

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:)	Proceeding under Section 1414(g)
)	of the Safe Drinking Water Act,
Richard Smith, Owner)	U.S.C. § 300g-3(g)
Lodore Supper Club and Saloon)	
Sheridan, Wyoming)	Docket No. SDWA-08-2012-0056
)	
Respondent.)	
)	
_____)	

ORDER FOR PRODUCTION OF EVIDENCE AND CLARIFICATION

On January 23, 2013, each party was ordered to file a prehearing information exchange pursuant to 40 C.F.R. § 22.19. The purpose of prehearing exchange was to provide the parties with the evidence to be introduced at hearing and upon which a decision in this case could be rendered.

On March 15, 2013, Complainant filed a prehearing exchange incorporating by reference numerous exhibits attached to Complainant's Opposition to Respondent's Motion to Dismiss, originally filed March 8, 2013. Respondent never filed an official prehearing exchange, instead opting to submit a series of letters that have been subsequently filed with the Regional Hearing Clerk and are part of the record. Upon review of the documents provided by the parties, I have discovered inconsistencies and have several questions of clarification. Additional information is necessary for this Presiding Officer to understand and substantiate critical allegations of both parties. In my opinion, this case cannot be decided based on the current record.

Pursuant to 40 C.F.R. § 22.4(c)(5) the Presiding Officer may "[o]rder a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party."

This provision of the rules serves to assure that all facts are fully elicited and allows the Presiding Officer the opportunity to render a fair and impartial decision. Therefore, I am requesting both parties provide additional evidence as detailed below.

COMPLAINANT

Public water systems are defined to include only those systems that deliver water to at least 15 service connections or an average of at least 25 individuals on a daily basis for at least 60 days per year. 42 U.S.C. § 300f(4)(A) and 40 C.F.R. § 141.2. Evidence indicates that the Lodore Supper Club and Saloon (“Lodore”) water system delivers water to only one service connection. (Complainant’s Prehearing Exchange, Ex. No. 6, Pages 2 and 4 (2012 Sanitary Survey)). The record presents conflicting data regarding the number of individuals that the Lodore serves on a regular basis. Paragraph 4 of the Administrative Order submitted to Mr. Richard Smith on July 28, 2010 states that the system “regularly serves an average of approximately 210 individuals daily for at least 6 months out of the year.” The Complainant then alleges that the system “serves an average of approximately 50 individuals per day” during the summer season. (Complainant’s Prehearing Exchange, Page 6). Lastly, the 2012 Sanitary Survey estimates the winter population to be approximately 20 individuals. (Comp. Ex. No. 6, at 4). These conflicting numbers included in the record indicate a discrepancy in need of clarification.

Next, the Safe Drinking Water Act imposes water monitoring and reporting requirements on the supplier of water. 40 C.F.R. § 141.31. The supplier of water is defined to include “any person who owns or operates a public water system.” 42 U.S.C. § 300f(5) and 40 C.F.R. § 141.2. On December 18, 2007, EPA issued an Administrative Order to Respondent Kimmeri’s Kuisine, a corporation, as owner and/or operator of the Lodore (Docket No. SDWA-08-2008-0010). The accompanying letter identified Ms. Kim Eckerman as a Registered Agent. This Administrative

Order alleged that Kimmeri's Kuisine failed to monitor the Lodore water system for total coliform bacteria for the fourth quarter of 2006, and for the first, second, and third quarters of 2007, and failed to monitor for nitrate in 2006. On September 17, 2009, the EPA notified Ms. Eckerman that the Administrative Order had been closed because, as of December 2008, she was no longer the owner and/or operator of the Lodore Supper Club. This transfer of ownership/operatorship does not absolve the violations outlined in the December 2007 Administrative Order. Complainant Exhibits 1.j and 1.k are comprised of documents naming Ms. Eckerman. However, Ms. Eckerman is not a party to this complaint and the Administrative Order naming Kimmeri's Kuisine is no longer valid. The series of events and relationships surrounding these exhibits are convoluted and in need of clarification.

Accordingly, **IT IS ORDERED THAT** Complainant shall:

1. Produce any available evidence concerning the actual number of individuals that the Lodore water system served on a daily basis in 2010 and 2011.
2. Clarify and explain why and how the Lodore water system qualified as a public water system in 2010 and 2011.
3. Clarify and explain the legal position of Ms. Eckerman and Kimmeri's Kuisine regarding this matter.
4. Clarify and explain why Exhibits 1.j and 1.k were included in the record and provide a brief explanation as to how Complainant intends to utilize these exhibits at hearing.
5. Show cause concerning why the EPA has taken no administrative actions against any operator of the Lodore public water system.

RESPONDENT

Respondent, Mr. Richard Smith, never filed an official prehearing exchange, but instead submitted numerous letters and documents that have been filed with the Regional Hearing Clerk and subsequently entered into the record. On November 8, 2012, Mr. Smith submitted one such letter with numerous enclosed documents. Mr. Smith alleged that the new owner/operator of the Lodore Supper Club did conduct the requisite water monitoring on four separate occasions in 2011, contradicting Count I of the Complaint. However, the attached documents include only three water sample analysis reports and three case narratives from Inter-Mountain Labs with the following dates: November 22, 2010, May 18, 2011, and November 21, 2011. These three documents do not constitute sufficient evidence to validate Mr. Smith's claim that all requisite water monitoring was conducted in 2011.

Mr. Smith also alleged in his November 8, 2012 letter that the Lodore was closed to the public for a portion of those times outlined in the Complaint, presumably 2007-2011. However, there is no evidence provided by Mr. Smith to verify this claim.

Accompanying Mr. Smith's November 8, 2012 letter is a copy of the Complaint upon which Mr. Smith handwrote responses to Complainant's allegations. In response to Count III alleging Mr. Smith's failure to notify the public of having failed to monitor the Lodore's water system for total coliform during the fourth quarter of 2008 and the second and fourth quarters of 2009, Mr. Smith wrote, "deny." Mr. Smith wrote that Ms. Eckerman did provide the requisite public notice. However, Mr. Smith provided no evidence to verify this claim.

Accordingly, **IT IS ORDERED THAT** Respondent shall:

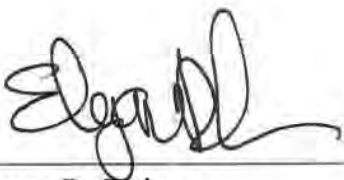
1. Produce any available evidence pertaining to every water analysis conducted for the Lodore during calendar years 2010 and 2011.

2. Produce any available evidence confirming that the Lodore was closed to the public for any period during 2007, 2008, 2009, 2010, or 2011.
3. Produce any available evidence that public notice was given for failure to monitor the Lodore water system for total coliform during the fourth quarter of 2008 and the second and fourth quarters of 2009.
4. Produce any available evidence describing Mr. Smith's inability to pay the proposed fine of \$1,200. Such evidence can include but is not limited to tax returns, balance sheets, income statements, statements of changes in financial position, statements of operations, retained earnings statement, loan applications, financial agreements, security agreements, or annual reports from the past 3 to 5 years.

In general, evidence may include but is not limited to documents, written testimony, and witnesses. 40 C.F.R. § 22.22. In the event that either party cannot, for any reason, produce the evidence requested in this order, that party **IS ORDERED** to provide a brief written explanation detailing the reason(s) for failure to produce. All responses to this order shall be made in accordance with the filing requirements contained in 40 C.F.R. § 22.5.

Both parties shall submit their responses to this order **on or before July 10, 2013**.

SO ORDERED, this 13th day of June, 2013.



Elyana R. Sutin
Regional Judicial Officer
Region 8

CERTIFICATE OF SERVICE

The undersigned certifies that the original of the attached **ORDER FOR PRODUCTION OF EVIDENCE AND CLARIFICATION** 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 June 12, 2013.


Further, the undersigned certifies that a true and correct copy of the document was delivered to, Margaret "Peggy" Livingston, Enforcement Attorney, U.S. EPA – Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. A true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt requested on June 12, 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 – Region 8
1595 Wynkoop Street
Denver CO 80202

June 12, 2013


Tina Artemis
Paralegal/Regional Hearing Clerk