

IN THE COURT OF COMMON PLEAS
GUERNSEY COUNTY, OHIO

Salimbene
Malone
FILED
COMMON PLEAS COURT
NOV - 5 2008

**STATE OF OHIO ex rel.
NANCY H. ROGERS
ATTORNEY GENERAL OF OHIO**

GUERNSEY COUNTY, OHIO
Teresa A. Dankovic, Clerk of Court

Plaintiff,

CASE NO. 07-CV-243

vs.

UTILITY OPERATORS CORP.

**FINDINGS OF FACT /
CONCLUSIONS OF LAW /
JUDGMENT ENTRY**

and

EDWARD A. BISCHOFF

Defendants.

**FINAL APPEALABLE
ORDER
NO JUST CAUSE FOR DELAY**

This case came before the Court for Trial to the Bench commencing on October 27, 2008 and concluding on October 29, 2008. The State of Ohio was present, represented by Assistant Attorneys General Andrea M. Salimbene and Margaret A. Malone. Jennifer Witte also was present as a representative of the Ohio Environmental Protection Agency. Defendant appeared as an individual defendant and as a representative of Utility Operators Corporation, represented by Attorney David Gary Cox.

Testimony and exhibits were received into evidence and the case was taken under advisement, with written decision to issue.

The Court hereby makes the following Findings of Fact and Conclusions of Law and issues its Judgment herein.

FINDINGS OF FACT

1. The Court finds that Defendant Utility Operators Corporation is a non-profit corporation with Edward Bischoff and Pamela Patton, Edward Bischoff's daughter, as the only two trustees. Utility Operators Corporation has no employees but contracts work with Edward Bischoff's other two companies, Bischoff, Miller & Associates and Water Quality Management, Inc.

2. The Court finds that Defendants own and/or operated the Rolling Hills Wastewater Treatment Plant (hereinafter referred to as "WWTP") located in Jackson Township, Guernsey County, Ohio during the dates set forth in the State's Amended Complaint. Count One concerns unauthorized discharges from the Rolling Hills WWTP to waters of that state in violation of the National Pollutant Discharge Elimination System (hereinafter referred to as "NPDES") permit prohibition against bypassing. Count Two concerns un-permitted discharges to waters of the state that occurred when waste was discharged from outfalls not authorized by permit. Count Three concerns violations of the water quality standards set forth in the NPDES permits. Count Four concerns Defendants' failure to notify Ohio EPA of its noncompliance. Counts Five and Six concern violations of the effluent limitations and monitoring requirements set forth in the NPDES permits. Count Seven concerns Defendants' failure to provide a Class III State Certified Operator for the Rolling Hills WWTP. Count Eight concerns Defendants' violation of facility operation and quality control requirements. Finally, Count Nine concerns Defendants' failure to mitigate or to reduce the likelihood of effects to human health or the environment. Each count constitutes violations of Revised Code Chapter 6111, the rules adopted thereunder, and the terms and conditions of its NPDES permits.

3. The Court finds this case was initiated on May 15, 2007 when the State filed a Complaint and secured Temporary Restraining Orders against Defendants after human sewage from homes and businesses in the Rolling Hills subdivision was discovered flowing into the inoperable Rolling Hills WWTP, avoiding treatment, and discharging

directly into an unnamed tributary to Wills Creek. These odorous and unsanitary conditions were observed by Randy Shepard, licensed sanitarian of the Guernsey County Health Department, after receiving a complaint from an employee of the Rolling Hills Local School District, which operates Meadowbrook High School, Meadowbrook Middle School and Brook Elementary School, all located adjacent to the unnamed tributary, (hereinafter referred to as “the stream”) and the Rolling Hills WWTP.

4. The Court finds that inspections by Ohio EPA revealed that every stage of wastewater treatment was in a state of failure. Black, raw, untreated and/or partially treated sewage had been discharged directly into the stream from the plant’s outflow pipe, which is supposed to be discharging clear, treated wastewater. Immediately downstream from the Rolling Hills WWTP, black sewage was clearly visible in the stream as it runs through the grounds of the adjacent schools. (*See Plaintiff’s Exhibits 3-A through 3-R from the May 30, 2007 Evidentiary Hearing for Temporary Restraining Order.*)
5. The Court finds stream sampling revealed black, malodorous discharge from the Rolling Hills WWTP at the outflow pipe containing dangerously low levels of dissolved oxygen. Extensive, stringy brown and green algae, strong sewage odors, black water, sludge deposits and red sludge worms were observed downstream. The effluent discharge from the Rolling Hills WWTP and the water downstream from the Rolling Hills WWTP also contained extremely high levels of fecal coliform and E. coli.
6. The Court finds there was also discharge on the ground and flowing into the stream and sewage was back-splashing on wood and starting to pool. Raw sewage that had not gone through any treatment was inside and outside the fenced-in area at the Rolling Hills WWTP.
7. The Court finds that this Court granted summary judgment as to the liability of Utility Operators Corporation on September 22, 2008. The remaining issues are whether Defendant Edward A. Bischoff is personally liable for the established violations of law, and the

appropriate injunctive relief and civil penalty for both Defendants.
(See *Summary Judgment Entry dated September 22, 2008.*)

8. The Court finds individual defendant, Edward Bischoff, graduated from The Ohio State University in 1957 with a Bachelor's of Science Degree in civil engineering. Defendant Bischoff later went on to form Bischoff, Miller & Associates, a civil engineering design firm, Water Quality Management, Inc., a company in the business of operating water and waste water treatment plants, and Utility Operator's Corporation, which was formed to own the Rolling Hills WWTP. The Court further finds that all three companies share the same office space.
9. The Court finds Utility Operators Corporation was incorporated in 1978 as a non-profit corporation by Defendant Edward Bischoff on the advice of counsel to "stay away" from the Public Utilities Commission of Ohio's (PUCO) regulations. However, in 1994, Ohio law changed and brought non-profit corporations, which were operating public utilities, under PUCO's rate making powers.
10. The Court finds that Defendant Edward Bischoff set up a "slick" arrangement by incorporating Utility Operators Corporation as a non-profit corporation to avoid PUCO regulations and having two companies that Defendant Bischoff owns and controls perform the majority of the business of Utility Operators Corporation.
11. The Court finds Edward Bischoff, through Utility Operators Corporation, has been managing the Rolling Hills WWTP since 2000. In 2001, Water Quality Management Inc. hired Eric Phillips of Envirotech, who had a Class III operator's license to operate the Rolling Hills WWTP. Eric Phillips left the Rolling Hills WWTP in 2003 when he stopped getting paid.
12. The Court finds that Water Quality Management, Inc. then hired Ira Dyer, who had a Class III operator's license, to operate the Rolling Hills WWTP. Ira Dyer went to the Rolling Hills WWTP about twice a week. Ira Dyer then left the employment of Water Quality

Management, Inc and no longer was the licensed operator at the Rolling Hills WWTP.

13. Rusty Baldwin was then hired to be the main operator of the Rolling Hills WWTP. Rusty Baldwin had no operator's license, no training, no electrical experience, didn't know how to install pumps, and didn't know what an NPDES permit was. Rusty Baldwin worked at the Rolling Hills WWTP from August 2001 to May 2007. The Court further finds that Rusty Baldwin was paid between \$10.00 and \$14.50 an hour including approximately five (5) hours of drive time per day while he worked approximately 2 hours a day at the Rolling Hills WWTP, except on weekends. Defendant Edward Bischoff testified that he was aware of some of Rusty Baldwin's weaknesses.
14. The Court finds that Jennifer Witte, Environmental Specialist, of the Ohio EPA was in charge of inspections at the Rolling Hills WWTP starting in 2000. She performed inspections, reviewed monthly operating reports, and checked for compliance of the NPDES permits. She has completed at least 25 inspections at the Rolling Hills WWTP since 2001. Jennifer Witte's pay rate is \$33.23 per hour.
15. The Court finds that Joann Montgomery, also an Environmental Specialist of the Ohio EPA, performed samplings in May of 2007 of the water downstream from the Rolling Hills WWTP and found very high levels of fecal coliform and E. coli. *See Plaintiff's Exhibit 5.*
16. The Court finds the NPDES permits set forth standards that have to be met, such as there must be a Class III licensed operator working at the plant. The NPDES permits also set forth sampling guidelines and the total maximum daily load of the amount of waste load that a stream can assimilate. *See Plaintiff's Exhibits 7 and 8.*
17. The Court finds if any of the requirements of the NPDES permits are not met, a violation of Ohio water pollution laws is committed per Ohio Revised Code Chapter 6111. On the dates alleged in the Amended Complaint, numerous violations had been committed at the Rolling Hills WWTP. The State of Ohio alleges that 16,305 days of

violations were committed; this evidence was not disputed by the Defendants.

18. The Court finds any violation of the NPDES permit may put the environment and the surrounding community at risk. Violations under the NPDES permits are to be self reported by the operator and are subject to Ohio EPA inspections.
19. The Court finds the public harm under the public policy of protecting the environment and human health and safety in this situation was increased as the health of many children was at risk as the highly contaminated stream flowed through the land which contains Brook Elementary School, Meadowbrook Middle School, and Meadowbrook High School along with their athletic facilities. *(See Plaintiff's Exhibits 3-O and 3-P from the May 30, 2007 Evidentiary Hearing for Temporary Restraining Order.)*
20. The Court finds Defendant Edward Bischoff, as the “operating trustee” of Utility Operators Corporation during the dates alleged in the Amended Complaint, knew of the violations occurring at the Rolling Hills WWTP as the Ohio EPA requires self-regulating Monthly Operating Reports to be sent to the Ohio EPA, which reports any violations. Jennifer Witte then followed up with the Monthly Operating Reports by mailing out seven (7) “Notices of Violation” letters to the Defendants. *See Plaintiff's Exhibit 3.*
21. The Court finds Defendant Bischoff had attempted to come into compliance with “band-aid” repairs and purchasing used and residential parts, such as sump pumps. However, the sand filters remained plugged with sludge and very little water was able to percolate through. Further, Rusty Baldwin was instructed to bypass the plugged sand filters resulting in solids being carried over directly into the receiving stream.
22. The Court finds Utility Operators Corporation’s **failed** to file a Statement of Continued Existence as a non-profit corporation on May 11, 2006 and the non-profit corporation was not reinstated until May

29, 2007. During this time period of 383 days, individual Defendant Edward Bischoff operated the Rolling Hills WWTP as “business as usual” without the corporate protection of Ohio law. The Court further finds the reinstatement of the non-profit corporation status occurred **after** the Complaint was filed in this case. (*Emphasis added.*) See *Plaintiff’s Exhibit 2*.

23. The Court finds that Jennifer Witte of Ohio EPA testified that 3,013 violations occurred between May 11, 2006 and May 29, 2007.

24. The Court finds by July of 2007, the conditions at the Rolling Hills WWTP had worsened. Raw sewage was flowing into the stream, odors were emanating, dark black sludge deposits were forming, red sludge worms (characteristic of raw sewage) were present, algae was growing and there were shoulder high weeds growing in the sand filters.

25. The Court finds Jennifer Witte of Ohio EPA spoke with Edward Bischoff and Rusty Baldwin several times in person and over the phone of what needed to be done to bring the Rolling Hills WWTP into compliance with the NPDES permits. Little was done to improve the Rolling Hills WWTP, and the plant was not brought into compliance until after Temporary Restraining Orders were granted.

26. The Court finds on July 11, 2007, this Court ordered a receivership that the Village of Byesville would operate the Rolling Hills WWTP.

27. The Court finds after being in disrepair for years, the Village of Byesville had the Rolling Hills WWTP in working condition and in compliance with NPDES permits within sixteen (16) days after being appointed receiver by this Court.

28. The Court finds that John Van Dommelen of the Ohio EPA who works in the Compliance Assistance Unit worked approximately 65 hours a month providing suggestions, operations strategies and answering questions to the Village of Byesville. The Court further finds that John Van Dommelen’s pay rate is \$34 per hour.

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29. The Court finds while Utility Operators Corporation was operating the plant there was over \$25,000 in outstanding sewer bills. Utility Operators Corporation's only source of income is the customers' sewage fees. After the Village of Byesville obtained the Receivership, the delinquent accounts were reduced to \$6,031.
30. The Court finds Defendants would direct letters to those who were delinquent and filed injunctions, but after Utility Operators Corporation still wasn't being paid the delinquent payments, Edward Bischoff testified he stopped any collection action to obtain payment of the sewer bills.
31. The Court finds that Defendant Bischoff testified in 2001 that Utility Operators Corporation applied to PUCO for and received a rate increase, which was based upon estimated revenue of \$119,000 to \$125,000 per year.
32. The Court finds that Defendant Edward Bischoff testified that he felt a further rate increase from PUCO was necessary. He further testified that Utility Operators Corporation was on an inadequate rate structure from PUCO. The Court finds Bischoff testified he asked PUCO numerous times for a rate change. The Defendant did receive two United States Department of Agriculture loans in the amounts of \$125,000 in 1985 and \$118,000 in 1995. The money was used to make improvements at the Rolling Hills WWTP and to also pay bills to others, which were primarily to his two other companies. The Defendant may be personally liable for one of those loans so long as he is the operator of the Rolling Hills WWTP.
33. The Court finds while Defendant Bischoff testified that he also sent numerous letters to PUCO, no letters were entered into evidence nor was a formal rate application ever made to PUCO by Utility Operators Corporation after 2001.

34. The Court finds that Defendant Edward Bischoff testified that he requested the Village of Byesville to replace the flow meters, which were reporting lower rates than what was actually being used. All of the faulty flow meters were replaced by 2004 by the Village of Byesville.
35. The Court finds that Defendant Bischoff testified he thought he was “running out of options” and could have abandoned the Rolling Hills WWTP to PUCO. The Court finds that although Defendant Bischoff was aware of the procedure of PUCO abandonment, he did not choose to take advantage of this remedy of law and continued to operate Utility Operators Corporation under-funded and in compliance only when money was available.
36. The Court finds that in the bankruptcy petition for Utility Operators Corporation dated October 13, 2006, \$870,000 was listed for Ohio EPA claims for 2001 through 2006. Edward Bischoff testified that \$870,000 was both the cost to “fix the system” and the possible civil penalties. However, the Court finds his testimony not worthy of belief as the petition states the amount of claim contingent, unliquidated, and disputed. The Court further finds that the bankruptcy petition lists Ohio EPA at page 7 item 17(a) as a “...governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law.” There is no other evidence, estimate, or testimony that would support that this figure was anything but the civil penalty that Defendant Bischoff and his attorney, who signed the bankruptcy petition, thought was possible under the environmental laws. *See Plaintiff's Exhibit 9.*
37. The Court finds that Edward Bischoff testified his other businesses (Bischoff, Miller & Associates and Water Quality Management, Inc.) were doing poorly because of the time spent on Utility Operators Corporation. He further testified that revenues for all his companies had been affected by Utility Operators Corporation.
38. The Court finds that Defendants' Exhibit A (the answers to interrogatories), Plaintiff's Exhibit 13 (the affidavit of Edward

Bischoff), and Plaintiff's Exhibit 6 (discovery responses) all used different accounting methods, which were not reconciled. Therefore, based on the evidence before the Court, the Court can give this accounting evidence little weight. However, Defendant Edward Bischoff testified that more than eighty percent (80%) of the revenues of Utility Operators Corporation were paid to his other two companies.

39. The Court finds that Defendant Bischoff never testified of any concern for the health of others, specifically school children from the health risks in the stream. Defendant Bischoff only testified about the amount of money that was needed to operate the Rolling Hills WWTP and the alleged financial inability of he as an individual and of Utility Operators Corporation to be in compliance with the NPDES permit requirements.

CONCLUSIONS OF LAW

1. The Court concludes as a matter of law that R.C. 6111.04 and R.C. 6111.07 impose strict liability on any person who violates that section. (*Emphasis added.*)
2. The Court concludes as a matter of law that on the State of Ohio's five separate theories of liability, which the State attempts to hold Edward Bischoff personally liable, the burden of proof on four of the five is by a preponderance of the evidence. The only theory where the burden of proof is by clear and convincing evidence is whether Defendant Bischoff had a reckless disregard for the best interest of Utility Operators Corporation. *See R.C. §1702.30*. The Court concludes as a matter of law that the State of Ohio has met its burden of proof in this case on each of the five separate theories of liability.
3. The Court concludes as a matter of law that the standard for determining whether a party may "pierce the corporate veil" and hold an individual liable is set forth in *Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274 and *Dombroski v. WellPoint, Inc.* (2008), 2008 Ohio 4827., which

held “the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own; (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud, an illegal act or similarly unlawful act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.” The Court concludes as a matter of law, based on the facts of this case, the State of Ohio has met its burden of proof on each of these elements required to pierce the corporate veil.

4. The Court concludes as a matter of law that the Court has broad discretion in determining the amount of the civil penalty imposed. See State ex rel. Brown v. Dayton Malleable (April 21, 1981), Montgomery County App. No. 6722; 1981; aff'd at 1 Ohio St.3d 151.
5. The Court concludes as a matter of law that there are four factors that must be considered by Courts in determining an appropriate civil penalty for environmental violations. Those four factors are (1) the harm or threat of harm posed to the environment; (2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law; (3) the economic benefit gained by the violation; and (4) any extraordinary enforcement costs incurred. See State ex rel. Brown v. Dayton Malleable (April 21, 1981), Montgomery County App. No. 6722; 1981; aff'd at 1 Ohio St.3d 151.
6. The Court concludes as a matter of law that summary judgment in this case found 16,305 days of violations, which could result in the maximum penalty amounting to \$163,050,000. Each violation per day results in a separate violation with a maximum penalty of \$10,000. See R.C. §6111.07 and §6111.09.
7. The Court concludes as a matter of law that Defendant Bischoff is personally liable when Utility Operators Corporation had no corporate existence when it failed to file its Statement of Continued Existence from May 11, 2006 through May 29, 2007 and Edward Bischoff

- continued to operate the Rolling Hills WWTP as Utility Operators Corporation as “business as usual.” During this time frame, 3,013 violations were committed. *See R.C. §1702.59 and Chatman v. Day (1982), 7 Ohio App.3d 281 and Board of Trustees of the Ohio Laborers’ Fringe Benefit Programs v. Jenkins (March 30, 2007), 6th Cir. No. 2:05-CV-54, aff’d at 2008 U.S. App. LEXIS 12626.*
8. The Court concludes as a matter of law, based on Jennifer Witte’s testimony, at least one violation per day was committed between May 11, 2006 and May 29, 2007 when Utility Operators Corporation’s corporate existence was cancelled.
 9. The Court concludes as a matter of law that different violations committed on the same day should be treated as only one day of violation based upon the facts of this case. *See R.C. §6111.09 and State v. Tri-State Group, Inc. (2004), 2004-Ohio-4441 (Ohio App. 7 Dist.)*
 10. The Court concludes as a matter of law that as 383 days elapsed between May 11, 2006 and May 29, 2007, there is a maximum possible civil penalty of \$3,830,000 during that time period. *See United States v. Gulf Park Water Co. (D. Miss. 1998), 14 F. Supp.2d 854, 858.*
 11. The Court concludes as a matter of law that it chooses not to impose the maximum penalty and concludes the civil penalty is determined by the factors the Court chooses to give weight to. *See United States v. Gulf Park Water Co. (Supra.)*
 12. The Court concludes as a matter of law that the harm or threat of harm posed to the environment should increase the penalty as Joann Montgomery of Ohio EPA testified that the stream that was tested below the Rolling Hills WWTP was one of the worst for E. coli she has seen in her 27 years of experience.

13. The Court concludes as a matter of law that the civil penalty should be increased based on the effects on water quality as testified to by Jennifer Witte and Joann Montgomery of Ohio EPA.
14. The Court concludes as a matter of law that the harm posed to the public was increased by the fact that the stream ran through the grounds of the Rolling Hills public schools where children play. (*See Plaintiff's Exhibits 3-O and 3-P from the May 30, 2007 Evidentiary Hearing for Temporary Restraining Order.*)
15. The Court concludes as a matter of law that extraordinary enforcement costs were incurred as Jennifer Witte of Ohio EPA testified that approximately fifty percent (50%) of her time working at the Ohio EPA was consumed by her work on the Rolling Hills WWTP when she has 41 other facilities that she is in charge of in Southeastern Ohio.
16. The Court concludes as a matter of law that extraordinary enforcement costs were incurred based on John Van Dommelen of Ohio EPA's testimony as to the amount of time and expense he had in the Rolling Hills WWTP.
17. The Court concludes as a matter of law that the civil penalty should be increased based on Edward Bischoff's level of indifference towards the concern of others' health when he knew raw, untreated sewage was flowing into the stream adjacent to public schools.
18. The Court concludes as a matter of law that the maximum amount of penalties should not be imposed in this case as Defendant Edward Bischoff did make some efforts, however ineffective, to remedy the violations. The Court further concludes as a matter of law that Defendant Edward Bischoff was not totally recalcitrant.
19. The Court concludes as a matter of law that the maximum amount of penalty should not be imposed. Defendant Edward Bischoff testified and believed that the problems at the Rolling Hills WWTP all stemmed from an imprecise rate structure formulated by another state

agency, PUCO. Defendant Edward Bischoff felt PUCO did not understand as a non-profit corporation Utility Operators Corporation did not have other investors to raise funds. This, however, is a “catch 22” scenario that Bischoff created for himself by originally having Utility Operators Corporation set up as a non-profit corporation to avoid PUCO regulations.

JUDGMENT

The Court finds that a permanent injunction is hereby **ORDERED** against Utility Operators Corporation and Edward A. Bischoff as an individual from further operating and licensing the Rolling Hills WWTP, directly or indirectly.

The Court finds that a civil penalty of **\$870,000** is hereby imposed on Utility Operators Corporation.

The Court finds that a civil penalty of **\$100,000** for personal liability is hereby assessed to Defendant Edward Bischoff for personal violations committed between May 11, 2006 and May 29, 2007, while Utility Operators Corporation was not in existence.

Costs of this action are hereby assessed to Defendants, jointly and severally.

IT IS SO ORDERED.



JUDGE OF THE COMMON PLEAS COURT
GUERNSEY COUNTY, OHIO

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