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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

VICTORY MOTEL,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

**BRIEF OF RESPONDENT WASHINGTON STATE
DEPARTMENT OF HEALTH**

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I. NATURE OF CASE

This is an appeal from the Department of Health's ("Department") determination and final order that the Victory Motel Water System is a Group A water system, for which the owner/operator, Mr. Lei, was required to conduct a sanitary survey every five years and sample for coliform bacteria at least five times a month until a sanitary survey was completed in order to protect the public health, safety, and welfare of the Victory Motel customers. Mr. Lei filed a judicial review of the Department's March 16, 2007 Findings of Fact, Conclusions of Law and Order ("Final Order") to the Pierce County Superior Court, which affirmed the Department.

The purpose of the state drinking water program is to ensure that public water systems provide safe and reliable drinking water to their customers. The construction and operation of public water systems is governed by state and federal law, including the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j (2006), RCW Title 70.119A, and WAC Title 246-290.

Underlying Mr. Lei's appeal is his argument that the Department erred by categorizing the Victory Motel as a Group A water system. Group A water systems, which serve a larger number of individuals than a Group B Water System, are required to have a sanitary survey every five

years to assure protection of public health. When a sanitary survey is not done, the owner/operator is required to monitor the water system for coliform bacteria five times per month. For over seven years, Mr. Lei submitted no evidence to the Department of a sanitary survey ever being conducted. Instead, Mr. Lei claims that "testing" occurred some time in the year 2000, but has no documentation to support that claim, or to clarify what "testing" occurred. Nonetheless, the evidence is uncontroverted that Mr. Lei did not have a sanitary survey conducted within the five year period between 2000 and 2006 and he failed to submit five coliform bacteria samples per month. The Final Order of the Health Law Judge was supported by substantial evidence in the agency record.

Mr. Lei disagrees with the Department's categorization of Victory Motel as a Group A water system alleging that 18 service connections are not sufficient to trigger the Group A water system requirements because they are not "residential" connections according to WAC 246-290-020 Table 1. Mr. Lei is incorrect. Victory Motel qualifies as a Group A water system under the federal laws defining "public water system," which are incorporated into the state's definitions under WAC 246-290-020(4). Thus, Mr. Lei violated WAC 246-290-416, and under RCW 70.119A.040, the Department is authorized to issue a civil penalty against Mr. Lei and Victory Motel.

II. ISSUE

1. Have the former owners/operators of Victory Motel established that the Department erred in deciding that Victory Motel is a Group A transient non-community water system?
2. Have the former owners/operators of Victory Motel established that the Department's findings, that the former owners/operators of Victory Motel did not complete a sanitary survey and did not collect five coliform samples per month, as required under WAC 246-290-416 and WAC 246-290-300, are not supported by substantial evidence?

III. STATEMENT OF CASE

In Mr. Lei's statement of the case, he relies on information outside of the agency record in an attempt to re-argue the administrative hearing.¹ However, as the agency record indicates, there was substantial evidence to support the findings of fact in the Health Law Judge's Final Order.

The Victory Motel Water System is located at 10801 Pacific Highway SW, Tacoma, Washington, in Pierce County. Final Order at 6, ¶ 2.1.² The owners of the water system were Jiangong (Jay) Lei and Yumei Pan.³ *Id.* The water system provides water from a well for one

¹ Mr. Lei alleges facts that are not in the record and assigns intents and motives to those alleged facts. The Department disputes the accuracy of those factual allegations. Mr. Lei's allegations regarding intent and motives are purely his speculation and belief.

² The Final Order is located at AR 218 – 233. For the court's convenience, a copy of the Final Order is attached in the Appendix at pages 1-16.

³ On or about July 10, 2007, Jiangong (Jay) Lei and Yumei Pan sold the property known as Victory Motel to Pinnacle Commercial Properties, LLC. Mr. Lei and

residential connection and 17 non-residential connections serving a monthly population of approximately 378 to 418 guests. Final Order at 6, ¶ 2.2. On May 14, 1996, based upon information submitted by the owners, the Department determined that the Victory Motel is a Group A water system. Final Order at 4, ¶ 1.1. More specifically, the Department determined the Victory Motel is a Group A transient non-community water system as defined in WAC 246-290-020, which meets the definition of a public water system in the 1996 amendments to the federal Safe Drinking Water Act. AR 295-96.

Mr. Lei was first notified on June 1, 1999, that he was required to conduct a sanitary survey every five years pursuant to WAC 246-290-416 since the Victory Motel was classified as a Group A public water system. Final Order at 4, ¶ 1.2. Sanitary surveys are conducted by Department personnel or their representatives. AR 237. The Tacoma-Pierce County Health Department (“County Health Department”) entered into an agreement with the Department to conduct sanitary surveys for the Tacoma-Pierce County area. Final Order at 4, ¶ 1.2. The first sanitary survey was to be completed during the July 1, 1999 to June 30, 2000 period, by the County Health Department, who would contact Mr. Lei. AR 237. The County Health Department contacted Mr. Lei on May 2, 2000, to schedule the sanitary survey. AR 240. The fee for the

Ms. Pan were the owners of the Victory Motel water system at the time the civil penalty was assessed for failure to comply with the Department’s June 28, 2006 Order.

sanitary survey was \$370. AR 240. The Department has no record of a sanitary survey being completed in 2000. AR 385.

Consistent with its practice of providing technical assistance to owners and operators of public water systems, rather than proceeding immediately to enforcement, the Department notified Mr. Lei through formal reminders on February 18, 2003, February 11, 2004, November 12, 2004, and December 6, 2004, stating that he was legally obligated to complete a sanitary survey for Victory Motel.⁴ Final Order at 7 ¶ 2.5; Appendix at 17-18. The Department has no record of Mr. Lei contacting the Department to inquire into the sanitary survey process until November 2004.⁵ AR 318-21.

Mr. Lei contended he contacted the Department in late 2004 to contest the Group A water system designation. Department records do not confirm those contacts, except for requests on November 22, 2004, and December 1, 2004, for a water facility inventory (“WFI”) form so he could update the classification information for Victory Motel. AR 321, 323. On December 23, 2004, the Department received an updated WFI form from Mr. Lei. Mr. Lei modified the WFI form by decreasing the number of transient users per month, he did not change the number of connections, which was listed as one residential connection and 17 non-

⁴ Mr. Lei’s statements regarding Department employee Brian Boye filing a false report on or about December 2004 are not supported by citations to the record and are not in the record. Brief at 7-8.

⁵ Mr. Lei’s statements regarding communications with Mr. Porter from the County Health Department regarding the sanitary survey are not supported by citations to the record and are not in the record. Brief at 5.

residential connections. AR 254-55. On January 13, 2005, the Department sent Mr. Lei an updated WFI form with the changes he requested, indicating that Victory Motel was still classified as a Group A transient non-community system since it served 15 or more connections. AR 325-27. The Department has no record of Mr. Lei responding to this Group A classification letter.

Prior to the issuance of any monetary penalty, except if there is a public health emergency, the Legislature requires the Department to resolve any violations informally. RCW 70.119A.040(9). Consistent with that directive, on March 11, 2005, after giving Mr. Lei ample opportunity to come into compliance, the Department issued a Notice of Violation (“NOV”) for failure to schedule a sanitary survey in the year 2000. Final Order at 4, ¶ 1.3 and at 7, ¶ 2.8. If a sanitary survey was not completed or scheduled to be completed within 15 days of the NOV, Mr. Lei was required to submit five coliform bacteria samples per month pursuant to WAC 246-290-300. *Id.* Continued failure to comply with the requirements in the NOV, would result in additional enforcement action.

Mr. Lei responded to the NOV by requesting a hearing, he did not conduct a sanitary survey.⁶ AR 329, 371. More importantly, Mr.

⁶ A Notice of Violation constitutes a Notice of Correction for purposes of RCW 43.05.100(2), which means it is not subject to appeal and is considered informal enforcement. RCW 43.05 was adopted by the Legislature requiring regulatory agencies to encourage voluntary compliance for those affected by agency rules. This voluntary compliance would emphasize education and assistance before the imposition of penalties. RCW 43.05.005.

Lei admitted he received the NOV, did not schedule a sanitary survey, and testified that the requirement to submit five coliform samples per month was in the middle of the second page and that he does not fully read the contents of the letters that the Department sends. AR 418-21.

In response to Mr. Lei's request for a hearing, on May 18, 2005, a meeting was held between Mr. Lei, Department representatives (Bob James and Ingrid Salmon) and County Health Department representatives (Brad Harp and Michelle Cox) to discuss the sanitary survey requirement.⁷ Final Order at 7, ¶ 2.6. Mr. Lei was informed yet again that Victory Motel was a Group A water system because it had more than 15 service connections and that a sanitary survey was required.⁸ AR 372. Mr. Lei was also informed that Table 1 in WAC 246-290-020 contained a typographical error and that the test was "service connections" not "residential connections." AR 470-71. During this meeting, Mr. Lei provided no documentation that a sanitary survey was completed in 2000, although he claimed that "testing" occurred.

Mr. Lei then sent letters to Governor Gregoire regarding Victory Motel's classification as a Group A water system and the sanitary survey

⁷ Mr. Lei's allegations regarding the use of a "home-made lie detector" by the Department during the May 18, 2005 meeting are not supported by citations to the record and are not in the record. Brief at 10-11.

⁸ Mr. Lei alleges improper conduct by persons employed by the County Health Department. Brief at 12-14. The County Health Department and those employees are not parties to this appeal and are not agents or employees of the Washington State Department of Health. Their alleged conduct is not at issue in this case and is not relevant to the legal issue before this court.

requirement. AR 335-37. In June and August 2005, the Department responded to Mr. Lei's letters stating they would inquire into his concerns and requested that he schedule a sanitary survey unless he could provide documentation that Victory Motel had fewer than 15 service connections. AR 261, 263; *see also* Appendix at 19.

On October 18, 2005, the Department issued Mr. Lei a red operating permit since they were unsuccessful in obtaining an agreement with him to schedule a sanitary survey, nor had they received documentation that Victory Motel had fewer than 15 service connections. A red operating permit indicates a water system is substantially out of compliance with drinking water regulations and the system's safety cannot be determined. Final Order at 5, ¶ 1.4.

Between December 2005 and May 2006, the Department issued Mr. Lei six Coliform Monitoring Violations for failure to submit the required five monthly coliform samples. Final Order at 7-8, ¶ 2.9. Mr. Lei admitted that he received these monitoring violations and failed to contact the Department regarding their contents. AR 422-24.

In December 2005, Mr. Lei again contacted Governor Gregoire regarding Victory Motel's classification as a Group A water system; however, he admitted that Victory Motel has 18 connections. AR 272-77. In a letter dated January 17, 2006, the Department responded by informing Mr. Lei that even if a sanitary survey was completed in the year 2000, sanitary surveys are required every five years, and another survey was required. AR 279; *see also* Appendix at 20. Mr. Lei and the

Department exchanged numerous letters and telephone calls between January 2006 and February 2006 regarding the classification of Victory Motel. AR 283, 285, 341. On February 23, 2006, Mr. Lei informed the Department that he would no longer respond to any additional Notices that were issued. AR 283.

Since Mr. Lei continued to disregard the sanitary survey requirement and failed to submit five coliform samples per month, the Department issued an Order on June 28, 2006, requiring a sanitary survey by July 31, 2006, and to submit five coliform samples per month until a sanitary survey report was received by the Department. Final Order at 5, ¶ 1.5. Based on Mr. Lei's inability to complete a sanitary survey and submit the requisite coliform samples, the Department issued a Notice of Imposition of Penalties in the amount of \$3,150 on August 16, 2006. Final Order at 5, ¶ 1.6. On September 18, 2006, the Department received Mr. Lei's request for an administrative hearing. AR 1-13.

On January 2, 2007, a prehearing conference was conducted between Mr. Lei, Assistant Attorney General Dorothy Jaffe and Health Law Judge Arthur E. DeBusschere. Mr. Lei identified 12 witnesses. Judge DeBusschere granted the Department's objection to the testimony of Shasta Quinn, Janice Adair, Denise Clifford and Joel Purdy. Respondent sought to present these witnesses to demonstrate that the Department failed to send him a WFI form, a form he acknowledged he received. Judge DeBusschere ruled that the witnesses were not allowed

to testify for the purpose of demonstrating that Mr. Lei did not receive a WFI form, since that was not an issue for the administrative hearing. AR 206 ¶ 1.9. Mr. Lei was given until January 10, 2007, to identify additional witnesses and exhibits. AR 207 ¶ 1.11.

An administrative hearing was conducted on January 23, 2007, and Health Law Judge Arthur E. DeBusschere issued Findings of Fact, Conclusions of Law and Final Order on March 16, 2007. AR 218-233⁹. At the hearing, Mr. Lei offered 12 exhibits, which were all admitted. AR 220. Mr. Lei argued that a sanitary survey was completed in the year 2000. AR 425, 445-48. Bob James testified that the Department had no record of a sanitary survey being completed in the year 2000. AR 385. Mr. Lei admitted that he had no record of the 2000 survey nor did he pay for the survey. AR 445-46. Even if, as Mr. Lei argued, a sanitary survey was completed in the year 2000, sanitary surveys are required to be completed every five years; therefore another survey was required in the year 2005. AR 385. Mr. Lei even testified that if a survey was required in the year 2000, and if the system completed a survey in the year 2000 that another survey would be required in the year 2005. AR 426.

The Health Law Judge affirmed the Notice of Imposition of Penalties filed on August 23, 2006. In so doing, the Health Law Judge concluded that Victory Motel was correctly categorized as a Group A

⁹ See also Appendix at 1-16.

transient non-community system since it had 18 total service connections. Final Order at 12-13, ¶ 3.11-3.12. Since Victory Motel was a Group A water system, it was required to have a sanitary survey, which Mr. Lei failed to complete. Final Order at 13, ¶¶ 3.13-3.14. In addition, the Health Law Judge concluded that Mr. Lei failed to collect and submit five coliform samples per month as ordered. Final Order at 14, ¶¶ 3.15-3.16.

Mr. Lei filed a petition for judicial review on April 13, 2007, in Pierce County Superior Court. CP 1-9. On October 12, 2007, Pierce County Superior Court entered an order affirming the Notice of Imposition of Penalties issued on August 23, 2006. CP 145-154. Mr. Lei appeals.

IV. STANDARD OF REVIEW

The Health Law Judge issued an order affirming the Department's Notice of Imposition of Penalty for failure to comply with the June 28, 2006 Order. Final agency orders are reviewed by the court under the Administrative Procedures Act (APA). RCW 34.05.534, .542, and .570. Under the APA, this court sits in the same position as the superior court, applying the APA to the record before the agency. *DaVita, Inc. v. Washington State Dep't of Health*, 137 Wn. App. 174, 180, 151 P.3d 1095 (2007). This court reviews the administrative determinations for abuse of discretion based on the agency record. *Okamoto v. Employment Security Dep't*, 107 Wn. App. 490, 494-95, 27

P.3d 1203 (2001). A court reviewing agency action under the APA has authority only to affirm, reverse, or remand administrative proceedings to the agency. RCW 34.05.574(1)(b).

The party challenging the agency's action bears the burden of demonstrating error. RCW 34.05.570(1)(a). In addition, a court can only grant relief on an issue if the petitioner was "substantially prejudiced" by the agency action. RCW 34.05.570(1)(d); *Rauch v. Fisher*, 39 Wn. App. 910, 913-914, 696 P.2d 623 (1985).

Under the APA, judicial review of facts is confined to the record made before the agency. RCW 34.05.558; *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004). New evidence outside the agency record may be heard by the court only if it relates to the validity of the agency action at the time it was taken and is needed to decide disputed issues regarding unlawfulness of procedure or additional evidence is needed to decide disputed issues of material fact. RCW 34.05.562. Neither of these exceptions is applicable in this case, nor has Mr. Lei argued that any of the exceptions apply.

To obtain relief from an agency order in an adjudicative proceeding, a petitioner must demonstrate that at least one of the nine bases listed in RCW 34.05.570(3) applies. Mr. Lei cited to all nine parts of RCW 34.05.570(3), however, he failed to argue all nine. Mr. Lei did not identify which subparts in RCW 34.05.570(3) he relies on, but based on his arguments it appears he is relying on subsections (a) [unconstitutional agency action], and (d) [error of law].

Under the “error of law” standards, RCW 34.05.570(3)(a) and (d), the court engages in de novo review of the agency’s legal conclusions. *Franklin Cy. Sheriff’s Office v. Sellers*, 97 Wn. 2d 317, 325, 646 P.2d 113 (1982), *cert denied*, 459 U.S. 1106 (1983). Notwithstanding de novo review, substantial weight must be accorded an agency’s interpretation of the law when the subject matter falls within the agency’s special area of expertise. *Towle v. Dep’t of Fish & Wildlife*, 94 Wn. App. 196, 204, 971 P.2d 591 (1999).

An agency’s factual findings are reviewed to determine whether they are supported by substantial evidence sufficient to persuade a fair-minded person of the declared premise. RCW 34.05.570(3)(e); *Towle*, 94 Wn. App. at 203. An agency’s factual findings will be overturned only if they are clearly erroneous. *DaVita*, 137 Wn. App at 181 (citing *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568 588, 90 P.3d 659 (2004)). The substantial evidence standard is “highly deferential” to the agency fact finder. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The court will view the evidence in the light most favorable to the party who prevailed in the highest administrative forum to exercise fact-finding authority. *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001). The court will accept the fact-finder’s determinations of witness credibility and the weight to be given to reasonable but competing inferences. *Id.*

Since the implementation and enforcement of the federal Safe Drinking Water Act and the public water system statute (RCW 70.119A) in Washington state is within the Department's special area of expertise, the Department's interpretation of these statutes and the administrative rules that implement them is entitled to substantial weight.

V. ARGUMENT

A. **The Victory Motel Water System Is A Group A Transient Non-Community Water System**

Both the Health Law Judge and the trial court concluded that Victory Motel is a Group A public water system as that term is defined in both the state drinking water regulations, RCW 70.119A.020(4), WAC 246-290-010 and the federal Safe Drinking Water Act. Final Order at 13, ¶ 3.12; CP 152 at ¶ 2.18. Mr. Lei argues that Victory Motel is not a Group A water system since it has only one residential connection and serves fewer than 25 people per day, thereby making it a Group B water system according to WAC 246-290-020 Table 1. Brief at 25. This argument is incorrect.

1. **A Group A Public Water System Is A Water System That Meets The Federal Definition Of A "Public Water System"**

The Washington State Legislature gave the State Board of Health ("Board") and the Department authority to regulate all "public water systems." The Board established two sets of drinking water regulations. One set encompasses water systems that meet the federal definition of a

“public water system;” called Group A public water systems. AR 361. The other set of state regulated water systems are those that do not meet the federal definition of a public water system; the Board chose to regulate them under the Group B drinking water regulations. AR 362. Since the Board chose to regulate all water systems regardless of the number of connections, the Department’s definition of a “public water system,” is much broader than the federal definition. The term “public water system” is generally defined (in relevant part) as:

Any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing water for human consumption through pipes or other constructed conveyances...

RCW 70.119A.020(4). The Board further defined a “public water system” as Group A and Group B. A “Group A” system is defined as:

A public water system providing service such that it meets the definition of a public water system provided in the 1996 amendments to the federal Safe Drinking Water Act (Pub. L. No. 104-182, § 101, §§ b).

WAC 246-290-020(4). The federal Safe Drinking Water Act (SDWA) defines a “public water system” (in relevant part) 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 15 service connections or regularly serves at least 25 individuals.

(emphasis added); 42 U.S.C. § 300f(4)(A) (2006); 40 CFR § 141.2 (2007); AR 362.

The federal implementing regulations (as well as the state regulations), further divide “public water system” (or Group A water systems) into residential community systems and non-residential (or non-community) water systems.

A public water system is either a “community water system” or a “non-community water system.”

The term “**community water system**” means a public water system that (A) serves at least 15 service connections used by year-round residents of the area served by the system; or (B) regularly serves at least 25 year-round residents.

The term “**non-community water system**” means a public water system that is not a community water system.

42 U.S.C. § 300f (16) (2006), 40 CFR § 141.2 (2007); WAC 246-290-020(5)(a)”. A “non-community water system” is further defined as either a “transient non-community water system” or a “non-transient non-community water system.”

“**Transient non-community water system**” or TWS means a non-community water system that does not regularly serve at least 25 of the same persons over six months per year.¹⁰

“**Non-transient non-community water system**” or NTNCWS means a public water system that is not a community water system and that regularly serves at least 25 of the same persons over six months per year.¹¹

¹⁰ Examples of a transient non-community water system include restaurants, taverns, motels and campgrounds. WAC 246-290-020(5)(b)(ii).

¹¹ Examples of non-transient non-community water system include schools, daycare centers or businesses. WAC 246-290-020(5)(b)(i).

40 CFR § 141.2 (2007); WAC 246-290-020(5)(b). Therefore, if a system has 15 service connections (or more) it is automatically regulated as a federal public water system, and is defined as a Group A water system, regardless of the number of people served. WAC 246-290-020(4).

A Group B system is a “public water system that does not meet the definition of a Group A water system.” WAC 246-290-020(5)(c). Therefore, a Group B water system is a system that serves fewer than 15 service connections and fewer than 25 people per day. WAC 246-290-020(4) and (5).

Victory Motel is classified as a Group A transient non-community water system and a public water system under the federal Safe Drinking Water Act since it serves at least 15 service connections (he serves 18 connections), is a “non-community” water system, since it does not serve year round residents, and is “transient” since it does not regularly serve the same 25 people over six months per year. It is not a Group B water system since it has more than 15 service connections.

2. Mr. Lei Argues That Because Of The Language In WAC 246-290-020 Table 1, The Test For A Group A Water System Is Whether It Has 15 Or More “Residential” Connections, He Is Incorrect

Mr. Lei relies on WAC 246-290-020 Table 1 for his contention that Victory Motel is not a Group A water system since it does not serve 15 or more residential connections. Brief at 25. Mr. Lei is incorrect because WAC 246-290-020(4) correctly defines a Group A water system and is consistent with federal law; Bob James, Department employee,

testified that WAC 246-290-020 Table 1 contains a typographical error; and the rules of statutory construction establish that absurd interpretations should be avoided.

Bob James, Director of the Northwest Regional Drinking Water Office testified that a Group A water system is a system that meets the federal definition of a “public water system,” which is a system that serves 15 or more service connections. AR 468-69. Mr. James testified that WAC 246-290-020 Table 1, upon which Mr. Lei relies for his contention, contains typographical errors. AR 469. WAC 246-290-020 Table 1 contains a box labeled “Group A” it states “system that regularly serves 15 or more residential connections.” (emphasis added); *See* Appendix at 21. In the box labeled “Group B” it states “system serving less than 15 residential connections.” (emphasis added); *See* Appendix at 21. Mr. James testified that the text of the law in WAC 246-290-020(4) is correct, however Table 1 should have read “[a] system that regularly serves 15 or more connections, or 25 or more people per day for sixty or more days per year. So this was an error that was inserted into the table, the word: residential.” AR 469.

WAC 246-290-020 Table 1 was meant as an explanatory tool to assist individuals in determining their appropriate water system category. Mr. James testified the word “residential” was erroneously included in the table.¹² A Group A water system is a system that meets the federal

¹² On January 14, 2008, WAC 246-290-020 Table 1 was amended. In the box labeled “Group A” it now states “system that regularly serves 15 or more service

definition of a public water system, which serves 15 or more service connections; it is not limited to residential connections. AR 469-70. Mr. James also testified that the error in WAC 246-290-020 Table 1 was explained to Mr. Lei at their May 18, 2005 meeting. AR 470-71.

Rules of statutory construction are well established that absurd results should be avoided. *Point Allen Service Area v. Washington State Dep't of Health*, 128 Wn. App. 290, 115 P.3d 373 (2005). The spirit or purpose of an enactment should prevail over the express but inept wording. *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 92 Wn.2d 474, 598 P.2d 395 (1979). The rules of statutory construction apply to administrative regulations. *D.W. Close Co., Inc. v. Washington State Dep't of Labor and Indus.*, 177 P.3d 143, 148 (2008) (citing *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)).

The state regulations and definition of a Group A water system are required to conform to the federal definition of a public water system.

A public water system providing service such that it meets the definition of a public water system provided in the 1996 amendments to the federal Safe Drinking Water Act (Pub. L. No. 104-182, § 101, §§ b).

WAC 246-290-020(4). The federal definition of a public water system is clear, a public water system “has at least 15 service connections.” (emphasis added); 42 U.S.C. § 300f(4)(A) (2006). The federal definition references the word “service connections,” not just “residential

connections.” (emphasis added) In the box labeled “Group B” it now states “system serving less than 15 service connections.”

connections.” *Id.* Further evidence of this can be found in the breakdown of the types of public water systems, “community” and “non-community.” 40 CFR § 141.2 (2007). “Community” water systems serve year-round residential customers and “non-community” systems do not serve residential customers. *Id.* A motel is a non-community water system since its guests are not “residents.” A federal “public water system,” which is synonymous with a state Group A water system, did not intend to limit “connection” to only “residential connections” since it would eliminate from regulation water systems serving non-residential customers, that was not the intent of the federal Safe Drinking Water Act. 42 U.S.C. § 300f(4)(A) (2006).

Victory Motel has 15 or more total service connections and therefore is a Group A water system under the state drinking water regulations and a “public water system” under the federal Safe Drinking Water Act. WAC 246-290-020(4); 42 U.S.C. § 300f(4)(a) (2006). Mr. Lei admitted on numerous occasions that Victory Motel has a total of 18 connections. Brief at 3; AR 417-18. Therefore based on substantial evidence, the Health Law Judge and the trial court correctly concluded that Victory Motel serves at least 15 service connections and is a Group A water system. Final Order at 13, ¶ 3.12; CP 152 at ¶¶ 2.17-2.18.

B. Mr. Lei Failed To Comply With The Department’s June 28, 2006 Order

Since all Group A water systems are required to complete a sanitary survey and the Health Law Judge and the trial court concluded

that the Victory Motel was a Group A water system, it was also required to complete a sanitary survey. Since Mr. Lei failed to complete a sanitary survey within the requisite time period, he was required to submit five coliform samples per month. Final Order at 13-14, ¶¶ 3.15-3.16; CP 153 at ¶ 2.20.

1. Mr. Lei Failed To Complete A Sanitary Survey For Victory Motel

All Group A water systems are required to complete a sanitary survey every five years. WAC 246-290-416; AR 368. A sanitary survey is an inspection of a water system's well, storage tank, distribution system and records. Final Order at 6, ¶ 2.4. The inspector can be someone from the Department, the local health jurisdiction or a qualified third party. AR 368-69. The purpose of the sanitary survey is to determine if the water system is capable of delivering safe drinking water to its customers. Final Order at 6-7, ¶ 2.4. The inspector has unrestricted access to the water system, including the well. WAC 256-290-416(2). The inspector then discusses the operation and maintenance of the water system with the owner and provides a copy of a report to the Department and the owner. Final Order at 6-7, ¶ 2.4. The County Health Department informed Mr. Lei that a sanitary survey would cost \$370. AR 240.

Mr. Lei was notified over and over again that a sanitary survey was required for all Group A public water systems and that Victory Motel was a Group A water system. He claims that a survey was completed in 2000, yet he provided no documentation or receipt to prove this. Instead, he

argued that Victory Motel was in fact a Group B water system and that he was not required to complete a sanitary survey; an argument he is still making today. Even after the Department began informal enforcement proceedings (Notice of Violation and Department Order), Mr. Lei still failed to conduct the survey, a fact he admits. By failing to conduct a sanitary survey of Victory Motel, Mr. Lei was putting the public at risk. Based on the totality of the agency record and the frequency in which the Department informed Mr. Lei of his obligations to conduct a sanitary survey, the Health Law Judge and the trial court properly concluded that Mr. Lei failed to comply with the June 28, 2006 order, which required a sanitary survey to be completed. Final Order at 13, ¶¶ 3.12-3.14; CP 152 at ¶ 2.19.

2. Mr. Lei Failed To Monitor For Coliform Five Times Per Month

On March 11, 2005, the Department issued Mr. Lei a Notice of Violation for failure to complete a sanitary survey in the year 2000. Final Order at 7, ¶ 2.8. The Notice specifically stated that if Mr. Lei failed to schedule a sanitary survey within the next 15 days he was required to submit five coliform samples per month until the survey was completed pursuant to WAC 246-290-300. *Id.* Mr. Lei testified that the requirement to submit five coliform samples per month was in the middle of the second page and that he does not fully read the contents of the letters that the Department sends; however, he did recall receiving the Notice. AR 420-21.

Enhanced coliform reporting requirements were used by the Department since Mr. Lei failed to complete a sanitary survey for Victory Motel. The sanitary survey ensures the integrity of the entire water system to identify conditions that may present a sanitary or public health risk. An increased coliform sampling requirement is required to ensure the safety of the water for the customers.

The Department sent Mr. Lei numerous letters regarding monthly coliform violations for failure to submit the requisite five samples per month. Mr. Lei admitted he received these monitoring violations and yet he still did not contact the Department. Since Mr. Lei failed to submit five coliform samples per month, the Department issued an Order on June 28, 2006. Mr. Lei never submitted five coliform samples per month pursuant to the Notice of Violation or the Department's Order. Due to Mr. Lei's on-going failure to submit five coliform samples per month, a Notice of Imposition of Penalty of \$3,150 was issued on August 16, 2006. Final Order at 5-6, ¶ 1.6. Based on the substantial evidence in the agency record, the Health Law Judge and the trial court correctly found that Mr. Lei failed to comply with the Department's June 28, 2006 Order. Final Order at 13-14, ¶¶ 3.15-3.16; CP 153 at ¶¶ 2.20-2.21.

C. Mr. Lei's Assertions That the Department Acted in Bad Faith Was Negligent, Bureaucratic, Reckless, and Unlawful in Handling This Matter Is Immaterial

Mr. Lei alleges in Sections 5 through 7 of his brief that the Department acted negligently, recklessly and in bad faith in its handling of

wrongfully excluded from the administrative hearing. Mr. Lei also failed to demonstrate how he was substantially prejudiced by the rulings of the Health Law Judge; therefore, his due process claims must fail. RCW 34.05.570(1)(d).

VI. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests that the Court of Appeals affirm the decision of the Health Law Judge and the trial court and uphold the Department's Notice of Imposition of Penalties in the amount of \$3,150 for failure to comply with the Department's June 28, 2006 Order.

RESPECTFULLY SUBMITTED this 12 day of May, 2008.

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re:)
)
VICTORY MOTEL) Docket No. 06-08-C-2008DW
JIANGONG (JAY) LEI & YUMEI PAN)
) FINDINGS OF FACT,
) CONCLUSIONS OF LAW
ID No. 917174,)
) AND FINAL ORDER
)
Respondents.)
_____)

APPEARANCES:

Victory Motel, Jiangong (Jay) Lei & Yumei Pan (the Respondents), pro se

Department of Health Drinking Water Program (the Program) by
Office of the Attorney General, per
Dorothy H. Jaffe, Assistant Attorney General

PRESIDING OFFICER: Arthur E. DeBusschere, Health Law Judge

The Presiding Officer conducted a hearing on January 23, 2007. The Program had issued a Notice of Imposition of Penalties. Penalty Affirmed.

ISSUE

Should the Notice of Imposition of Penalties filed on August 23, 2006 be affirmed?

SUMMARY OF PROCEEDINGS

The Program presented the testimony of Robert James and Carol Stuckey. The Respondent, Mr. Jiangong (Jay) Lei, testified on his own behalf. The following twenty-two (22) Program exhibits were admitted:

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- Program's Exhibit No. 1: Letter from Program to Jay Lei, June 1, 1999, pp. 1-2.
- Program's Exhibit No. 2: Letter from Tacoma-Pierce County Health Department to Jay Lei, May 2, 2000, p. 1.
- Program's Exhibit No. 3: Letter from Program to Jay Lei, February 18, 2003, pp. 1-2.
- Program's Exhibit No. 4: Letter from Program to Jay Lei, February 11, 2004, pp. 1-2.
- Program's Exhibit No. 5: Letter from Program to Jay Lei, November 12, 2004, pp. 1-2.
- Program's Exhibit No. 6: Letter from Program to Jay Lei, December 6, 2004, pp. 1-2.
- Program's Exhibit No. 7: Water Facilities Inventory, December 20, 2004, pp. 1-2.
- Program's Exhibit No. 8: Notice of Violation, Re: Victory Motel, ID# 917174, March 11, 2005, pp. 1-3.
- Program's Exhibit No. 9: Letter from Denise Clifford to Jay Lei, June 29, 2005, p. 1.
- Program's Exhibit No. 10: Letter from Denise Clifford to Jay Lei, August 3, 2005, p. 1.
- Program's Exhibit No. 11: Letter from Program to Jay Lei, October 18, 2005, pp. 1-2.
- Program's Exhibit No. 12: Letter from Carol Stuckey to Jay Lei, December 1, 2005, p. 1.
- Program's Exhibit No. 13: Letter from Carol Stuckey to Jay Lei, December 22, 2005, p. 1.
- Program's Exhibit No. 14: Letter from Jay Lei to Governor Christine Gregoire and attachments, pp. 1-6.
- Program's Exhibit No. 15: Letter from Program to Jay Lei, January 17, 2006, p. 1.
- Program's Exhibit No. 16: Letter from Program to Jay Lei, February 9, 2006, p. 1.
- Program's Exhibit No. 17: Letter from Jay Lei to Program, February 23, 2006, p. 1.
- Program's Exhibit No. 18: Letter from Program to Jay Lei, February 23, 2006, pp. 1-2.
- Program's Exhibit No. 19: Letter from Program to Jay Lei, March 28, 2006, p. 1.

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Program's Exhibit No. 20: Letter from Program to Jay Lei, April 28, 2006, and attachment, pp. 1-2.

Program's Exhibit No. 21: Letter from Program to Jay Lei, May 24, 2006, p. 1.

Program's Exhibit No. 22: Program's Order, Re: Victory Motel, Docket No. 06-SDO-009, June 28, 2006, and attachments, pp. 1-22.

The Respondents offered twelve (12) exhibits. It was not necessary to admit Respondents' Exhibit No. 1, which was a copy of the administrative rules and a federal statute. The Presiding Officer has access to the rules and statutes. Next, it was not necessary to admit Respondents' Exhibit No. 2, which the Respondents identified as the exhibits offered by the Program. The Program's exhibits shall also be part of his case in chief. The Respondents' Exhibits Nos. 3-12, which were admitted, are the following:

Respondent's Exhibit No. 3: Letter from Jay Lei to Program, November 19, 2004, p. 1.

Respondent's Exhibit No. 4: Letters from Jay Lei to Program (Brian Boyle and Shasta Guinn), both dated November 22, 2004, pp. 1-2.

Respondent's Exhibit No. 5: Letter from Jay Lei to Program, December 1, 2004, p. 1.

Respondent's Exhibit No. 6: Letter from Jay Lei to Program, January 13, 2005, and attachment, pp. 1-3.

Respondent's Exhibit No. 7: Letter from Jay Lei to Program, March 29, 2005, p. 1.

Respondent's Exhibit No. 8: Email from Jay Lei to Program, May 19, 2005, with attached memo dated May 18, 2005, pp. 1-3.

Respondent's Exhibit No. 9: Letter from Jay Lei to Governor Christine Gregoire, June 8, 2005, pp. 1-3.

Respondent's Exhibit No. 10: Water Bacteriological Analysis, Re: Victory Motel, October 18, 2005 and November 28, 2005, p. 1.

Respondent's Exhibit No. 11: Two letters from Jay Lei to Program, February 7, 2006 and February 23, 2006, pp. 1-2.

Respondent's Exhibit No. 12: Letter from Program to Jay Lei, May 24, 2006 with attachment, pp. 1-2.

Based upon the evidence presented, the Presiding Officer makes the following:

I. PROCEDURAL FINDINGS

Notice of "Group A" Water System.

1.1 On May 14, 1996, and based upon information submitted by the owners, the Program determined that Victory Motel Water System was a Group A water system.

1.2 On June 1, 1999, the Program notified the Respondents that they were a Group A public water system and they were required to have a sanitary survey completed every five (5) years. In this letter dated June 1, 1999, the Respondents were notified that they should contact the Tacoma-Pierce County Health Department, who has an agreement with the Program to conduct the sanitary surveys.

Notice of Violation.

1.3 On March 11, 2005, the Program issued to the Respondents a Notice of Violation. The Notice of Violation notified the Respondents that they have not had a sanitary survey within the previous five (5) years as required by regulation. The Notice of Violation notified the Respondents that the public water systems, which do not collect five or more routine water samples per month, must undergo a sanitary survey. In the Notice of Violation, the Respondents were notified that in the event that the Respondents failed to complete the sanitary survey within 15 days of the Notice, then the Respondents were required to monitor bacteriological quality at least five (5) times per month.

Notice of "Red" Operating Permit.

1.4 On October 18, 2005, the Program issued a "Red" operating permit for the Victory Motel Water System, because of the significant non-compliance with the water system requirements of the federal Safe Drinking Water Act. A category Red operating permit means that the water system is substantially out of compliance with safe drinking water regulations.

Program's Order.

1.5 On June 28, 2006, the Program issued an Order, Docket No. 06-SDO-009, In Re: Victory Motel Water System, Pierce County, ID# 917174 (the Program's Order). The Program's Order was issued to Jiangong (Jay) Lei and Yumei Pan, who were identified as the owners of Victory Motel Water System. In Paragraph 2.2 of the Program's Order, the Respondents were ordered to apply to the Program or the Tacoma-Pierce County Health Department for a sanitary survey and to ensure unrestricted availability of all facilities and records at Victory Motel Water System by July 31, 2006. Further, in Paragraph 2.1, the Program ordered the Respondents to monitor bacteriological quality five (5) times per month.

Notice of Imposition of Penalties.

1.6 On August 23, 2006, the Program filed a Notice of Imposition of Penalties, ASU No. 06-08-C-2008DW, Docket No. 2006-NIP-002, In Re Victory Motel Pierce County, ID# 917174 (Notice of Imposition of Penalties). The Notice of Imposition of Penalties was issued because the Respondents failed to comply with Paragraph 2.1 and Paragraph 2.2 of the Program's Order. The Respondents were penalized pursuant

to RCW 70.119A.040 in the sum of three thousand one hundred fifty dollars (\$3,150.00).

II. FINDINGS OF FACT

2.1 The Victory Motel is located on 10801 Pacific Hwy SW, Tacoma, Washington. Victory Motel has a permanent well with no treatment to the water. The owners of Victory Motel are Jiangong (Jay) Lei and Yumei Pan.

2.2 The Victory Motel Water System provides water for one (1) residential connection, serving the Respondents' family members, and eighteen (18) service connections, serving a monthly population of approximately 378 to 418 occupants. Generally, the occupants of Victory Motel are day laborers staying at the motel.

Notice to Perform Sanitary Survey.

2.3 On June 1, 1999, the Program notified the Respondents that they were a Group A public water system and were required to have a sanitary survey completed every five (5) years.

2.4 A sanitary survey is an inspection of a water system facility and records. A sanitary survey is an inspection of the purveyor's well. The purpose of the sanitary survey is to see if the water system is capable of delivering safe drinking water. The inspector is to have unrestricted access to the water system, including the well. The inspector discusses with the owners about operations and maintenance. The inspector provides the results of the survey to the Program and the owner. As part of his results, the inspector would include photographs, drawings, and additional information. The Program would then determine if the sanitary survey requirement has been met and

determine if any follow-up action would be required. The cost for a sanitary survey would be about three hundred dollars (\$300.00).

2.5 On June 1, 1999, May 2, 2000, February 18, 2003, February 11, 2004, November 12, 2004, and on December 6, 2004, the Program informed the Respondents by correspondence that they should have a sanitary survey.

2.6 On May 18, 2005, the Program and the Tacoma-Pierce County Health Department met with Mr. Lei to discuss the sanitary survey requirement and to review any records that the Respondents wanted to show.

2.7 On June 29, 2005, August 3, 2005, October 18, 2005, and January 17, 2006, the Respondents were notified that they had not completed a sanitary survey.

Notice to Monitor Bacteriological Quality.

2.8 Since a sanitary survey had not been conducted and pursuant to the Notice of Violation, the Respondents were required to monitor bacteriological quality of the water at least five (5) times per month. To monitor bacteriological quality of their well, the Respondents would collect a small sample of well water and submit (send or deliver) it to a laboratory. The water sample (hereinafter called coliform sample) is used to test for coliform bacteria. The laboratory would perform a water bacteriological analysis to test for coliform bacteria to see if the well water was safe to drink. Usually, the laboratory sends the test results to the Program.

2.9 In letters dated December, 1, 2005, December 22, 2005, February 9, 2006, March 28, 2006, April 28, 2006, and May 4, 2006, the Respondents

were notified that they failed to submit coliform samples at least five (5) times per month. The letters addressed sampling period from October 2005 through April 2006.

2.10 On March 23, 2006 and on April 28, 2006, the Respondents took a coliform sample. The sample taken on April 28, 2006 was not tested, because the laboratory determined that it was too old or unsuitable for testing. The laboratory determined that the sample taken on March 23, 2006 was satisfactory.

Failure to Comply with Program's Order.

2.11 The Respondents failed to obtain a sanitary survey for their water system and failed to submit the required coliform samples. From June 1, 1999 (when the Respondents were first notified that a sanitary survey was required) through August 16, 2006 (when the Notice of Imposition of Penalties was issued), the Respondents failed to obtain a sanitary survey. From March 11, 2005 (when the Notice of Violation was issued) through August 16, 2006 (when the Notice of Imposition of Penalties was issued), the Respondents failed to collect and submit coliform samples five (5) times per month from representative points in the distribution system. Moreover, the Respondents failed to comply with the requirements in Paragraphs 2.1 and 2.2 of the Program's Order.

III. CONCLUSIONS OF LAW

3.1 The Program has the authority to adopt regulations relating to the operation of public water systems, pursuant to RCW 43.20.050 and 70.119.050. The regulations adopted are contained in chapter 246-290 WAC.

3.2 In this case, the Program ordered the Respondents to comply with its rules by having a sanitary survey performed and if not timely performed, to monitor bacteriological quality five (5) times per month. As a result of the Program's Order and the Respondents' conduct, the Program issued a Notice of Imposition of Penalties. The Respondents were penalized in the sum of three thousand one hundred fifty dollars (\$3,150.00). The Respondents filed a Request for Adjudicative Proceeding contesting the Notice of Imposition of Penalties.

3.3 To address the Respondents' appeal, the Presiding Officer takes evidence, listens to oral argument, and issues findings and conclusions. RCW 34.05.449(2) and .461(4). In accordance with the Department's rules, the Presiding Officer conducts the hearing de novo. WAC 246-10-602(2)(a).

3.4 The Program has the burden to prove the allegations by a preponderance of the evidence. WAC 246-10-606.

3.5 The Department has jurisdiction to regulate a "public water system," as defined in RCW 70.119A.020(4) and WAC 246-290-010.

"Public water system" means any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing water for human consumption through pipes or other constructed conveyances, including any collection, treatment, storage, or distribution facilities under control of the purveyor and used primarily in connection with the system; and collection or pretreatment storage facilities not under control of the purveyor but primarily used in connection with the system, including:

(a) Any collection, treatment, storage, and distribution facilities under control of the purveyor and used primarily in connection with such system; and

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(b) Any collection or pretreatment storage facilities not under control of the purveyor which are primarily used in connection with such system.

RCW 70.119A.020(4), and

Public water system shall mean any system providing water for human consumption through pipes or other constructed conveyances, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm. Such term includes:

(a) Collection, treatment, storage, and/or distribution facilities under control of the purveyor and used primarily in connection with such system; and

(b) Collection or pretreatment storage facilities not under control of the purveyor, but primarily used in connection with such system.

WAC 246-290-020(1). In this case, the Program has jurisdiction to regulate Victory Motel Water System as a "public water system."

3.6 As part of its regulation of public water systems, the Program is required to work with the purveyor, who owns and operates it.

"Purveyor" means any agency or subdivision of the state or any municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or any other entity, that owns or operates a public water system. It also means the authorized agents of any such entities.

RCW 70.119A.020(6); and

"Purveyor" means an agency, subdivision of the state, municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or other entity owning or operating a public water system. Purveyor also means the authorized agents of these entities.

WAC 246-290-010. As the owners of Victory Motel, Jiangong (Jay) Lei and Yumei Pan are "purveyors" of the Victory Motel Water System.

3.7 The Program's rule defines a Group A water system:

(4) A **Group A** system shall be defined as a public water system providing service such that it meets the definition of a public water system provided in the 1996 amendments to the federal Safe Drinking Water Act (Public Law 104-182, Section 101, subsection b).

WAC 246-290-020(4) (emphasis added by underline).

3.8 The federal Safe Drinking Water Act defines a public water system:

(4) Public water system.

(A) In general. The term "public water system" means 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. Such term includes (i) any collection, treatment, storage, and distribution facilities under control of the operator of such system and used primarily in connection with such system, and (ii) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

42 USCS 300f(4)(A) (emphasis added).

3.9 The Respondents did not dispute that they have eighteen (18) connections, but they argued that the term "service connections" under the rule means "residential connections." For the basis of their argument, the Respondents referenced Table 1 included with the Program's rule, WAC 246-290-020. In Table 1, there is a box describing Group A, in which it stated "[s]ystem that regularly serves: 15 or more residential connections or 25 or more people for 60 or more days/yr." Referencing this statement in Table 1, the Respondents pointed out that Victory Motel has only one

residential connection, which serves their family. Then, the Respondents argued that the other 18 water connections that serve the individual units in Victory Motel should not be considered. Thus, they argued that since Victory Motel Water System has less than 15 residential connections, they should not be classified as a Group A water system.

3.10 The Respondents' argument is in error. In interpreting the Program's rule and the federal statute, the Presiding Officer can obtain guidance from relevant case law:

The meaning of a statute is a question of law that is reviewed de novo. The Court's fundamental objective in determining what a statute means is to ascertain and carry out the Legislature's intent. If the statute's meaning is plain on its face, then courts must give effect to its plain meaning as an expression of what the Legislature intended. A statute that is clear on its face is not subject to judicial construction.

State v. J.M., 144 Wn.2d 472, 480 (2001) (citations omitted). The meaning of the applicable rule (WAC 246-290-020(4)) and federal statute (42 USCS 300f(4)(A)) regarding the term "service connections" are plain on their face. The Program's rule was intended to conform to the Federal Safe Drinking Water Act of 1974 and as amended in 1986 and as amended in 1996. WAC 246-290-001(4). The federal definition of a public water system referenced "service connections" and did not limit the term "service connections" to only "residential" connections. 42 USCS 300f(4)(A).

3.11 Table 1 included after the Program's rule in WAC 246-290-020, and referenced by the Respondents, was provided to explain the rule. The Program's rule under WAC 246-290-020(4) conforms with 42 USCS 300f(4)(A) and controls here. Under the plain reading of 42 USCS 300f(4)(A), a water system with at least fifteen (15)

service connections would be a Group A water system. Thus, the Respondents' eighteen (18) "service connections" would be included in the determination of a Group A water system.

3.12 In this case, Victory Motel Water System has eighteen (18) service connections and one residential connection. The Program correctly defined Victory Motel as a Group A transient non-community water system. WAC 246-290-020(4) and (5).

3.13 The Program requires public water systems to submit to a sanitary survey by a schedule described in its rules:

All public water systems shall submit to a sanitary survey conducted by the department, or the department's designee, based upon the following schedule:

...

(b) For transient noncommunity water systems, every five years unless the system uses only disinfected ground water and has an approved wellhead protection program, in which case the survey shall be every ten years.

WAC 246-290-416(1)(emphasis added).

3.14 In this case, the Respondents failed to have a sanitary survey completed. Based upon the above Procedural Findings and the above Findings of Fact, Paragraphs 2.1 through 2.7 and Paragraph 2.11, the Program proved by a preponderance of the evidence that the Respondents failed to comply with the Program's Order, Paragraph 2.2.

3.15 In the Notice of Violation, the Respondents were notified that in the event that the Respondents failed to complete the sanitary survey within 15 days, the

Respondents were required to collect and submit five (5) routine monthly coliform samples per month. This requirement was issued pursuant to WAC-246-290-300(1)(a), Table 2. See 40 CFR 141.21(d). In the Program's Order, the Respondents were ordered to collect and submit five (5) routine monthly coliform samples.

3.16 In this case, the Respondents failed to collect and submit five (5) routine monthly coliform samples per month. Based upon the above Procedural Findings and Findings of Fact, Paragraphs 2.1 through 2.11, the Program proved by a preponderance of the evidence that the Respondents failed to comply with the Program's Order, Paragraph 2.1.

3.17 The Program may impose penalties for failure to comply with an order of the Division, when the order requires a purveyor to cease violating any regulation pertaining to public water systems or to take specific actions within a specified time to place a public water system in compliance with such regulations. RCW 70.119A.030; RCW 70.119A.040. In this case, since the Respondents failed to complete a sanitary survey and to collect and submit five (5) coliform samples per month as required, the Program's Notice of Imposition of Penalties should be affirmed.

III. ORDER

Based upon the above, the Presiding Officer AFFIRMS the Notice of Imposition of Penalties, ASU No. 06-08-C-2008DW, Docket No. 2006-NIP-002, In Re Victory Motel Pierce County, ID# 917174. Accordingly, Jiangong (Jay) Lei and Yumei Pan,

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FINDINGS OF FACT
CONCLUSIONS OF LAW
AND FINAL ORDER

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Docket No. 06-08-C-2008DW

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the owners of Victory Motel, shall pay the civil penalty of three thousand one hundred and fifty dollars (\$3,150.00). The civil penalty is due upon service of this Final Order.

Dated this 16th day of March 2007.



ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

This Final Order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Final Order with:

Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to:

Drinking Water Program
Department of Health
PO Box 47822
Olympia, WA 98504-7822

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A **petition for judicial review** must be filed and served within 30 days after service of this Final Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

FINDINGS OF FACT
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The Final Order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Final Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

FINDINGS OF FACT
CONCLUSIONS OF LAW
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STATE OF WASHINGTON

DEPARTMENT OF HEALTH

20435 72nd Ave. S., Suite 200, K17-12 • Kent, Washington 98032 -2358

February 18, 2003

JAY LEI
VICTORY MOTEL
10801 PACIFIC HWY SW
TACOMA, WA 98499

SUBJECT: Victory Motel ID# 917174
Pierce County
Third Party Sanitary Survey Program

EXHIBIT NO. 3
Admitted: 1/1
Not Admitted: 1
Date: 1-23-07
Case: Victory
p 1-2

Dear Jay Lei:

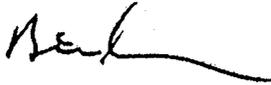
Washington State Department of Health (DOH) drinking water regulations for Group A public water systems, WAC 246-290-416 call for a routine sanitary survey for all Group A water systems once every five years. A sanitary survey is the complete inspection and evaluation of a water system components, operation, water quality monitoring and overall management. Regular sanitary surveys have long been recognized as an important part of protecting public drinking water, because they can help identify potential problems before significant health risks develop. In addition, many water system managers find the survey helpful for understanding how to improve their water systems, ensure they stay in compliance with state drinking water regulations and to meet our surveyors face-to-face.

The survey is pre-arranged with the water system owner or manager by DOH or an authorized representative of DOH. The Tacoma Pierce County Health Department (TPCHD) has entered into an agreement with DOH to assist in conducting routine sanitary surveys of Group A water systems as an authorized representative of DOH in Pierce County. **Your water system has been selected to have a survey completed during the first six months of 2003. These surveys will be conducted on a quarterly basis. TPCHD will send you an application form for the survey prior to the quarter in which your system will be inspected. Please be aware there will be a fee charged for the survey.**

The findings of the health district's survey will be provided to you and to DOH. You are responsible to correct any deficiency found during the survey. When we receive the survey results, we may require you complete immediate follow-up corrective actions if any high public health risks are identified. DOH will continue to conduct surveys of certain types of Group A water systems, primarily larger systems or those systems involving significant public health concerns as determined by DOH.

We hope you will find sanitary surveys to be helpful in your water system management efforts. If you should have any questions about the sanitary survey requirement, or need further information, please feel free to contact me at the number shown below.

Sincerely,



Brian Boye
Public Health Advisor
Northwest Drinking Water Operations
Washington State Department of Health
(253) 395-6778

cc: John Ryding, P.E., DOH
Tacoma-Pierce County Health Dept.
Survey File

Please Contact:

**Tacoma-Pierce County Health Department
Michelle Cox, EHS
Pierce County
3629 South D Street
Tacoma, WA 98418-6813
(253) 798-7683**

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STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF DRINKING WATER

August 3, 2005

Jay Lei
10801 Pacific Highway South
Tacoma, Washington 98499

Dear Mr. Lei:

I want to thank you once again for alerting Governor Gregoire and me to your recent experiences with the Department of Health Office of Drinking Water and the Tacoma-Pierce County Health Department.

Let me assure you that we do take your concerns seriously. I am personally following up with staff to learn more about what has transpired, and will contact you at the number you provided if I need more information.

Meanwhile, it is time to schedule a sanitary survey (inspection) for the Victory Motel. I urge you to contact Derek Pell in our Northwest Regional office to get this scheduled. His phone number is (253) 395-6763.

If your motel has fewer than 15 service connections (each hotel room is equal to one service connection), and therefore does not meet the criteria for a federally-regulated Group A water system, you are welcome to send us documentation about the number of service connections that are actually in your motel. You said that you have already provided this information; however, we would need it in writing in order to waive your five-year sanitary survey requirement.

Again, thank you for sharing your concerns with us. We look forward to working with you to help you provide safe and reliable water to customers of the Victory Motel.

Sincerely,

Denise A Clifford

Denise Addotta Clifford
Director, Office of Drinking Water

cc: Janice Adair, Assistant Secretary, DOH

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STATE OF WASHINGTON
 DEPARTMENT OF HEALTH
 DIVISION OF ENVIRONMENTAL HEALTH
 PO Box 47820 • Olympia, Washington 98504-7820

January 17, 2006

DA
 EXHIBIT NO. 15
 Admitted: 11
 Not Admitted:
 Date: 1-23-07
 Case: Victory
p. 1

Jay Lei
 10801 Pacific Highway Southwest
 Tacoma, Washington 98499

Dear Mr. Lei:

After receiving your letter to Governor Gregoire dated December 25, 2005, I asked our Drinking Water Office to call you. I understand that you spoke with Leslie Thorpe of our staff on January 5. She shared with me her notes from that conversation. I want to thank you for taking the time to explain how you felt your concerns had not been well understood or responded to by our agency explain. I sincerely apologize for any failure on our part to listen respectfully to your concerns or to treat you with dignity. I hope that we can start anew to develop a good working relationship. I promise we will do our part.

From your letter to the Governor, it seems you are in agreement that the Victory Hotel has 18 connections, which means of course that it has to have an inspection (what we call a "sanitary survey") every five years because it is a public water system. (Leslie highlighted the explanation of what is a public water system in the enclosed copy of the federal rules that cover these water systems.) I understand that you believe that the system was inspected in 2000, and I have no reason to believe otherwise. So, it is time to schedule the next one since more than five years have gone by. I have asked the Drinking Water office to lift the red operating permit from your establishment the minute you call to schedule your survey. Please contact Derek Pell in our Kent office as soon as you can to make the arrangements. He may be reached at (253) 395-6763.

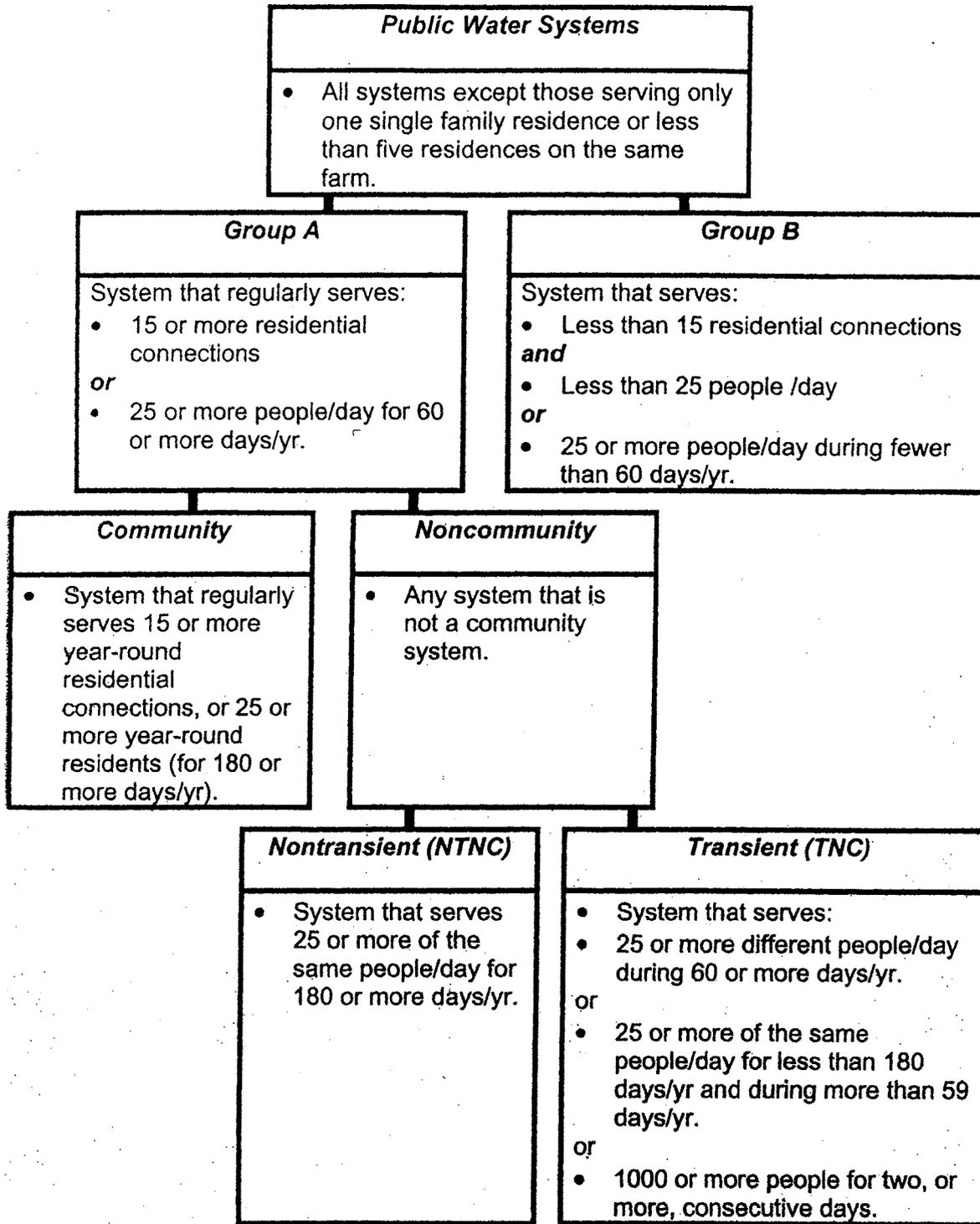
Sincerely,

Janice Adair
 Janice Adair
 Assistant Secretary

Enclosure

cc: ~~_____~~
 Derek Pell, Northwest Regional Office, Office of Drinking Water
 Shannon Walker, Transient Accommodations Section

Table 1



[Statutory Authority: RCW 43.20.050 [43.20.050]. 99-07-021, § 246-290-020, filed 3/9/99, effective 4/9/99.
 Statutory Authority: RCW 43.20.050. 94-14-001, § 246-290-020, filed 6/22/94, effective 7/23/94; 93-08-011 (Order 352B), § 246-290-020, filed 3/25/93, effective 4/25/93; 91-02-051 (Order 124B), recodified as § 246-290-020, filed 12/27/90, effective 1/31/91. Statutory Authority: P.L. 99-339. 89-21-020 (Order 336), § 248-54-006, filed 10/10/89, effective 11/10/89.]