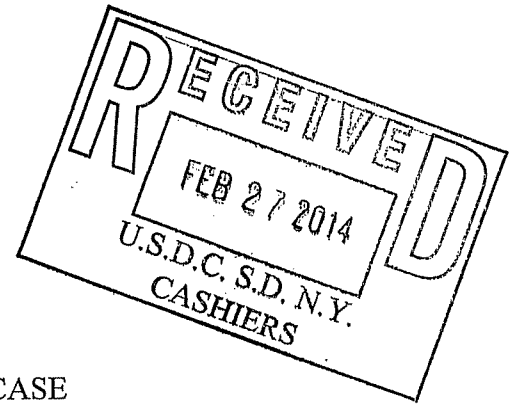


JUDGE ROMAN

PREET BHARARA
 United States Attorney for the
 Southern District of New York
 By: ELLEN LONDON
 ROBERT WILLIAM YALEN
 Assistant United States Attorney
 86 Chambers Street
 New York, New York 10007
 Tel. No.: (212) 637-2737/2722
 Fax No.: (212) 637-2702
 E-mail: ellen.london@usdoj.gov
 robert.yalen@usdoj.gov

14 CV 1299



UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF NEW YORK

----- x
 UNITED STATES OF AMERICA,

Plaintiff,

v.

EDWARD A. EHERTS and PAINTED
 APRON WATER COMPANY, INC.,

Defendants.
 ----- x

ECF CASE

14 Civ. _____

COMPLAINT

The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), for its complaint against defendants Edward A. Eherts ("Eherts") and Painted Apron Water Company, Inc. ("Painted Apron" and, collectively, "Defendants"), alleges as follows:

NATURE OF THE ACTION

1. The United States brings this civil action against Defendants for civil penalties for violations of the Safe Drinking Water Act ("SDWA" or "Act"), 42 U.S.C. § 300f *et seq.*, its

implementing regulations and applicable requirements, and for violations of an Administrative Order issued by EPA.

2. “[S]afe drinking water is essential to the protection of public health.” Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, § 3(1). Risks to drinking water include contamination by various pollutants, such as chemicals, animal wastes, human threats, and naturally-occurring substances. To ensure the safety of covered public water systems, the SDWA requires public water systems to take steps to protect against contamination of the drinking water they supply to the public. These steps include source-water protection, water treatment, water-quality monitoring, and providing information to the public. *See* “Understanding the Safe Drinking Water Act,” http://water.epa.gov/lawsregs/guidance/sdwa/upload/2009_08_28_sdwa_fs_30ann_sdwa_web.pdf.

3. Defendant Painted Apron owns and defendant Eherts – until recently – operated the public water system (the “Water System”) supplying drinking water to approximately 150 residents in the Town of Deerpark, New York. As the owner and former operator, Defendants are responsible for ensuring that the Water System complies with all applicable requirements of the SDWA. Ignoring their responsibilities, however, Defendants have repeatedly failed to comply with numerous applicable requirements of the SDWA, including, among other things, failing to test the water for contaminants and failing to treat the water for known contaminants. Moreover, in July 2011, Eherts sought to abandon his responsibilities at the Water System, leaving this public water system without monitoring or controls until July 22, 2013, when a temporary operator was appointed to take over the operation of the system.

4. As a result of Defendants' violations of applicable requirements of the SDWA, the abandonment of the Water System, and the confirmed presence in May 2010 and July 2011 of the bacterium *Esterichia coli* ("E.coli") in raw water at the Water System, the Orange County Department of Health ("County Health Department") periodically placed the Water System on "boil-water notices," which advised the Water System's customers to boil their water before using it for human consumption or for food preparation. A boil-water notice remained in effect for the Water System until the appointment of the temporary operator on July 22, 2013.

5. Between March 2012 and July 2013, the United States Attorney's Office for the Southern District of New York and EPA worked with community members and the New York State Public Service Commission ("PSC") to develop a replacement for Defendants as operators of the Water System, in order to secure necessary improvements to the system and ensure that it is operated in compliance with the SDWA. On July 22, 2013, as a result of these efforts, the PSC appointed a committee of community members to serve as the temporary operator of the Water System. Although the temporary operator is intended to ensure compliance with the SDWA for this community going forward, this lawsuit is being filed to address the past violations by Defendants.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 1414(b) and (g) of the SDWA, 42 U.S.C. §§ 300g-3(b) and (g).

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and 1395 because the violations alleged below occurred in this District, because Defendant Eherts resides in this district, and because Defendant Painted Apron has its principal place of business in this District.

THE PARTIES

8. Plaintiff is the United States of America on behalf of EPA.

9. Defendant Edward A. Eherts is a natural person, who, on information and belief, resides in Port Jervis, New York.

10. Defendant Painted Apron Water Company, Inc., is a corporation incorporated in the State of New York, on February 27, 1987, pursuant to Transportation Corporations Law Ch. 63, Art. 4, to own and operate the Painted Apron public water system. Defendant Eherts is the President of this corporation. Although this corporation purportedly was dissolved by proclamation/annulment of authority in October 2011 by the New York State Department of Taxation and Finance, such dissolution did not relieve the corporation of its duties as a supplier of public drinking water. To that end, the New York Public Service Law § 108(a) requires water-works corporations, such as Painted Apron Water Company, Inc., to obtain consent from the PSC prior to dissolution.

**THE SAFE DRINKING WATER ACT AND NATIONAL
PRIMARY DRINKING WATER REGULATIONS**

11. The SDWA requires that owners and operators of public water systems test their water supply for specified contaminants, treat the water accordingly, provide regular reports and other notices to their customers, and take corrective measures to cure deficiencies. Each of these steps is essential to ensuring that the drinking water is safe.

General Provisions

12. The Water System is a “public water system” and a “community water system” as that term is used in the SDWA and the SDWA regulations. Specifically, Section 1401(4) of the SDWA, 42 U.S.C. § 300f(4), and 40 C.F.R. § 141.2 define “public water system” as a “system for the provision to the public of water for human consumption through pipes or other

constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” Section 1401(15) of the SDWA, 42 U.S.C. § 300f(15), and 40 C.F.R. § 141.2 define a “community water system” (“CWS”), as relevant here, as a public water system that “regularly serves at least 25 year-round residents.” The Water System serves approximately 32 households year-round.

13. As the owner and former operator of the Water System, Defendants are “suppliers of water” as that term is used in the SDWA and SDWA regulations. A “supplier of water” is defined at Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5), and 40 C.F.R. § 141.2 as “any person who owns or operates a public water system.”

14. Under Section 1411 of the SDWA, 42 U.S.C. § 300g, the owner or operator of a public water system must comply with the National Primary Drinking Water Regulations promulgated under Part B of the SDWA, 42 U.S.C. §§ 300g-300g-6, except to the extent that an exception, variance or exemption under Sections 1411, 1415, or 1416, 42 U.S.C. § 300g, 300g-4, or 300g-5, is applicable. These regulations contain the maximum contaminant levels (“MCLs”) for various contaminants in drinking water, and testing, treatment, reporting, and corrective action requirements with regard to such contaminants.

New York State Primary Enforcement Responsibility and Federal Enforcement Authority

15. Under Section 1413(a) of the SDWA, 42 U.S.C. § 300g-2(a), a State may obtain primary enforcement responsibility for ensuring that public water systems comply with all applicable requirements of the SDWA during any period for which EPA determines that the State satisfies statutory requirements for primary enforcement responsibility specified in the SDWA.

16. EPA has determined that the State of New York has satisfied the requirements to obtain primary enforcement responsibility pursuant to Section 1413(a) of the SDWA, 42 U.S.C. § 300g-2(a), with respect to the SDWA matters at issue in this case. The New York State Department of Health (“NYSDOH”), and as relevant here, the Orange County Health Department administer the State’s SDWA program pursuant to this primary enforcement responsibility.

17. Although New York State has primary enforcement responsibility, Section 1414 of the SDWA, 42 U.S.C. § 300g-3, authorizes EPA to bring a civil action to require compliance with any “applicable requirement” of the SDWA and to seek civil penalties whenever EPA finds that a public water system has violated any such requirement and where the State does not itself commence appropriate enforcement action within thirty days of notice provided to the State by EPA.

18. Pursuant to Section 1414(i) of the SDWA, 42 U.S.C. § 300g-3(i), “applicable requirements” of the SDWA include: (1) any requirement of Section 1412, 1414, 1415, 1416, 1417, 1433, 1441, or 1445 of the SDWA, 42 U.S.C. § 300g-1, 300g-3, 300g-4, 300g-5, 300g-6, 300i-2, 300j, or 300j-4; (2) any federal regulation promulgated pursuant to any of the above sections; (3) any schedule or requirement imposed pursuant to any of the above sections; and (4) any requirement of, or permit issued under, an approved State program.

19. EPA has promulgated regulations implementing the requirements of the SDWA at, inter alia, 40 C.F.R. Part 141, which are applicable requirements of the SDWA.

20. New York’s Public Water Supply Supervision Program regulations (Title 10 of the New York Code, Rules and Regulations), which cover the various aspects of providing drinking water to the public, and which were promulgated to ensure that such drinking water is

safe, are requirements of the State's SDWA program, and are, therefore, applicable requirements of the SDWA. 42 U.S.C. § 300g-3(i)(4).

21. On June 14, 2012, EPA provided New York State notice pursuant to Section 1414(a)(1)(A) of the SDWA, 42 U.S.C. § 300g-3(a)(1)(A), that Defendants were in violation of several applicable requirements of the SDWA. New York State has not commenced an enforcement action against Defendants. Therefore, because more than thirty days have passed since EPA notified New York State of the violations at the Water System without the State commencing an enforcement action, EPA has authority to commence this suit pursuant to the SDWA.

22. Under Section 1414(b) of the SDWA, 42 U.S.C. § 300g-3(b), and the subsequent Civil Monetary Penalty Inflation Adjustment Rules, 61 Fed. Reg. 69,364 (Dec. 31, 1996), 73 Fed. Reg. 75,340 (Dec. 11, 2008), and 74 Fed. Reg. 628 (Jan. 7, 2009), this Court may impose on Defendants a civil penalty of up to \$32,500 for each day of violation occurring between March 15, 2004 and January 12, 2009, and up to \$37,500 for each day of violation occurring on or after January 12, 2009. EPA seeks only penalties for violations occurring within the applicable five-year limitations period applicable to civil penalties, 28 U.S.C. § 2462, and thus occurring on or after February 27, 2009.

Monitoring, Treatment, Operational, and Reporting Requirements

23. Owners and operators of public water systems are required to sample, monitor and report on various substances in such water systems in accordance with the regulations set forth at 40 C.F.R. Part 141 to determine compliance with maximum contaminant levels and treatment requirements. Among other things, owners and operators of public water systems must monitor for total coliform, inorganic compounds, organic compounds, radionuclides, lead,

copper, chemical disinfectants (if added to the water), and disinfection byproducts (if chemical disinfectants are added) in the drinking water. *See* 40 C.F.R. §§ 141.21, 141.23, 141.24, 141.26, 141.80 and 141.132; 10 NYCRR § 5-1.50 through 5-1.52.

24. “Since the overwhelming majority of drinking water systems are never sampled by an independent party, self-monitoring and truthful reporting are critical to the success of the [SDWA] in that they represent the only way for the government to determine if a drinking water supply system is safe.” *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010, 1014 (N.D. Cal. 2002).

25. A public water system, such as the Water System, that uses ground water and identifies significant deficiencies must take corrective actions, including correcting all significant deficiencies, providing an alternate source of water, eliminating the source of the contamination or providing appropriate treatment. 40 C.F.R. § 141.400; 10 NYCRR §§ 5-1.30 and 5-1.71(d).

26. A ground water source utility, such as the Water System, must treat its ground water through disinfection by chlorination or other disinfection methods acceptable to the State. 10 NYCRR § 5-1.30(a). When chlorine is used as a disinfectant, a free chlorine or heterotrophic bacteria analysis must be conducted. 10 NYCRR § 5-1.30(g).

27. A public water system, such as the Water System, is required to have in place a certified operator. 10 NYCRR § 5-4.

28. Additionally, as a community water system, the Water System must provide its customers with an annual report containing water quality information including risks (if any) associated with exposure to contaminated drinking water. The system must give notice to its customers and to either EPA or the relevant state agency of any violations of the NPDWRs. 40 C.F.R. §§ 141.151 and 141.201; 10 NYCRR §§ 5-1.77, 5-1.78, and 5-1.72(e)-(h).

**DEFENDANTS' VIOLATIONS OF THE SAFE
DRINKING WATER ACT AND NATIONAL
PRIMARY DRINKING WATER REGULATIONS**

29. Defendants have repeatedly violated applicable requirements of the SDWA.

30. From at least January 1, 2005, through July 22, 2013, Defendants failed to conduct monitoring for contaminants such as total coliform, inorganic compounds, organic compounds, lead, copper, radionuclides, sodium, and others.

31. From at least September 30, 2009, through July 22, 2013, Defendants failed properly to treat the water either by disinfection through chlorine or any other acceptable method.

32. From August 1, 2006, through August 11, 2010 and from July 7, 2011 through July 22, 2013, Defendants failed to have in place a certified operator at the Water System.

33. From at least July 1, 2008, through July 22, 2013, Defendants failed to comply with the public notice requirements designed to ensure that their customers had notice of the various risks associated with the water being provided.

Eherts's Purported Abandonment of the Water System

34. After being apprised by the County Health Department of this non-compliance, instead of correcting the problems, Eherts attempted to abandon the facility. On July 15, 2011, Eherts wrote a letter to a Senior Public Health Engineer at the County Health Department stating that he was "relinquishing [his] responsibilities to Painted Apron Water Co. to Orange County Health Dept." Eherts noted in this letter that he was "leav[ing] the keys to the waterhouse above the door."

35. Notwithstanding Eherts's unilateral effort to abandon the Water System, according to New York Public Service Law § 89-h(1), "[n]o water-works corporation shall transfer or lease its franchise, works or system or any part of such franchise, without the written consent of [PSC]." On September 6, 2011, PSC responded to Eherts's letter allegedly relinquishing his responsibilities and advised Eherts that his purported relinquishment of responsibility "does not constitute a valid transfer of ownership" and that he is "still legally responsible for the operation of this community public water supply and the provision of safe and adequate service." Additionally, PSC advised Eherts that "the assets of a waterworks corporation cannot be legally transferred or abandoned without the approval of" PSC.

36. Eherts never responded to PSC, and Defendants continued to violate the applicable requirements of the SDWA.

EPA's Administrative Order

37. On August 12, 2011, after a review of data pertaining to violations at the Water System, EPA issued an Administrative Order (Docket No. SDWA-02-2011-8018) ("EPA Order"), finding, among other things, that Defendants failed to provide required reports to consumers, failed to monitor for several contaminants and failed to collect certain samples. Among other things, the EPA Order directed Defendants to submit a schedule to bring the Water System into compliance with monitoring requirements within ten (10) days of receiving the EPA Order. Defendants received the EPA Order on August 16, 2011; therefore, the schedule to return the Water System to full compliance was due on or before August 26, 2011.

38. Defendants took no action to comply with the EPA Order.

Current Status

39. Defendants have failed to take any corrective action in response to the efforts made by EPA, the County Health Department or PSC, and, as detailed above, continued to violate applicable requirements of the SDWA until they were replaced as operators of the Water System by PSC on July 22, 2013, as described below, in paragraph 40.

40. Because of these violations, certain members of the community have had to undertake responsibilities and make repairs on their own, using their own resources. Specifically, the community members identified a certified operator to operate the system; rebuilt chlorinators; resumed disinfection; replaced an air compressor and booster pumps; installed a new front door, added interior insulation, and fixed a leak in the roof of the pump house; and repaired the back-up generator and water main.

41. On July 22, 2013, after months of negotiations between these community members, EPA, the U.S. Attorney's Office, and PSC, PSC appointed a committee of community members (the "Painted Apron Water Committee") to serve as the temporary operator of the Water System, replacing Defendants. The Order appointing the Painted Apron Water Committee as the temporary operator (the "PSC Order") is attached as Exhibit A.

42. As stated in the PSC Order, "Painted Apron is an abandoned system; it failed to provide safe and adequate service; and it lacked the technical, financial and managerial ability to operate a water system." The "Committee's appointment as the temporary operator . . . serves the public interest because it will assist in the provision of safe and adequate water service to Painted Apron residents."

FIRST CLAIM FOR RELIEF

(Violations of the Safe Drinking Water Act and Regulations Regarding Monitoring)

43. The United States incorporates by reference paragraphs 1 to 42 as if fully set forth herein.

44. Defendants repeatedly failed to monitor the water at the Water System for a number of contaminants, in violation of 40 C.F.R. §§ 141.21, 141.23, 141.24, 141.26, 141.80 and 141.132; 10 NYCRR § 5-1.50 through 5-1.52.

45. Defendants are liable for civil penalties for every day on or after February 27, 2009, that they violated the aforementioned applicable requirements of the SDWA.

SECOND CLAIM FOR RELIEF

(Violations of the Safe Drinking Water Act and Regulations Regarding MCLs and Treatment)

46. The United States incorporates by reference paragraphs 1 to 45 as if fully set forth herein.

47. Defendants exceeded the MCL for total coliforms, in violation of 40 C.F.R. § 141.63.

48. Defendants repeatedly failed to correct deficiencies relating to inadequate treatment, inadequate monitoring, inadequate follow-up on prior deficiencies and the lack of a qualified operator of the system, in violation of 40 C.F.R. Part 141.

49. Defendants repeatedly failed to properly treat their ground water source by disinfection, in violation of 10 NYCRR § 5-1.30(a).

50. Defendants are liable for civil penalties for every day on or after February 27, 2009, that they violated the aforementioned applicable requirements of the SDWA.

THIRD CLAIM FOR RELIEF

(Violations of the Safe Drinking Water Act and Regulations Regarding a Certified Operator)

51. The United States incorporates by reference paragraphs 1 to 50 as if fully set forth herein.

52. Defendants repeatedly failed to have in place a certified operator, in violation of 10 NYCRR § 5-4.

53. Defendants are liable for civil penalties for every day on or after February 27, 2009, that they violated the aforementioned applicable requirements of the SDWA.

FOURTH CLAIM FOR RELIEF

(Violations of the Safe Drinking Water Act and Regulations Regarding Public Notice)

54. The United States incorporates by reference paragraphs 1 to 53 as if fully set forth herein.

55. Defendants repeatedly failed to provide Consumer Confidence Reports in violation of 40 C.F.R. Part 141, Subpart O, and repeatedly failed to provide public notification of drinking water violations, in violation of 40 C.F.R. Part 141, Subpart Q.

56. Defendants are liable for civil penalties for every day on or after February 27, 2009, that they violated the aforementioned applicable requirements of the SDWA.

FIFTH CLAIM FOR RELIEF

(Failure to comply with EPA's Administrative Order)

57. The United States incorporates by reference paragraphs 1 to 56 as if fully set forth herein.

58. Defendants failed to comply with the Administrative Order issued by EPA to Defendants on August 12, 2011.

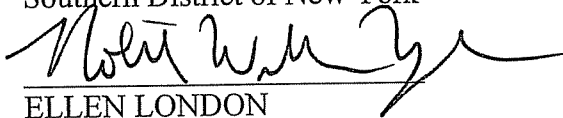
59. Defendants are liable for penalties for every day on or after February 27, 2009, that they failed to comply with the EPA Administrative Order.

PRAYER FOR RELIEF

WHEREFORE, the United States of America respectfully requests that this Court:

- A. Order Defendants to pay a civil penalty for each day on or after February 27, 2009, on which Defendants violated any applicable requirement of the SDWA.
- B. Order Defendants to pay a civil penalty for each day on which Defendants failed to comply with the Administrative Order issued by EPA on August 12, 2011;
- C. Award the United States its costs in this action; and
- D. Grant such other and further relief as the Court deems just and appropriate.

Dated: New York, New York
February 27, 2014

PREET BHARARA
United States Attorney for the
Southern District of New York
By: 
ELLEN LONDON
ROBERT WILLIAM YALEN
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Tel. No.: (212) 637-2737/2722
Fax No.: (212) 637-2702

ELLEN MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel: Chris Saporita
Assistant Regional Counsel
Water and General Law Branch
United States Environmental Protection Agency, Region 2

EXHIBIT A

NEW YORK STATE
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on July 18, 2013

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
James L. Larocca
Gregg C. Sayre
Diane X. Burman

CASE 11-W-0640 - Proceeding on Motion of the Commission as to
the Acts, Practices and Adequacy of Service
Provided by Painted Apron Water Company, Inc.

ORDER APPOINTING A TEMPORARY OPERATOR AND
APPROVING A RATE INCREASE AND SURCHARGE

(Issued and Effective July 22, 2013)

BY THE COMMISSION:

INTRODUCTION

On June 14, 2013, the Painted Apron Water Committee (Committee) submitted a petition requesting that the Commission appoint the Committee as the temporary operator of the Painted Apron Water Company, Inc. (Painted Apron or Company) water system. The three-member Committee has effectively operated the Company on a voluntary basis since October 2011, following abandonment of the Company by its owner on July 15, 2011.

The Company provides metered water service to 32 residential customers in a subdivision known as Painted Apron Village located in the Town of Deerpark (Town), Orange County. Public fire protection service is not provided.

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In this Order, we determine that the Painted Apron water system satisfies the statutory criteria necessary for appointment of a temporary operator. Painted Apron is an abandoned system; it failed to provide safe and adequate service; and it lacked the technical, financial and managerial ability to operate a water system (Public Service Law (PSL) §112-a). We determine that the three-member Committee qualifies as a temporary operator of the water system, because its members possess the technical, financial, and managerial qualifications necessary to operate and manage the system and have demonstrated their management ability during their effective operation of the Company since October 2011. The Committee's appointment as the temporary operator of the Painted Apron system serves the public interest because it will assist in the provision of safe and adequate water service to Painted Apron residents. In order to provide safe and adequate service, comply with statutory and regulatory standards and pay for improvements, we authorize a rate increase, billing method change and separate surcharge.

PUBLIC NOTICE

In accordance with State Administrative Procedure Act §202(1), a Notice of Proposed Rulemaking was published in the State Register on November 29, 2011. The Secretary to the Commission received no comments by the expiration of the comment period, which occurred on January 23, 2012. On June 19, 2013, the U.S. Environmental Protection Agency (EPA) submitted comments in support of the appointment of the Committee.¹

¹ Although the EPA letter was received after the deadline for submission of comments, we will take them into consideration because they advance the record in this proceeding.

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PETITION

Each of the Committee's three members expresses willingness to serve and demonstrates expertise to operate and manage the system: Kim Springer, a business person; Wayne Little, a certified operator; and Robert Schneider, a general contractor.² Ms. Springer has more than 30 years of managerial experience as an office director, bookkeeper, and customer service representative and is prepared to assume the financial and managerial tasks necessary to perform the duties required of a temporary operator. Ms. Springer works with the other Committee members to coordinate the upkeep and daily operations of the system, and, in this capacity, bills customers, collects payments, and acts as the contact person for vendors hired to repair the system and provide necessary parts for its daily operation. She provides information to customers regarding scheduled water shut-offs and repairs to the system.

Mr. Little has more than 35 years of technical experience; as part of the Committee, he is responsible for the electrical, electronic, mechanical, operational, record-keeping, sampling, training and supervisory needs and requirements of the water system. He would continue to perform these technical functions as a temporary operator. Mr. Little worked as an assistant water operator at the Painted Apron water system from 1999 to 2004. He was not affiliated with the system in any way from August 2004 to October 2011. Mr. Little states that, with the help of the Committee and other community members, the system was restored to normal operating conditions, and chlorination resumed in January of 2012. Mr. Little completed the Grade C water operator training course in the spring of 2012 in preparation for the Committee's appointment as temporary

² The petition submitted by the Committee includes resumes for Ms. Springer, Mr. Little and Mr. Schneider.

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operator and, on May 30, 2013, received his New York State (NYS) Department of Health (DOH) certification. He was previously certified from 2004 to 2007. Mr. Little stated that he would begin keeping monthly operation reports on June 1, 2013, which is a daily task.

Mr. Schneider has more than 34 years of extensive experience in all aspects of construction and related fields including, but not limited to, blueprints, surveys, framing, masonry, roofing, electrical, plumbing, drywall, insulation, painting, and finish work. As such, he is prepared to perform the structural maintenance duties required of a temporary operator.

COMMENTS

The EPA supports the Committee's petition for appointment as temporary operator. Over the past year, the EPA and the Office of the U.S. Attorney for the Southern District of New York (USAO SDNY) worked with the Committee to resolve the system's long-term noncompliance with the Safe Drinking Water Act (SDWA) and NYS water quality regulations.

The EPA's efforts included significant research and outreach in the community and provision of assistance to the Committee for over a year to ensure that safe drinking water is available to the members of the community. The EPA affirms that the Committee's efforts to date demonstrate that the Committee is a capable, responsible body able to operate and manage the water system. These efforts include performing repairs to the system to ensure adequate chlorination and system integrity, collecting water usage fees, and certification of a Committee member as a certified operator.

The EPA letter states that the staffs of the EPA, USAO SDNY and Department of Public Service (DPS) met in April 2013 and decided that the appointment of a temporary operator for

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Painted Apron offered the most effective administrative solution to the inadequacy of service provided to the Company's customers.³ The EPA asserts that the appointment would allow the water system to operate in compliance with the SDWA and establish a foundation for the long-term sustainability of the system.

BACKGROUND

History of Non-Compliance

Painted Apron has a history of NYS Sanitary Code (10 NYCRR Part 5, Subpart 5-1) violations. According to OCDOH records, OCDOH cited the Company numerous times for failure to exercise due care and diligence in the operation and maintenance of the treatment plant, distribution system and appurtenances. On March 3, 2010, the Company was ordered to pay \$3,500 plus costs, disbursements and interest, related to its failure to comply with an Orange County Health Commissioner's Order dated January 5, 2009. The fine remains unpaid.

Painted Apron Abandonment

In a letter dated July 15, 2011 and notarized, the owner of Painted Apron stated that he was relinquishing his responsibilities relating to Company's operation to the OCDOH. He attached to his letter a foreclosure sale notice for the property issued by Orange County for failure to pay taxes.⁴ He

³ The EPA expressed its gratitude to the DPS Staff for working with the EPA to resolve the unique challenges presented by abandoned water systems and ensure that the systems are operated properly so that consumers receive safe, reliable drinking water.

⁴ Real property taxes amounted to about \$6,200 for the period 2009 to 2011. The County decided to pursue other remedies available under the Real Property Tax Law; and the deed remains in the name of the Company.

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enclosed a list of customers and meter readings, stating that he left the keys to the water house above the door.

EPA Administrative Order

On July 19, 2011, the DOH referred Painted Apron to the EPA for action. On August 12, 2011, the EPA issued an administrative order stating that Painted Apron failed to comply with National Primary Drinking Water Regulations (40 C.F.R. Part 141) and the NYS Sanitary Code. These regulations establish requirements relating to a variety of contaminants detected in drinking water, including monitoring, testing and reporting the results. The EPA directed the Company to comply with the requirements and stated that the Company is subject to certain administrative and civil penalties for failure to comply.

Town of Deerpark

On August 8, 2011, the Town requested that OCDOH temporarily take over operation of the water system until another water company, individual, or a homeowners association is established. The Town stated that it is not in any financial position to operate a public water system and no member of its staff is a certified water system operator.⁵

Department of Public Service Letter

In a letter dated September 6, 2011, the DPS Staff informed the Company's owner that his July 15, 2011 letter does not constitute a valid transfer of ownership, that he remains legally responsible for the operation of the Company and the provision of safe and adequate service, and that Commission approval is required for transfer or abandonment of the water system. The letter advised the Company's owner that it was

⁵ In January 2009, a number of Painted Apron customers requested that the Town assume operation of the water system. The Town was unable to grant their request, due to lack of resources and expertise.

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imperative to restore chlorination immediately and fix the Black Rock main leak. DPS Staff also offered to assist the owner in developing a compensatory rate to provide for the recovery of reasonable costs of operating and maintaining the system and a surcharge for emergency repairs.

Order to Show Cause

On January 19, 2012, the Commission issued an order to show cause why the Commission should not appoint a temporary operator for the Company and institute a penalty action. In the Order, the Commission concluded that the Company provided unsafe and inadequate service for several years, due to ineffective management and lack of funds to improve the system.

OCDOH Report

On January 9, 2013, the OCDOH submitted a report on field visits it conducted on November 14, 2012, December 10, 2012 and January 4, 2013 (OCDOH Report). OCDOH reports that the boil water advisory for the Company's water system, initiated on July 13, 2011, continues in effect until a certified Grade C water operator has been designated as the operator in responsible charge that makes decisions about the daily operations of the system that will directly impact the quality and/or quantity of the drinking water. The OCDOH Report notes the need for Painted Apron to submit monthly reports and required chemical test results, and lists a number of needed improvements to the water system, including repair of an inoperable transfer pump, relocation of a buried fuel storage tank, installation of a safety railing and addition of interior ceiling and wall coverings.

The OCDOH Report commends the Committee for resuming chlorination in January 2012, stating that the Company's two chlorinators are working and free chlorine residual is maintained in the distribution system. The Report notes a

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number of improvements that the Committee accomplished during 2012. These include replacement of a broken transfer pump; repair of a distribution leak on Black Rock Trail; repairs to the emergency power generator, so that it is operable; replacement of the air pressure reducing station on the electric control panel; cleaning the probes of the hydro-pneumatic tank, resulting in improved operation of the system; cleaning of the production meter mechanism; provision of a new door and lock for the treatment building; removal of debris inside and outside of the building; resolution of some roof issues; and, placement of a visitation log on a calendar inside of the treatment building. In addition to the items noted in the OCHD report, the DPS Staff reports that the Committee purchased a second replacement transfer pump and made subsequent repairs to the distribution leak on Black Rock Trail.

Rate Plan

The tariff rate, established as an initial rate effective May 1, 1987, consists of a \$75 quarterly service charge plus a metered rate of \$2.25 per thousand gallons.⁶ The Company has not filed a request for a rate increase since these initial rates were established, approximately 25 years ago.

The Commission authorized sufficient initial rates to provide an opportunity to earn a revenue requirement of \$27,750 based upon the expectation that the Company would provide service to 49 homes. It was anticipated that the Company would recover \$567 annually from an average customer using approximately 119,000 gallons per year. In fact, only 39 of the building lots were developed. The system serves 32 residences because seven customers drilled wells.

⁶ Painted Apron Water Company, Inc. - Initial Tariff Filing, Untitled Order, issued May 1, 1987.

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DISCUSSION

Painted Apron satisfies the criteria for appointment of a temporary operator (PSL §112-a(a)). It is a Company that failed to provide safe and adequate service, incurred substantial number of citations and penalties for failure to comply with safe drinking water requirements, displayed an inability to successfully manage finances, neglected the maintenance and improvements needed for effective operation of the water system, and effectively abandoned its operation and management of the water system.

Given the financial, managerial, and technical ability of the Committee members and their ongoing, voluntary commitment to undertake the operation and maintenance work at Painted Apron to continue water service and preserve the public health and safety, the Committee satisfies the PSL §112-a criteria for appointment as a temporary operator of the Painted Apron water system. The OCDOH commended the Committee for restoring the water system to normal operating conditions, with the resumption of chlorination in January 2012. One of the Committee members obtained his Grace C water operator certification; and, upon appointment of the Committee as a temporary operator, OCDOH may lift its boil water restriction. We note that Town does not possess the financial resources or expertise to operate and manage the system; and, the EPA and USAO SDNY support the appointment of the Committee as a temporary operator, after consideration of a number of options to resolve the difficulties involved in Painted Apron's operation.

We, therefore, appoint the Committee as the temporary operator of the Painted Apron water system, effective on the date of the issuance of this Order. As a temporary operator of the Painted Apron water system, the Committee is allowed to operate and manage the water system, consistent with the

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approved tariff, Public Service Law and Commission rules. Thus, the Committee is authorized, consistent with the law and rules, to enter and remain on property as necessary to maintain and operate the water system and its appurtenances; bill and collect charges for water service that are established in the tariff as just and reasonable; collect past due amounts; discontinue service for non-payment;⁷ and, take any other action required to operate and manage the system. The OCDOH conducts regular field inspections and issues reports on small water systems, including Painted Apron. The DPS Staff is able to monitor the Committee's management through these reports. Additionally, DPS Staff has the authority to inspect Committee's books and records at any time it deems necessary to do so.

The Painted Apron 1987 initial tariff authorizes the Company to charge a \$300 annual rate, plus a metered rate of \$2.25 per thousand gallons. The rates are based upon the expectation of 49 residential customers, instead of the 32 actual customers served by the water system. Based on DPS Staff's review of actual expenses incurred by the Committee in 2012 and 2013, the 1987 rates would not produce sufficient revenues to allow Painted Apron to pay for ongoing daily operation and maintenance expenses, assure compliance with applicable statutory and regulatory standards, and provide safe and adequate service. Staff's analysis indicates that a revenue requirement of \$22,139 is needed for the forecast level of annual expenses based on actual costs incurred by the Committee and Staff's recommended allowances for salaries, power expenses, transportation, repairs and maintenance, water testing expenses,

⁷ The Commission's rules establish requirements relating to notices of discontinuance (16 NYCRR Part 533).

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and property taxes.⁸ Projected revenues do not include any allowance for depreciation, return on rate base, and net income because the Company is managed under the direction of a temporary operator. The Company does not charge the authorized \$2.25 metered usage charge, because its meters are inoperable. Recognizing the impracticality of the meter charge, we authorize the Company to discontinue the charge and substitute a flat monthly charge billed in advance. To recover \$22,139 in revenues, Painted Apron would bill its customers \$57.66 per month, resulting in a 22% increase in base rates.

As recommended in the OCDOH Report, repairs to the Painted Apron water system are required to improve water quality and the system's reliability. Thus, we authorize the Committee to open and maintain an interest-bearing escrow account with a maximum balance of \$15,000, not including account interest, funded by a monthly surcharge of \$13.02 per customer. The Committee is authorized only to use the reserve funds to make plant improvements and extraordinary repairs, and pay for unforeseen expenses not covered in rates.

We determine that a rate increase and change in billing is needed in order for the Committee to pay for daily operation and maintenance and comply with applicable statutory and regulatory water quality standards. The Committee is authorized to file amendments to the Painted Apron Water Company Inc.'s tariff that would allow it to collect \$22,139 in revenues and issue total monthly bills of \$70.68, consisting of a monthly flat rate of \$57.66 and a monthly surcharge of \$13.02. This rate increase and surcharge would result in an annual bill of \$848, which is a 50% increase over the \$567 annual bill under the current rates. Administrative details of the tariff filings

⁸ An explanation of these adjustments is contained in Appendix B to this Order.

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and Staff's recommended income statement and summary of adjustments are contained in Appendices A and B, respectively, to this Order.

CONCLUSION

The appointment of the Committee as the temporary operator of the Painted Apron water system will result in the provision of safe and adequate service to customers; and, thus, it is in the public interest. We appoint the Committee as the temporary operator of the Painted Apron water system effective upon the date that this Order is issued, with the authority to operate and manage the water system, in compliance with the Company's tariff, statutory provisions and regulatory requirements. We determine that an increase in the revenues of the Painted Apron Water Company, Inc. is required in order to pay for daily operation and maintenance expenses and comply with statutory and regulatory requirements for drinking water quality, and that a surcharge is necessary to make necessary improvements to the water system to improve its reliability.

The Commission Orders:

1. The Painted Apron Water Committee is appointed temporary operator of the Painted Apron Water Company, Inc. supplying water service to the Painted Apron Village real estate subdivision in the Town of Deerpark, Orange County, effective upon the date that this Order is issued.

2. As a temporary operator, the Painted Apron Water Committee is authorized to operate and manage the Painted Apron Water Company, Inc., in compliance with Painted Apron Company, Inc.'s tariff approved and on file with the Commission and with statutory and regulatory requirements, in accordance with the discussion in the body of this Order.

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3. The Painted Apron Water Committee is authorized to file a supplement cancelling the Painted Apron Water Company, Inc.'s tariff amendments contained in Appendix A, on not less than one day's notice to become effective on August 1, 2013.

4. The Painted Apron Water Committee is authorized to file the Painted Apron Water Company, Inc.'s electronic tariff schedule P.S.C. No. 2 - Water, containing Staff's recommended rates as shown in Appendix C, on not less than one day's notice to become effective on August 1, 2013.

5. The Painted Apron Water Committee is authorized to file Surcharge Statement No. 1 to the Painted Apron Water Company, Inc.'s electronic tariff schedule P.S.C. No. 2 - Water containing Staff's recommended surcharge as shown in Appendix D, on not less than one day's notice to become effective on August 1, 2013.

6. The Painted Apron Water Committee shall notify each customer of the Painted Apron Water Company, Inc. in writing through direct mail or by means of a bill insert, no later than August 31, 2013, of the Commission's decision and file a copy of the notification with the Secretary to the Commission by September 30, 2013.

7. The Painted Apron Water Committee is authorized to put into effect the Painted Apron Water Company tariff revisions in compliance with this Order prior to the end of the 30 day notice period and without compliance with the statutory and regulatory requirements for completion of newspaper publication once a week for four weeks (Public Service Law § 89-c(10) and 16 NYCRR § 720-8.1).

8. The Secretary to the Commission may extend deadlines set forth in the Ordering Clauses.

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9. This proceeding is continued.

By the Commission,

(SIGNED)

JEFFREY C. COHEN
Acting Secretary

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APPENDIX A

Administrative Details

SUBJECT: PAINTED APRON WATER COMPANY, INC. is directed to file the following:

Cancellation of P.S.C. No. 1 - Water
P.S.C. No. 2 - Water, Original Leaves 1 - 12
P.S.C. No. 2 - Water - Escrow Account Statement No. 1

NATURE OF FILING: New electronic tariff leaves and escrow account statement.

SAPA: 11-W-0640SP1 - State Register - November 29, 2011

NEWSPAPER PUBLICATION: Waived

CUSTOMER NOTIFICATION: By direct mail or by means of a bill insert no later than August 31, 2013.

NUMBER OF CUSTOMERS: 32

TERRITORY SERVED: Painted Apron Village
Town of Deerpark, Orange County

SUMMARY OF TARIFF CHANGES

Returned Check Charge:

The Company may charge the fee from the bank plus \$5.00, not to exceed the maximum allowed under Section 5-328 of the General Obligations Law.

Restoration of Service Charge:

\$50 during normal business hours (Monday thru Friday)
\$75 outside of normal business hours (Monday thru Friday)
\$100 on weekends or holidays

Terms of Payment:

Bills shall be rendered monthly in advance and are due and payable upon receipt. Bills not paid within 23 days of mailing are delinquent and the late payment charge becomes applicable and service may be discontinued after proper notice as required by law.

Late Payment Charge:

A late payment charge to be computed at the rate of 1½ percent per month, compounded monthly, may be applied to all balances left unpaid 23 days following mailing of the bill.

Term:

Terminable by the customer upon 10 days written notice to the Company.

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APPENDIX B
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Painted Apron Water Company, Inc.

2013 Projected Income Statement

Revenues:	\$22,139	
Operating Expenses:		
Manager's Salary	3000	1
Operator & Helper's Salary	5300	2
Materials and Supplies	325	3
Office Expenses	534	3
Power Expenses	3550	4
Purification Chemicals	350	3
Transportation	285	5
Repairs & Maintenance	5000	6
Water Testing Expenses	1057	7
Miscellaneous	<u>600</u>	8
Total Operating Expenses	\$20,001	
Other Deductions		
Property Taxes	<u>\$2,139</u>	9
Total	\$22,139	

Customer Surcharge

\$156 per customer annual surcharge for
reserve account for unforeseen
expenses not covered in rates,
extraordinary repairs, and/or plant
improvements

\$5,000

Total Annual Bill With Reserve Account \$848

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Painted Apron Water Company, Inc.

Explanation of Allowances

- | | | |
|---|---|---|
| 1 | Manager's Salary | To reflect Staff's recommended allowance of 12.5 hours/month at \$20/hr. per US Department of Labor (DOL) 2012 rates for Bookkeeping, Accounting, and Auditing Clerks, adjusted for inflation |
| 2 | Operator and Helper's Salary | To reflect Staff's recommended allowance of 15 hours/month at \$25/hr. per DOL 2012 rates for Water and Liquid Waste Treatment Plant & System Operators, plus 4 hours/month at \$15/hr. for Helpers - Pipelayers, Plumbers, Pipefitters, and Steamfitters, adjusted for inflation |
| 3 | Materials and Supplies; Office Expenses; Purification Chemicals | To reflect the actual annualized costs incurred by the Committee in 2012-2013 |
| 4 | Power Expenses | To reflect the actual average annual power expense from 2009-2013 |
| 5 | Transportation | To reflect Staff's recommended allowance to transport monthly water samples to lab in Bloomingburg, NY at 56.5 cents per mile (2013 mileage rate) |
| 6 | Repairs and Maintenance | To reflect Staff's recommended allowance for the average of two largest plant & road repair expenses incurred by the Committee in 2011-2013 |
| 7 | Water Testing Expenses | To reflect Orange County Health Department's projected annual average water testing expense |
| 8 | Miscellaneous | To reflect the actual annualized snowplowing & groundskeeping costs incurred by the Committee in 2012-2013 |
| 9 | Property Taxes | To reflect the actual annual property taxes from orangecountygov.com |

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APPENDIX C

PSC NO: 2 - WATER
COMPANY: PAINTED APRON WATER COMPANY, INC.
INITIAL EFFECTIVE DATE: AUGUST 1, 2013

LEAF: 12
REVISION: 0
SUPERSEDING REVISION:

GENERAL INFORMATION

Applicable to use of Service for:

Metered residential, small commercial, and general use.

Character of Service

Continuous.

Rate:

Flat rate of \$57.66 per month

Minimum Charge:

Flat rate of \$57.66 per month

Terms of Payment

Bills shall be rendered monthly in advance and are due and payable upon receipt. Bills not paid within 23 days of mailing are delinquent, the late payment charge becomes applicable, and service may be discontinued after proper notice as required by law.

Late Payment Charge

A late payment charge to be computed at the rate of 1½ percent per month, compounded monthly, may be applied to all balances left unpaid 23 days following mailing of the bill.

Term

Terminable by the customer upon 10 days written notice to the company.

Issued By: Painted Apron Water Committee c/o Kim Springer 10 Black Rock Trail Port Jervis, NY 12771
(Appointed Temporary Operator Pursuant to Commission Order in C. 11-W-0640
issued and effective July 22, 2013)

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APPENDIX D

PSC NO: 2 - WATER
COMPANY: PAINTED APRON WATER COMPANY, INC.
INITIAL EFFECTIVE DATE: AUGUST 1, 2013,

STATEMENT TYPE: ESCROW
STATEMENT NO: 1

ESCROW ACCOUNT
STATEMENT NO. 1

The company is authorized to open and maintain an interest-bearing escrow account with a maximum balance of \$15,000, not including account interest, for the purpose of unforeseen expenses not covered in rates, extraordinary repairs, and/or plant improvements. The account will be subject to the following conditions:

1. The account will be funded by means of a monthly customer surcharge of \$13.02.
2. The account will be maintained in a separate bank account and will be under the control of the company.
3. The company will have access to the funds in this account solely for the purposes noted above and any taxes associated with the account.
4. Once the account has reached the maximum balance of \$15,000, not including account interest, the company shall stop collecting the monthly customer surcharge. However, if the company withdraws funds for the purposes noted above and the balance in the account falls below the \$15,000 approved level, the company will be permitted to surcharge the customers a pro-rata amount not to exceed \$13.02 per month in order to restore the account to the \$15,000 maximum approved level.
5. This account shall bear interest and such interest shall remain in the account and be used to cover expenses or reduce payments by customers when needed to replenish the account to its approved level.
6. A customer terminating service will not be entitled to a refund of payments made to the account.
7. The company must submit copies of all bank statements and a complete accounting of the revenues and expenses for the account by January 30 of each year. All information should be sent to the Chief of Tariffs, Electric Supply & Small Utility Rates, Office of Electric, Gas & Water, Department of Public Service, Three Empire State Plaza, Albany, NY 12223-1350.

Issued By: Painted Apron Water Committee c/o Kim Springer 10 Black Rock Trail Port Jervis, NY 12771
(Appointed Temporary Operator Pursuant to Commission Order in C. 11-W-0640
issued and effective July 22, 2013)