

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8

2013 MAR 27 PM 12:39

FILED  
EPA REGION VIII  
HEARING CLERK

IN THE MATTER OF: )  
 )  
Richard Smith, Owner )  
Lodore Supper Club and Saloon )  
Sheridan, Wyoming )  
 )  
Respondent. )  
 )  
 )  
 )

Proceeding under Section 1414(g)  
of the Safe Drinking Water Act,  
U.S.C. § 300g-3(g)  
Docket No. SDWA-08-2012-0056

**ORDER ON RESPONDENT'S MOTION TO DISMISS**

On February 26, 2013, Respondent filed a Motion and Order to Dismiss (Motion to Dismiss). On March 8, 2013, Complainant filed its Opposition to Respondent's Motion to Dismiss. Respondent's motion states that based on a lease agreement he should not be liable for the requirements set forth in the Safe Drinking Water Act (SDWA), its implementing regulations and the alleged violations in the September 25, 2012 Complaint. I have reviewed the request to dismiss this matter and deny the motion. The rationale for denying Respondent's motion is set forth below.

Respondent's Motion to Dismiss states the following:

Due to the terms of the lease granted to and entered into with the following parties:

Rick Hall  
Peri Thomas  
PO Box 591  
Big Horn, WY 82833

Respondent respectfully asks that his liability to test water at the Lodore Supper Club be relieved as it was the responsibility of the lessors to test and document the usage of the water in the said establishment. Respondent prays for relief from said situation and the responsible parties be fined for their lack of follow thru with the testing of the water that was essential to the running of the business they were leasing from Respondent.

See, Respondent's Motion to Dismiss. This is the only information provided in the Motion to Dismiss and the sole basis for Respondent's Motion. The lease agreement, attached to Respondent's Answer, is not complete and therefore the full terms of the lease cannot be ascertained. Regardless, Respondent fails to provide enough evidence in his Motion to Dismiss to show that as the owner of the Lodore Supper Club he is not responsible for the alleged violations in the Complaint.

Complainant, in its Opposition to the Motion to Dismiss, asserts that regardless of any lease agreement with an operator of the Public Water System (PWS) that may set out roles and responsibilities, the owner of the PWS is still liable. See, Opposition to Motion to Dismiss, pp. 6-7. Complainant support's this argument with the statutory and regulatory language of the SDWA that "any person who owns and operates a public water system" must comply. 42 U.S.C. § 300g-3 and 40 C.F.R. Part 141. The only evidence before me, at this juncture, shows Respondent Richard Smith as the owner of the Lodore Supper Club; and therefore, a person who owns or operates a public water system. See, Exhibits, 1a, 1h, and 1m from Opposition to Motion to Dismiss and Respondent's Answer.

Procedurally, motions to dismiss under 40 C.F.R. § 22.20(a), allow the Presiding Officer to dismiss a proceeding without further hearing upon such limited additional evidence that shows Complainant has failed to establish a prima facie case or other grounds which show no right to relief on the part of the complainant. Respondent has not provided any additional evidence to support its Motion to Dismiss nor has it demonstrated the failure of Complainant to establish a prima facie case.

Accordingly, to prevail on a motion to dismiss in the present proceeding, Respondent must demonstrate that the allegations in the Complaint, if true, fail to establish a violation by Richard Smith, as the owner of the PWS, or otherwise fail to show a right to relief. Respondent does not directly challenge the sufficiency of the Complaint in his Motion to Dismiss. Rather, Respondent requests a dismissal of this proceeding on the basis that he does not operate the Lodore Supper Club.<sup>1</sup>

In *Mercury Vapor Processing Technologies*, Judge Gunning set forth the analysis for determining how to rule on a motion to dismiss such as the one presented here. See, *Mercury Vapor Processing Technologies a/k/a River Shannon Recycling and Laurence C. Kelly*, Docket No. RCRA-5-2010-0015, 2011 EPA ALJ LEXIS 15 (ALJ, July 14, 2011). Motions to dismiss under Section 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP), citing *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993)<sup>2</sup>. *Id.* Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). *Id.* Judge Gunning, in *Mercury Vapor Processing Technologies*, looks to the Supreme Court which states:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

<sup>1</sup> Respondent may have a valid affirmative defense regarding the operator and any lease agreement entered into between the parties. Respondent is certainly able to present that evidence at hearing.

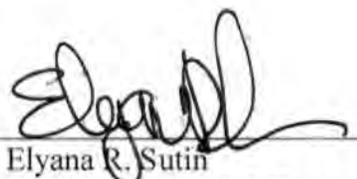
<sup>2</sup> The FRCP are not binding on administrative agencies. However, Rule 12(b)(6) and federal court decisions construing it can assist the Presiding Officer as instructive guidance in adjudicating a motion to dismiss under the Rules of Practice. See, e.g., *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008).

*Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence".40 C.F.R. §22.24. In this matter, Complainant has stated a claim for relief that is plausible based on a preponderance of the evidence.

Therefore, Respondent's Motion to Dismiss is **DENIED**. Please note, Respondent's Prehearing Exchange is due **April 12, 2013**.

**SO ORDERED**, this 27<sup>th</sup> day of March, 2013.



Elyana R. Sutin  
Regional Judicial Officer  
Region 8

## CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER ON RESPONDENTS MOTION TO DISMISS** in the matter of **RICHARD SMITH, OWNER, LODORE SUPPER CLUB AND SALOON, DOCKET NO.: SDWA-08-2012-0056** was filed with the Regional Hearing Clerk on March 27, 2013.

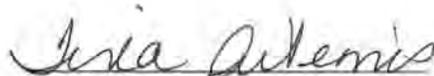
Further, the undersigned certifies that a true and correct copy of the documents were delivered to, Margaret "Peggy" Livingston, Enforcement Attorney, U. S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. True and correct copies of the aforementioned document was placed in the United States mail certified/return receipt requested on March 27, 2013, to:

Richard Smith, Owner  
Lodore Supper Club and Saloon  
P. O. Box 6044  
Sheridan, WY 82801

E-mailed to:

Honorable Elyana R. Sutin  
Regional Judicial Officer  
U. S. Environmental Protection Agency  
1595 Wynkoop Street (8RC)  
Denver, CO 80202

March 27, 2013

  
Tina Artemis  
Paralegal/Regional Hearing Clerk

