UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
LEISURE VALLEY WEST	)	Docket No. SDWA-III-23
WATER SYSTEM	)	
	)	
RESPONDENT	)	

IN THE MATTER OF:	)	
	)	
LEISURE VALLEY CENTRAL	)	Docket No. SDWA-III-24
WATER SYSTEM	)	
	)	
RESPONDENT	)	

IN THE MATTER OF:	)	
	)	
LEISURE VALLEY EAST	)	Docket No. SDWA-III-25
WATER SYSTEM	)	
	)	
RESPONDENT	)	

ORDER CONSOLIDATING RELATED ACTIONS

AND ORDER TO SHOW CAUSE

These actions were commenced on June 28, 1996, by the filing of complaints pursuant to Section 1414(g)(3)(B) of the Safe Drinking Water Act (SDWA), as amended, 42 U.S.C. § 300g-3(g)(3)(B), by the Director of the Water Protection Division, Region III, U.S. EPA ("Complainant"), against the above-named Respondents, alleging that Respondents violated the monitoring, reporting, and public notification requirements of the Act and applicable regulations at 40 CFR §§ 141.21 and 141.31. Each complaint identifies one Olan Hott as owner and operator of an identified water system and demands the maximum administrative penalty permitted by the Act of $5,000.*

Receipts for certified mail reflect that the complaints were served on Mr. Hott at Great Falls, Virginia on June 29, 1996. Mr. Hott did not file an answer to the complaints within the 20-day period specified by Rule 22.15(a) of the Consolidated Rules of Practice (40 CFR Part 22) and on March 13, 1997, Complainant, citing this failure, moved for default orders. These motions were filed with the Regional Judicial Officer (RJO), because Consolidated Rule 22.16(c) provides that the Regional Administrator shall rule on all motions made or filed before an answer to the complaint is filed. Thereafter, Mr. Hott retained counsel who on April 7, 1997, served a response to the motions for default and requested an extension of time in which to file an answer. On April 28, 1997, Respondent served answers to the complaints, grounds of defense and motions to dismiss, arguing that Complainant did not have jurisdiction over the water systems in question.

On May 8, 1997, the RJO granted Respondent's motion for an extension of time and denied Complainant's motions for default. Denial of the motions for default was based upon the fact that Respondent had filed an answer within the time Complainant had

---

* Administrative orders accompanying the complaints, issued in July of 1991, identified the owner and operator of the water systems as Mr. Olin Hoot.

---

indicated was acceptable in a letter, dated April 3, 1997. By letter, dated May 9, 1997, Complainant requested that the RJO postpone ruling on the motions for default until Complainant could determine the merits of the jurisdictional grounds for Respondent's motion to dismiss. The letter stated that in order to clarify Respondent's jurisdictional status the Region intended to discuss the matter with the West Virginia Department of Health and to request information from Respondent.

In a letter, dated May 13, 1997, the RJO referred to his orders of May 8, 1997, which disposed of all motions filed prior to the filing of the answers. The letter pointed out that Respondent's motions to dismiss and all subsequent motions could not be addressed by the RJO, because with the filing of the answers jurisdiction on these matters shifted to the Office of Administrative Law Judges. The RJO noted, however, that there was normally a period of time between the filing of an answer and the assignment of an ALJ and that this period may be sufficient to develop an informed position on Respondent's status.

On January 23, 1998, the undersigned was designated to preside over these proceedings.

Sua Sponte Consolidation of Actions

In accordance with Rule 22.12 of the Consolidated Rules of Practice (40 CFR Part 22), the ALJ may, pursuant to motion or sua sponte, consolidate one or more proceedings provided: "(1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues,

and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings." Here, for all that appears, the Respondents are separate unincorporated entities under common ownership. The answers filed in each of these proceedings are identical. Moreover, the factual issues as to whether the water systems have at least 15 service connections used by year-round residents or serve at least 25 year-round residents, and thus are "community water systems", or have at least 15 service connections or serve an average of at least 25 individuals daily at least 60 days out of the year, and thus are "public water systems", subject to the SDWA and implementing regulations are identical.

Under these circumstances, it is concluded that consolidation will simplify and expedite consideration of the issues and it is difficult to envisage that consolidation could result in any prejudice to the parties. Accordingly, these proceedings will be consolidated pursuant to Rule 22.12(a).

Respondent's Motion to Dismiss

Respondent's motion to dismiss is based upon the assertion that the Leisure Valley East, West and Central systems do not each have at least 15 regular service connections or regularly serve at least 25 individuals (Grounds of Defense and Motion to Dismiss, Answer, served April 28, 1997, at 3).

This assertion is supported by the affidavits of Heidi Hott and Luther Powers attached to the answers. Ms. Hott, relationship if any to Olan Hott not stated, states that she works for Olan Hott as manager of Leisure Valley in White Sulphur Springs, West Virginia, and that she has inspected the three water systems involved in this action (Affidavit, dated April 24, 1997). She states that the Leisure Valley West System has 11 service connections used by year-round residents which connections serve 24 persons. Additionally, the West System temporarily serves 24 campers for hunting and fishing purposes. The Leisure Valley Central System has four service connections used by year-round residents. These connections serve five persons. Additionally, The Central System temporarily serves eight campers for hunting and fishing purposes. Ms. Hott states that the Leisure Valley East System has ten service connections used by year-round residents. She further states that this system serves 21 persons and that, in addition, the East System temporarily serves 17 campers for hunting and fishing purposes.

Mr. Luther Powers, who is not otherwise identified, states that he has inspected the three water systems in White Sulphur Springs, West Virginia involved in this action (Affidavit, dated April 24, 1997). He states that the West System has 11 service connections used by year-round residents, that the Central System has four service connections used by year-round residents and that the East System has ten service connections used by year-round residents.

The SDWA applies to all public water systems, with exceptions not applicable here. 42 U.S.C. § 300g. Section 1401 (4) of the Act defines "public water system" as a system for the provision of piped water to the public for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. 42 U.S.C. § 300f(4). Regulations implementing the SDWA expand the definition of "public water system" to include systems for the provision of piped water to the public for human consumption, if such system has at least 15 service connections or "regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year." 40 CFR § 141.2.

The immediate question raised by the motions to dismiss is, therefore, whether the temporary service to campers at the Leisure Valley East and West Systems regularly extended for at least 60 days out of the year so that these systems equal or exceed the daily average 25-individual limit and thus are within the regulatory definition of a "public water system". On the facts presented, the Leisure Valley Central System appears to be well under the daily average 25-individual limit even if temporary campers are counted.

Notwithstanding that the correspondence with the RJO described above demonstrates that Complainant was well aware of the motion, Complainant has not responded in any

manner thereto. Under Rule 22.16(b), a party failing to respond to a motion within the ten-day period provided by the rule, plus five days allowed by Rule 22.07(c) where the motion is served by mail, may be deemed to have waived any objection to granting the motion. The Environmental Appeals Board has, however, ruled that complainant's failure to respond does not justify granting a motion to dismiss where the ALJ was aware that complainant opposed the motion. Asbestos Specialists, Inc., TSCA Appeal No. 92-3, 4 EAD 819, 825 (EAB, October 6, 1993). Because there is no indication that Complainant opposes the motion, Asbestos Specialists is not controlling here. Nevertheless, as indicated above, there is a substantial question as to whether the provision of water to the number of campers referred to in Ms. Hott's affidavit regularly extends for at least 60 days out of the year so as to bring the water systems at issue within the regulatory definition of a "public water system". Under these circumstances, granting the motion without allowing Complainant a final opportunity to demonstrate the factual basis for the instant actions would be inappropriate.

Complainant will be ordered to show cause, if any there be, why the complaints herein should not be dismissed.

Order

1. These proceedings are consolidated pursuant to Rule 22.12(a).

2. Complainant is directed to show cause, if any there be, why the complaints herein should not be dismissed.

3. Complainant's response to this order shall be filed on or before March 20, 1998.

4. Respondent may file a reply to Complainant's response to this order on or before April 20, 1998.

Dated this 18th day of February 1998.

Original signed by undersigned

_____

Spencer T. Nissen
Administrative Law Judge