



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Resolution of Exceedances of
the Arsenic Standard in the Public Water System
Located at 1226 Washington Avenue in the Town
of Cedarburg, Ozaukee County

Case No. IH-11-08

In the Matter of the Failure of 5 Corners Truck &
Auto, Inc. to Complete Required Monitoring for
the Public Water System Located at 1226
Washington Avenue in the Town of Cedarburg,
Ozaukee County

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Waukesha, Wisconsin, on July 14-15, 2010. The parties requested the opportunity to offer written closing arguments and the last submittal was received on July 23, 2012.

The contested case hearing was granted with respect to Administrative Order 2008-SEEE-135B on the following two issues:

1. Should the Order of Administrative Penalty, in Order No. 2008-SEEE-135B, which orders 5 Corners Truck & Auto, Inc., to pay a forfeiture of \$4,000 to the Department of Natural Resources, pursuant to s. 281.99(1)(c), Wis. Stats., be modified, if it is true that 5 Corners Truck & Auto, Inc. is no longer a non-transient non-community water system, as defined in s. NR 809.04(58), Wis. Adm. Code, even though 5 Corners Truck & Auto, Inc., was a non-transient non-community water system during the time period when nearly all of the violations in Order No. 2008-SEEE-135B occurred?
2. Should the Order of Compliance Measures in Order No. 2008-SEEE-135B be modified if it is true that 5 Corners Truck & Auto, Inc. is no longer a non-transient non-community water system, as defined in s. NR 809.04(58), Wis. Adm. Code?
(Exhibit 48)

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by (DNR or Department)

Attorney Judith Mills Ohm
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

5 Corners Truck & Auto, Inc. (Five Corners or 5 Corners)
Robert Habich, by

Attorney Perry P. Lieuallen
200 East Dekora Street
Saukville, WI 53080-2003

FINDINGS OF FACT

1. Five Corners did not collect inorganic contaminant (IOC) samples between January 1, 2010 and September 30, 2010, despite the requirement to monitor the 5 Corners water system for IOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.12(10) (renumbered as Wis. Admin. Code § NR 809.115(9) effective December 1, 2010). 5 Corners collected the 2010 IOC sample on December 20, 2010, 81 days after the deadline.

2. Five Corners did not collect inorganic contaminant (IOC) samples between January 1, 2007 and September 30, 2007, despite the requirement to monitor the 5 Corners water system for IOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.12(10) (renumbered as Wis. Admin. Code § NR 809.115(9) effective December 1, 2010). 5 Corners collected the 2007 IOC sample on October 25, 2007, 25 days after the deadline.

3. Five Corners did not collect synthetic organic contaminant (SOC) samples between January 1, 2007 and September 30, 2007, despite the requirement to monitor the 5 Corners water system for SOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.21(17) (renumbered as Wis. Admin. Code § NR 809.205(11) effective December 1, 2010). 5 Corners collected the 2007 SOC sample on October 24, 2007, 24 days after the deadline.

4. Five Corners did not collect volatile organic contaminant (VOC) samples between January 1, 2010 and September 30, 2010, despite the requirement to monitor the 5 Corners water system for VOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.25(20) (renumbered as Wis. Admin. Code § NR

809.245(11) effective December 1, 2010). Five Corners collected the 2010 VOC sample on December 20, 2010, 81 days after the deadline.

5. Five Corners did not collect volatile organic contaminant (VOC) samples between January 1, 2007 and September 30, 2007, despite the requirement to monitor the 5 Corners water system for VOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.25(20) (renumbered as Wis. Admin. Code § NR 809.245(11) effective December 1, 2010). 5 Corners collected the 2007 VOC sample on October 25, 2007, 25 days after the deadline.

6. Five Corners did not collect volatile organic contaminant (VOC) samples between January 1, 2004 and September 30, 2004, despite the requirement to monitor the 5 Corners water system for VOCs during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.25(20) (renumbered as Wis. Admin. Code § NR 809.245(11) effective December 1, 2010). 5 Corners collected the 2004 VOC sample on December 9, 2004, 70 days after the deadline.

7. Five Corners did not collect a coliform bacteria sample for the third calendar quarter of 2008, despite the requirement to monitor the 5 Corners water system for coliform bacteria during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.31(1)(c).

8. Five Corners did not collect a coliform bacteria sample for the third calendar quarter of 2007, despite the requirement to monitor the 5 Corners water system for coliform bacteria during that time period, as designated by DNR pursuant to Wis. Admin. Code § NR 809.31(1)(c).

9. DNR sent a notice of non-compliance to 5 Corners on October 22, 2004, because 5 Corners did not collect volatile organic contaminant (VOC) samples between January 1, 2004 and September 30, 2004, in violation of Wis. Admin. Code § NR 809.25(20). (Exhibit 3)

10. DNR sent a notice of violation to 5 Corners on October 30, 2007, because 5 Corners did not collect a coliform bacteria sample for the third calendar quarter of 2007, in violation of Wis. Admin. Code § NR 809.31(1)(c), and missed the sampling deadlines for IOCs, SOCs and VOCs in 2007, in violation of Wis. Admin. Code §§ NR 809.12(10), 809.21(17) and 809.25(10). (Exhibit 5)

11. DNR held an enforcement conference with 5 Corners on November 26, 2007, to discuss the violations outlined in the notice of violation, dated October 30, 2007, and to discuss the importance of meeting sampling requirements to ensure a safe water supply.

12. DNR and 5 Corners entered into an Agreement, dated November 26, 2007, outlining the actions necessary for 5 Corners to undertake to return to compliance with Safe Drinking Water Act requirements. (Exhibit 6)

13. Patricia Iwanski, DNR Water Supply Specialist, left voice messages with Robert Habich, owner and operator of 5 Corners, on October 16, 2008 and November 5, 2008, regarding a missing coliform bacteria sample for the third quarter of 2008. (Exhibits 9 and 10)

14. DNR sent a notice of violation to 5 Corners on November 14, 2008, because 5 Corners did not collect a coliform bacteria sample for the third calendar quarter of 2008, in violation of Wis. Admin. Code § NR 809.31(1)(c). (Exhibit 11).

15. DNR held an enforcement conference with 5 Corners on December 15, 2008, to discuss the violations outlined in the notice of violation, dated November 14, 2008, and the history of missed sampling deadlines. Robert Habich agreed to track monitoring periods on a calendar and collect samples early in the monitoring periods. (Exhibit 12)

16. DNR sent a notice of an unsafe total coliform bacteria sample for the 3rd quarter of 2009 to 5 Corners on September 30, 2009. The notice informed 5 Corners of the required follow-up sampling requirements. (Exhibit 14)

17. Patricia Iwanski sent e-mails to Robert Habich, dated October 14, 2010 and October 26, 2010, regarding the failure of 5 Corners to sample for IOCs and VOCs in 2010. Ms. Iwanski left a voice mail message with Mr. Habich regarding the same violation, on October 27, 2010. (Exhibit 17)

18. Patricia Iwanski placed a phone call to Robert Habich on November 1, 2010, regarding the failure of 5 Corners to sample for IOCs and VOCs in 2010. (Exhibit 18)

19. Five Corners collected an inorganic water sample on December 20, 2010. Arsenic was detected in the sample at 0.015 mg/L. This is above the maximum contaminant level (MCL) of 0.010 mg/L for arsenic, under Wis. Admin. Code §§ NR 809.11(2) and 809.117(1)(b).

20. Pursuant to Wis. Admin. Code § NR 809.115(4)(c) a public water system which exceeds the MCL for arsenic shall be monitored quarterly beginning in the next quarter after the violation occurred.

21. Pursuant to Wis. Admin. Code § NR 809.117(1)(b) when a public water system is monitored more frequently than annually, compliance with the MCL for arsenic is determined by a running annual average. If the average at any sampling point is greater than the MCL, then the public water system is out of compliance. If a water supplier fails to collect the required number of samples, compliance is based on the total number of samples collected.

22. DNR sent a letter to 5 Corners on January 4, 2011, advising that the water system had exceeded the arsenic standard and establishing a quarterly arsenic sampling schedule.

23. Five Corners collected an arsenic sample on March 30, 2011, within the first quarter of 2011. Arsenic was detected in the sample at 0.014 mg/L.

24. Five Corners failed to comply with the requirement to collect an arsenic sample for the second quarter of 2011.

25. Five Corners collected an arsenic sample on July 12, 2011. Arsenic was detected in the sample at 0.015 mg/L.

26. The results of the samples collected on December 20, 2010, March 30, 2011 and July 12, 2011 (0.015 mg/L, 0.014 mg/L and 0.015 mg/L, respectively) are averaged to determine a running annual average of 0.015 mg/L, above the allowable running annual average of 0.010 mg/L for arsenic, as specified in Wis. Admin. Code §§ NR 809.11(2) and 809.117(1)(b).

27. The results of subsequent samples collected continue to show that 5 Corners exceeds the arsenic MCL. The running annual average as of April 2012 is 13.5 ug/L (4 quarters at 15 ug/L, 13 ug/L, 13 ug/L and 13 ug/L), which exceeds the allowable MCL of 10 ug/L. (Exhibit 30)

28. The Department calculated the total number of full time employees plus part time employees working at least 16 hours per week each month for six months based on employment records submitted to DNR. Those results were as set forth below:

Month (in 2011)	Number of full time employees*	Number of part time employees working >16 hrs. per week each month for six months	Total number of employees
January	29	3	32
February	25	3	28
March	23	2	25
April	22	3	25
May	24	3	27
June	23	1	24
July	23	3	26
August	22	3	25
September	22	3	25
October	23	2	25
November	24	1	25
December	24	2	26

*Frank Knetter has been added to the number of full-time employees taken from the record 5 Corners submitted on January 16, 2012.

29. Based on the employment data that 5 Corners provided to DNR and DWD, 5 Corners has not established that the 5 Corners water system serves fewer than 25 persons on a consistent basis. In its only real defense, Five Corners argues that it did not employ 25 persons in the months of February and March, 2011. (Habich; 7/23/2011 Brief, p.2) However, as Ms. Iwanski testified, most water systems that serve around 25 persons, occasionally more or less, continue to comply with the requirements for non-transient non-community water systems. These requirements include continued monitoring for arsenic and achievement of compliance with the arsenic MCL by one of the following means: constructing a new well, reconstructing an existing well, connecting to an alternative water source, or implementing treatment controls with DNR approval. Wis. Admin. Code §§ NR 812.37(2)(e) and 809.11(4). Providing bottled water for drinking, the method 5 Corners currently employs is not an approved method for achieving compliance with the arsenic MCL.

30. The DNR properly considered relevant statutory factors in assessing the forfeiture in this matter. (Chung; Iwanski; Ex. 33) The forfeiture assessed in this matter was at the lower middle end of the range for similar types of violations, which ranged from \$5000 to \$7558. (Exhibits 39-46)

31. The Order of Compliance Measures in Order No. 2008-SEEE-135B were reasonable and necessary given the record as a whole.

32. Given the pattern of violations, the Order of Administrative Penalty, in Order No. 2008-SEEE-135B, which orders 5 Corners Truck & Auto, Inc., to pay a forfeiture of \$4,000 to the Department of Natural Resources was reasonable and necessary pursuant to § 281.99(1)(c).

DISCUSSION

Patricia Iwanski, a water supply specialist assigned to the 5 Corners water system in 2003, testified at the hearing regarding extensive contacts she had with 5 Corners and Robert Habich, owner and operator of 5 Corners, beginning formally with a notice of non-compliance she sent on October 22, 2004. (Exhibit 3) Ms. Iwanski prepared a chart summarizing all of the DNR contacts, notifications, offers of assistance and enforcement documents provided to 5 Corners from April 2004 to April 2012. (Exhibit 32)

The chart outlines 14 pages of contacts during this time period. Ms. Iwanski stated that she spent much more time on this water system than other water systems to which she is assigned. Patricia Chung, retired DNR enforcement specialist, also testified regarding multiple contacts with 5 Corners, including enforcement conferences in 2007 and 2008. (Exhibits 6 and 12)

It is telling that 5 Corners requested to become a transient non-community water system only after receiving the administrative orders from DNR in November of 2011. Exs. 1-2) It is also disturbing that Mr. Habich stated to Kelly Thomas, from Rural Water Association, back in October 2005, that since “he doesn’t drink the water . . . he will not treat it until DNR forces him to treat”. (Exhibit 4)

The DNR properly considered the relevant factors in assessing the forfeiture in this matter necessary pursuant to § 281.99(2)(b)(1). The forfeiture assessed in this matter was at the lower middle end of the range for similar types of violations, which were up to \$3500 higher than that assessed against 5 Corners.

If in the future, 5 Corners can definitively demonstrate that it regularly serves fewer than 25 persons on a consistent basis, it could ask DNR to reclassify 5 Corners as a transient non-community system. However, 5 Corners did not make that demonstration during the contested case hearing, nor did it seriously raise the issue until well after the Order being reviewed was issued by the Department.

Order of Compliance No. 2008-SEEE-135A and Order of Administrative Penalty No. 2008-SEEE-135B were reasonable and necessary and must be affirmed.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 227.43(1)(b) to hear contested cases and issue necessary orders in cases referred to it by the Department of Natural Resources.
2. Non-transient non-community water system" or "NTNCWS" means a non-community water system that regularly serves at least 25 of the same persons over 6 months per year. Wis. Admin. Code § NR 809.04(58) At all times relevant to the Orders being reviewed, Five Corners was a non-transient non-community water system within the meaning of this code provision.
3. The Order of Compliance Measures in Order No. 2008-SEEE-135A were reasonable and necessary given the record as a whole. The Department does not have discretion to accept bottled water as a viable remedy for these violations.
4. The department properly considered the following factors in assessing:
 1. The gravity of the violation, including the probability of harm to persons served by the water system.
 2. Good faith exercised by the water system owner or operator, including past or ongoing efforts to correct problems or achieve compliance with the safe drinking water program.

3. Any previous violations committed by the water system owner or operator at the same water system.
4. The financial benefit to the water system owner or operator of continuing the violation.
5. Any other relevant factors.

Given the pattern of violations, the potential health threats, the failure to comply with deadlines, and the history of previous violations, the Order of Administrative Penalty, in Order No. 2008-SEEE-135B, which orders 5 Corners Truck & Auto, Inc., to pay a forfeiture of \$4,000 to the Department of Natural Resources was reasonable and necessary pursuant to § 281.99(1)(c) and was at the lower middle range of forfeiture assessments for similar violations.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that Orders of the Department remain in full force and effect.

IT IS FURTHER ORDERED that the petition for review be DISMISSED.

Dated at Madison, Wisconsin on August 24, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.