and minimize dead end lines. Testimony Sanor, Burchard.

{¶30} On behalf of the Village, Mr. Burchard testified the 2009 DFFOs do not contain a date by which replacement of the four-inch water lines and minimization of dead end water lines must be completed. Mr. Sanor also testified that the Ten States Standards do not require replacement of four-inch water lines by a date certain and in his opinion it is unreasonable for Ohio EPA to require

Sebring to propose a specific schedule. Mr. Burchard explained that in light of Sebring's current economic position, the Village proposed replacement of the four-inch water lines "as funding becomes available." Testimony Burchard, Sanor.

{¶31} Mr. Burchard also testified extensively regarding the Village's current financial position. Mr. Burchard explained that although a grant application was submitted to the United States Department of Agriculture ("USDA"), the Village has been advised that no decision will be made until at least 2013. Mr. Burchard also acknowledged that Sebring did not submit the grant application to USDA until after the 2009 DFFOs were issued. Testimony Burchard.

{¶32} Mr. Burchard further explained that although the Ohio Public Works Commission ("OPWC") approved a zero percent interest loan, Sebring is not in a position to make the required payments. Mr. Burchard acknowledged that Sebring did not include a request to replace the four-inch water lines and minimize dead end water lines as part of the OPWC loan package. Testimony Burchard.

{¶33} Mr. Burchard further described actions taken by the Village to increase revenue. Specifically, in 2007 Sebring's tax rate was increased from 1.5 percent to 2 percent. Although revenue from the 2007 tax increase was designated for "capital improvements and the general fund," none was designated for Sebring's waterworks system fund ("WSF"). Testimony Burchard.

{¶34} Although not yet undertaken, Sebring anticipates raising the rate for drinking water services by 15 percent. Once implemented, the base rate for water services in Sebring will increase \$3.00 per quarter to \$25.00 per quarter.³

{¶35} Finally, Mr. Burchard testified that Sebring has experienced significant decreases in revenue to the WSF. Mr. Burchard noted a 10 percent decrease in population, the general economic downturn, and loss of a significant water customer as reasons why the Village has sustained a loss in revenue to the WSF. According to Mr. Burchard, revenue generated for Sebring's WSF has declined since 2005; and beginning in 2008, the Village began transferring funds from the general fund to pay necessary disbursements on behalf of the WSF. Sebring Exhibit B; Testimony Burchard.

{¶36} At the de novo hearing, the Director presented evidence detailing how Ohio EPA calculated the administrative penalty assessed to the Village. Christel Sherron, Compliance Coordinator for Ohio EPA's Drinking and Groundwater Central Office, testified that in accordance with R.C. 6109.33 and Ohio Adm.Code 3745-81-04, the \$8,250 administrative penalty was calculated based on the number of each type of violation multiplied by the population-based multiplier as provided in Ohio Adm. Code 3745-81-04. Ohio EPA Exhibit 6; Testimony Sherron.

{¶37} Ohio EPA determined that three types of violations were subject to administrative penalties: (1) exceedences of permitted limits of two constituents, (2) failure to comply with certain requirements of the 2008 DFFOs, and (3)

³ At the time of the hearing, the Village had approximately \$90,000 in delinquent bills for water services. The majority of the delinquency was from one customer in bankruptcy. Testimony Burchard.

failure to address deficiencies in the general plan as identified by the Director on September 15, 2008. On behalf of the Director, Ms. Sherron testified that violations prior to issuance of the 2008 DFFOs were not included in calculating the administrative penalties contained in the 2009 DFFOs because they were previously included in the settlement of the Director's administrative penalties contained in the 2008 DFFOs. Testimony Sherron.

{¶38} To calculate the civil administrative penalty for exceedences of TTHM and HAA^{5,4} Ms. Sherron testified that Ohio EPA determined that each quarter in which the PWS exceeded a permitted limit for each constituent would be counted as one violation, although R.C. 6109.23 authorizes administrative penalties to be calculated based on each day of violation. Testimony Sherron.

{¶39} Ohio EPA determined that Sebring's PWS served a population of 8,100 persons. Pursuant to the table set forth in Ohio Adm.Code 3745-81-04, a multiplier of 0.75 was selected, representing Sebring's population as between 6,701 to 10,000. Accordingly, the \$1,000 per day of violation authorized in R.C. 6109.33 was adjusted downward to \$750.

{¶40} Ohio EPA determined that between the second quarter 2008 and first quarter 2009, Sebring had three quarters in which the PWS had exceedences of TTHM and four quarters in which the PWS had exceedences of HAA⁵. Testimony Sherron.

{¶41} Ohio EPA also calculated an administrative penalty for Sebring's failure to comply with certain requirements of the 2008 DFFOs. In particular, Ohio EPA calculated penalties for Sebring's failure to submit detail plans for: (1)

⁴ Haloacetic acid.

an alternative means of obtaining back wash water, (2) replacement of the existing four-inch lines, and (3) minimizing the dead end water lines. Testimony Sherron.

{¶42} Although Ohio EPA was authorized to calculate the period of violation based on each day Sebring failed to comply with its obligation to submit detail plans, Ms. Sherron testified that she elected to count each failure as only one violation. Ms. Sherron calculated the administrative penalty for the Village's failure to submit detail plans by multiplying three violations by the 0.75 population-based multiplier to arrive at an administrative penalty of \$2,250. Testimony Sherron.

{¶43} Finally, Ms. Sherron calculated the administrative penalty for Sebring's failure to timely address deficiencies in a General Plan for TTHM reduction as set forth in the Director's September 15, 2008 Notification of Deficiencies.⁵ Ms. Sherron explained that pursuant to the 2008 Agreed DFFOs, Sebring agreed to respond within thirty days to any deficiencies in the General Plan noted by the Director. Again, although Ohio EPA was authorized to calculate the period of violation based on each day Sebring failed to comply with its obligation to timely address deficiencies in the General Plan, Ms. Sherron testified that Ohio EPA elected to count Sebring's failure as only one violation. Ms. Sherron calculated the administrative penalty for Sebring's failure to timely

⁵ The 2008 Agreed DFFOs required Sebring to submit a General Plan that described "at least 3 different options for TTHM reduction, a cost estimate of each option, and shall include a detailed compliance schedule with applicable milestone dates of significant events that are necessary to attain compliance." The Director's September 15, 2008 Notification of Deficiencies informed Sebring that the General Plan it submitted on September 4, 2008 "failed to contain information specified by the agreed upon [sic] by the May 9, 2008, DFFOs; and requiring that an acceptable General Plan, prepared by a registered engineer, be submitted to Ohio EPA within 30 days." Ohio EPA Exhibit 5.

address deficiencies in the General Plan by multiplying one violation by the population-based 0.75 multiplier for a total of \$750. Testimony Sherron.

{¶44} The Commission finds that the Director had a valid factual foundation to impose administrative penalties for each of the three types of violations assessed in the 2009 DFFOs.

CONCLUSIONS OF LAW

{¶45} Pursuant to R.C. 3745.05, the statutory duty of review imposed upon the Commission is a determination of whether the action of the Director under appeal is “unlawful” or “unreasonable.” “Unlawful” means that the action taken by the Director was not in accord with the relevant, applicable law. *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61 (10th Dist. 1977). “Unreasonable” means that the action was not in accord with reason, or that it lacks a valid factual foundation. *Id.* It is only in those cases where the record on appeal demonstrates that the Director’s action was not in agreement with the relevant, applicable law or that it was not in accord with reason or lacked a valid factual foundation, that the Commission can find that the action under appeal is unlawful or unreasonable. *Id.*

{¶46} Conversely, where the record on appeal before the Commission demonstrates that the action taken by the Director was lawful and reasonable, the Commission must affirm the action. *Id.* It is also well-accepted that in reaching its determination, the Commission must grant due deference to the Director’s “reasonable interpretation of the legislative scheme governing his Agency.” *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d. 274 (2005), citing *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282 (2001); *State*

ex rel. Celebrezze v. National Lime & Stone Co., 68 Ohio St.3d 377 (1994); *North Sanitary Landfill, Inc. v. Nichols*, 14 Ohio App.3d. 331 (2d Dist. 1984). In such an instance, the Commission may not substitute its judgment for that of the Director. *Buckeye Egg Farm, L.P., et al. v. Daily*, ERAC Case Nos. 455343-45 (October 15, 2003); *C.F./Walter v. Danis Clarkco Landfill Co.*, 10th Dist. Nos. 98AP-1481-82 (Oct. 28, 1999); *Citizens Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61 (10th Dist. 1977).

{¶47} R.C. 6109.03 through 6109.35 establish a comprehensive program granting the Director authority to regulate Ohio’s PWSs including primary enforcement responsibility under the Safe Drinking Water Act, 42 U.S.C. 300(f).

R.C. 6109.04 establishes the Director’s jurisdiction over PWSs as follows:

- (A) The director of environmental protection shall administer and enforce this chapter and rules adopted under it.

* * *

- (C) The director may do any or all of the following:

* * *

- (2) Provide a program for the general supervision of operation and maintenance of public water systems; * * *

- (7) Issue, modify, and revoke orders as necessary to carry out the director’s powers and duties under this chapter and primary enforcement responsibility for public water systems under the “Safe Drinking Water Act.” * * *

{¶48} R.C. 6109.07 prohibits construction or installation of, or substantial changes to, a PWS that are not in accordance with plans approved by the Director.⁶ R.C. 6107.07 provides, in relevant part:

(A) No person shall begin construction or installation of a public water system, or make a substantial change in a public water system, until plans therefore have been approved by the director or environmental protection under division (A)(1) or (2) of this section.

(1) Upon receipt of a proper application, the director shall consider the need for compliance with requirements of the Safe Drinking Water Act, and generally accepted standards for the construction and equipping of water systems, and shall issue an order approving or disapproving the plans. In granting an approval, the director may stipulate conditions designed to ensure that the system will be able to meet the requirements of [R.C. Chapter 6109] and rules adopted under it.

* * *

(B) No person shall construct or install a public water system, or make any substantial change in a public water system that is not in accordance with plans approved by the director.

{¶49} “Substantial change” is defined in Ohio Adm.Code 3745-91-01(C) as “any change that affects isolation, capacity, flows, water quality, source, distribution or treatment.” Ohio Adm.Code 3745-91-01(C) also provides that substantial changes to water distribution systems, such as a PWS include “new waterlines” and “replacement waterlines that change in size, alignment or material.”

⁶ Ohio Adm.Code 3745-91-02(A) also prohibits construction, installation, or substantial changes in a PWS that are not in accordance with plans approved by the Director and states “[n]o person shall construct or install a public water system, or make any substantial change in a public water system * * *, that is not in accordance with plans approved by the director.”

{¶50} Ohio Adm.Code 3745-91-03 sets forth specific requirements for plan drawings submitted to Ohio EPA for construction, installation, or substantial changes to a PWS stating, in pertinent part:

(A) Plan drawings shall * * *:

(3) Be issued in a manner consistent with section 4733.14 of the Revised Code by a registered professional engineer when required by paragraph (B) or (C) of this rule.

(B) The following types of plans shall be prepared and issued in a manner consistent with section 4733.14 of the Revised Code by a registered professional engineer:

(1) Plans involving expenditure of public funds in excess of five thousand dollars; * * *

(C) In addition to the specific types of plans in paragraph (B) of this rule, the director may require other plans to be prepared and issued in a manner consistent with section 4733.14 of the Revised Code by a registered professional engineer to protect the public welfare or to safeguard life, health, or property.

{¶51} Ohio Adm.Code 3745-91-04 through 3745-91-07 identify additional documents required for approval of construction or substantial changes to a PWS including specifications, data sheets, supporting documentation, and submittal letters. Notably, Ohio Adm.Code 3745-91-06 states that information “required by this rule may vary depending on the type and complexity of the project” and shall, at a minimum, include “an explanation of the project and its basis of design, and such other information relevant to approval of plans that may not be fully evident from the plan drawings and specifications.”

{¶52} Ohio Adm.Code 3745-91-08 governs the procedure for approval of plans submitted for the construction, installation, or substantial changes to a PWS and provides in relevant part:

(A) "Recommended Standards for Water Works: (2003). Great Lakes-Upper Mississippi River Board of State and Provincial Public Health and Environmental Managers, or such other publications as may be prepared by the Ohio environmental protection agency for guidance of designers of public water systems, shall be used as a guide in the technical review of plans submitted under this chapter of the Administrative Code. * * *

(D) Approval of plans submitted under this chapter of the administrative code may be conditioned upon requirements that may be necessary or desirable to ensure that the system being constructed, or of which the proposed project is a part, will be able to meet generally accepted standards for the design, equipping and operation of water systems.

{¶53} R.C. 6109.23 authorizes the Director to adopt rules for the administrative assessment and collection of monetary penalties for failure to comply with Ohio EPA's program for operation and maintenance of PWSs. Specifically, R.C. 6109.23 provides, in relevant part:

For public water systems serving populations of more than ten thousand, a monetary penalty assessed * * * shall not be less than one thousand dollars for each day of each violations, but in no case shall the total amount of monetary penalty exceed ten thousand dollars per violation. For public water systems serving populations of ten thousand or fewer, the rules * * * shall establish a methodology for calculating the monetary penalty based on the size of the system, the threat to public health presented by failure to comply, and other factors that may be necessary to ensure compliance * * * but in no case shall the total amount of monetary penalty exceed two thousand five hundred dollars per violation.

* * *

[T]he director may require the submission of compliance schedules and related information.

{¶54} Ohio Adm.Code 3745-81-04 sets forth the method by which the Director may assess and collect administrative penalties authorized by R.C. 6109.23:

[T]he director may assess and collect administrative penalties from any person who owns or operates a public water system and violates

Chapter 6109 of the Revised Code or the administrative rules adopted thereunder. Administrative penalties for a public water system shall be calculated according to this rule in the following manner. Each violation of the public water system shall be assigned a value of one thousand dollars. This amount represents the threat to public health caused by the public water system's failure to comply with the applicable regulations. This value is then multiplied by a number, expressed as a decimal, which represents the public water system's size, in accordance with the following list in order to determine the penalty amount for each day of each violation: * * *

System size (number of people served)

6701 to 10,000 [service connections] 0.75 * * *

{¶155} The issue before the Commission may be summarized as a chicken or egg disagreement between the parties. Sebring argues that it cannot submit detail plans as required by either the 2008 DFFOs or 2009 DFFOs until the parties reach agreement regarding a construction schedule for replacement of the four-inch water lines and minimization of dead end water lines. Ohio EPA contends it cannot consider a construction schedule until Sebring submits detail plans as required by R.C. 6109.07 and Ohio Adm.Code Chapter 3745-01. The Commission finds that the Director's position accurately reflects the statutory and regulatory requirements for approval of construction and significant changes to a PWS.

{¶156} At the hearing, Sebring alleged that the 2009 DFFOs are unlawful and unreasonable for three reasons. First, Sebring contends that the Director unlawfully and unreasonably required that detail plans include a specific schedule for construction and installation of the replacement water lines. Sebring argues there is no requirement in the 2009 DFFOs that impose a schedule for

replacement of the four-inch water lines and minimization of dead end water lines and it “cannot commit to a rigid and arbitrarily imposed deadline.”

{¶57} Contrary to Sebring’s contention, both the 2008 DFFOs and 2009 DFFOs require the Village to include a schedule for replacement of the four-inch water lines in the detail plans submitted to Ohio EPA. Specifically, 2008 DFFOs Paragraph 18 and 2009 DFFOs paragraph 20 require Sebring to commence construction for replacement of the four-inch water lines “in accordance with detail plans approved by Ohio EPA * * * *and the schedule contained within the detailed plans.*”

{¶58} Moreover, R.C. 6109.07 and Ohio Adm.Code 3745-91-02(A) clearly and unambiguously state that all construction, installation, or substantial changes to a PWS must be completed in accordance with plans approved by the Director. Accordingly, approval by the Director begins with the PWS submitting detail plans to Ohio EPA. No language in either provision requires the Director to reach agreement with an Applicant regarding information required in detail plans before they are submitted to Ohio EPA for approval.

{¶59} Additionally, Ohio Adm.Code 3745-91-06 specifically authorizes the Director to require detail plans to contain additional information “depending on the type and complexity of the project,” including “such other information relevant to approval of plans that may not be fully evident from the plan drawings and specifications.” Certainly, construction and installation schedules are both relevant to a project to replace water lines and may not be fully evident from the plan drawings or specifications.

{¶60} A determination whether information contained in detail plans, including whether a schedule for construction is adequate, is a different issue. To that end, Ohio Adm.Code 3745-91-08 provides that if submitted detail plans are not approvable, the Director must notify the Applicant and provide a “statement of alterations or revisions necessary for approval.” Alternatively, the Director may disapprove the plans. Again, however, the Director cannot determine what alterations or revisions are necessary until the owner or operator of the PWS submits detail plans as required by R.C. 6109.07 and Ohio Adm.Code Chapter 3745-01.

{¶61} Here, although Sebring contends it proposed to Ohio EPA to replace the four-inch water lines “as funding becomes available, the Village concedes that prior to issuance of the 2009 DFFOs, it did not comply with 2008 DFFOs paragraph 17(a) that required submission of detail plans to replace the existing four-inch water lines and minimization of dead end water lines. Sebring also concedes it did not provide the Director with a schedule by which it will commence and complete construction. Without detail plans, the Director cannot make a determination as to whether replacement of the four-inch water lines will “meet generally accepted standards for the design, equipping and operation of water systems.” Additionally, pursuant to Ohio Adm.Code 3745-91-06, based upon the type and complexity of the project, the Director also determined that a construction schedule was “relevant to approval of plans that may not be fully evident from the plan drawings and specifications.” Without submission of detail plans, the Director cannot evaluate whether Sebring’s proposed schedule to

replace four-inch water lines “as funding becomes available” is approvable or whether “alterations or revisions necessary for approval.”

{¶62} Sebring also argues that because it does not have a history of insufficient water pressure to respond to fire emergencies, the 2009 DFFOs are unlawful and unreasonable. Therefore, Sebring contends there is no rational basis to replace the four-inch water lines. The Commission disagrees.

{¶63} Initially, the Commission notes that Paragraph 19(a) requiring Sebring to replace the four-inch water lines pursuant to Ten States Standard section 8.8.2 is exactly the same order Sebring consented to in the 2008 DFFOs. Moreover, Sebring does not dispute that the Ten States Standards are incorporated into Ohio Adm.Code 3745-91-08 and are generally accepted standards for the design, equipping, and operation of PWSs.

{¶64} On behalf of the Director, Mr. Maschak testified that replacement of four-inch water lines with at least six-inch water lines is important for fire protection and sufficiency of water pressure within the Village. Mr. Maschak further testified that minimizing dead end water lines is necessary to provide increased reliability of service and to reduce stagnant water. Minimization of dead end lines also provides a means to provide adequate flushing of the lines. Accordingly, based upon evidence presented, the Commission finds that the Director had a valid factual foundation to order Sebring to replace the four-inch water lines pursuant to Ten States Standard 8.8.2 and to minimize dead end water lines.

{¶65} Finally, Sebring contends that the Director's imposition of an administrative penalty in the amount of \$8,250 is both unlawful and unreasonable.

{¶66} Sebring does not challenge the Director's authority to issue the administrative penalty and does not dispute that it failed to comply with certain terms and conditions contained in the 2008 DFFOs and assessed in the 2009 DFFOs. Sebring also does not dispute that the Director accurately calculated the administrative penalty in accordance with Ohio Adm.Code 3745-81-04. Sebring's objection to imposition of an administrative penalty in the 2009 DFFOs is limited to its contention that in light of its financial position, Sebring should be "excused from compliance based on impossibility of performance." At the hearing, Sebring asserted that assessment of the administrative penalty is unreasonable because the general downturn in the economy has resulted in a significant decrease in revenue to the PWS fund, and the Village had been unable to secure funding to pay for replacement of the four-inch lines and minimization of dead end lines.

{¶67} The Commission appreciates that as a result of the current economic climate, state and local governments face significant challenges and difficult decisions regarding how to plan and pay for services, construction, and maintenance projects necessary to comply with regulatory obligations, including requirements of the Safe Drinking Water Act. The Commission also recognizes that as a result of hardships resulting from the economic downturn, municipalities hesitate to impose additional financial burdens on their residents.

{¶68} However, the law dictates that an owner or operator of a PWS comply with the regulatory obligations promulgated by the Director pursuant to

the authority granted to him by R.C. Chapter 6109 to ensure that PWSs protect public health and welfare and comply with the mandates of the Safe Drinking Water Act.

{¶69} R.C. 6109.04(C)(7) grants the Director authority to “issue, modify, and revoke orders necessary to carry out the director’s powers and duties under this chapter and primary responsibility for public water systems under the ‘Safe Drinking Water Act.’” Additionally, R.C. 6109.23 establishes a specific methodology for calculating administrative penalties for failure to comply with R.C. Chapter 6109. The methodology set forth in R.C. 6109.23 and Ohio Adm.Code 3745-81-04 provides a per day monetary penalty based on the population served by a PWS. The Commission finds the Director complied with this framework and therefore acted lawfully in assessing an administrative penalty in the 2009 DFFOs.

{¶70} The final question remaining is whether the amount of the administrative penalty assessed against Sebring was reasonable.

{¶71} It is well established that the purpose of an administrative penalty is to deter the person subject to the penalty and other similarly situated persons from violating the law and conducting actions that are contrary to a regulatory scheme. *Celebrezze v. Thermal-Tron, Inc.*, 71 Ohio App.3d 11 (8th Dist. 1992). Further, where an agency has provided a reasonable explanation for the penalty assessment and the assessment amount falls within the broad range of penalty guidelines, a court should not substitute its judgment absent a showing that the agency has committed a clear error or abuse of discretion. *Mayes v. EPA*, E.D. Tenn. No. 3:05-CV-478, 2008 WL 33806 (January 4, 2008).

{¶72} Pursuant to R.C. 6109.23, the Director is authorized to issue an administrative penalty, not to exceed \$10,000 per day for each violation. The Director followed the method set forth in Ohio Adm.Code 3745-81-04 in calculating the amount of the penalty ordered in the 2009 DFFOs. And, to Sebring's benefit, \$8,250 is significantly less than the amount the Director is authorized by the regulation to assess. Having determined that Ohio EPA's penalty calculations were supported by a valid factual foundation, the Commission finds that the Director acted reasonably when he assessed the calculated penalty against Sebring for violations of Ohio statutes and regulations.

FINAL ORDER

In light of the foregoing, the Commission AFFIRMS the Director of Ohio Environmental Protection Agency's final action and finds the 2009 DFFOs against Sebring are both lawful and reasonable.

The Commission, in accordance with Ohio Adm.Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

SHILLING AND PETERSEN, COMMISSIONERS, CONCUR

THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION

Entered into the Journal
of the Commission this
_____ day of March 2012.

Lisa L. Eschleman, Chair

Melissa M. Shilling, Vice-Chair

Shaun K. Petersen, Member

COPIES SENT TO:

VILLAGE OF SEBRING
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Andrew L. Zumbar, Esq.
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[CERTIFIED MAIL]
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