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EPA REGION VIII
HEARING OFFICE

6 Attorney for Joseph Duvall (Craig Bar)

7 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
8 REGION 8

9 IN THE MATTER OF

Docket No. SDWA-08-2008-0088

10 Joseph Duvall
11 (Craig Bar)
12 Wolf Creek [sic], Montana

**ANSWER TO COMPLAINT,
DEMAND FOR HEARING ON
THE RECORD, REQUEST FOR
SETTLEMENT CONFERENCE**

13 Respondent,

14 Proceedings under section 1414(g)
15 of the Safe Drinking Water Act,
16 42 USC § 300g-3(g)

17 Respondent, Joseph Duvall (Craig Bar), for his answer to the civil
18 administrative Complaint filed by the Environmental Protection Agency [EPA],
19 admits, denies and alleges as follows:

20 FIRST DEFENSE

21 EPA's Complaint and Notice of Opportunity for Hearing fails to state a claim
22 against Respondent upon which relief can be granted in any of its counts, claims,
23 paragraphs, or at all, and therefore, should be dismissed.

24 SECOND DEFENSE

25 Without waiving his First Defense, Respondent answers the specific allegations
26 of the Complaint as follows:

- 27 1. Answering paragraph 1, Respondent admits.
- 28 2. Answering paragraph 2, Respondent admits that he owns a bar in Craig,
which has a well that is used to provide water for various purposes. The
primary purpose of the water system is not for "the provision to the

1 public of piped water for human consumption.” Instead, very little water,
2 a minute amount, is used for human consumption. Therefore, Respondent
3 denies the remaining allegations in paragraph 2.

- 4 3. Answering paragraph 3, Respondent denies that any water system at his
5 bar has 15 service connections. With respect to the number of people
6 served (25 people daily at least 60 days out of the year), Respondent has
7 not done any formal census at the bar, and is without sufficient
8 information at this time to admit or deny that allegation. Upon
9 information and belief, in the spirit of cooperation, and without waiving
10 any defense to be asserted at a later time based on an actual census,
11 Respondent guesses that his bar serves 25 people daily at least 60 days
12 out of the year. Respondent’s business has been damaged by certain
13 enforcement actions and the census is down. Insofar as any of the
14 remaining allegations constitute legal conclusions, Respondent is not
15 required to admit or deny, and all unanswered allegations in paragraph 3
16 are therefore denied.
- 17 4. Answering paragraph 4, Respondent admits that he owns a water system
18 and therefore supplies water. Insofar as any of the remaining allegations
19 constitute legal conclusions, Respondent is not required to admit or deny,
20 and all unanswered allegations in paragraph 4 are therefore denied.
- 21 5. Answering paragraph 5, Respondent admits that the source of the
22 System’s water is ground water from one well and that it is operational
23 year-round. Respondent denies the remaining allegations: the System
24 does not serve anywhere near an average of 80 persons per day and there
25 are three service connections: a bar sink and two bathroom sinks.
- 26 6. Answering paragraph 6, Respondent admits that EPA issued a letter and a
27 document denominated as an Administrative Order, that both were dated
28 July 11, 2007, and that the purported Order alleged violations of law.

1 Respondent denies all unanswered allegations in paragraph 6. In
2 addition, Respondent affirmatively alleges that he was denied due process
3 before the issuance of any "Order."

- 4 7. Answering paragraph 7, Respondent admits that a copy of the July 11,
5 2007 EPA letter and purported EPA Order of the same date are attached
6 as Exhibit 2 to the Complaint.
- 7 8. Answering paragraph 8, Respondent admits that EPA issued a letter
8 dated October 3, 2007. Respondent affirmatively alleges that the
9 document speaks for itself and that therefore he need not admit or deny
10 the remaining allegations in paragraph 7, and denies the same.
- 11 9. Answering paragraph 9, Respondent admits that a copy of the October 3,
12 2007 EPA letter is attached as Exhibit 3 to the Complaint.
- 13 10. Answering paragraph 10, Respondent admits that a copy of the
14 November 5, 2007 EPA letter (denominated "Administrative Order
15 Addendum") is attached as Exhibit 4 to the Complaint. Respondent
16 affirmatively alleges that the document speaks for itself and that he need
17 not admit or deny certain of the remaining allegations in paragraph 10,
18 and denies the same. Further, to the extent that any of the remaining
19 allegations constitute legal conclusions, Respondent is not required to
20 admit or deny, and all unanswered allegations in paragraph 10 are
21 therefore denied.

22 **Count I**
23 **Failure to Monitor for Nitrate**

- 24 1. Answering paragraphs 1 through 3 of Count I, Respondent is without
25 sufficient information, at this time, to admit or deny whether he collected
26 a nitrate sample within 30 days of the Order, or by August 14, 2007.
27 Respondent had been collecting samples for nitrate testing even before
28 the purported Order of July 11, 2007; for example, he possesses a

1 “Results of Chemical Analysis” for “Nitrate plus Nitrite as N” from a
2 sample collected on January 24, 2007 and reported on February 5, 2007.
3 It is possible that a sample was taken during that 30 day time frame, but
4 that Respondent has not been able to locate the result sheet. If there was
5 not such a sample taken, it was due to the bar being closed during that
6 time frame. The business was closed on August 29, 2007 and did not
7 reopen until November 2, 2007, due to an enforcement action brought by
8 the Lewis and Clark County Health Department -- that action commenced
9 essentially due to a clogged drain pipe.

10 Respondent also denies that he failed to monitor the System’s water for
11 nitrate during the first quarter in 2008. Respondent was aware of the
12 lengthy amount of time that it takes the Montana Environmental
13 Laboratory to analyze water samples for nitrate. As a result, Respondent
14 collected a water sample on December 4, 2007, and the results were
15 reported on January 2, 2008, during the first quarter of 2008. Any alleged
16 failure to monitor would be the result of an ambiguity in the law, the
17 slowness of the Lab in analyzing water samples for nitrate, etc. Without
18 waiving any defense, and in the spirit of cooperation, Respondent agrees,
19 in the future, to collect the water sample for nitrate during the quarter for
20 which the monitoring is required. Respondent personally collects the
21 samples for nitrate and coliform testing.

22 **Count II**
23 **Failure to Monitor for Chlorine Residual**

- 24 1. Answering paragraphs 1 and 2 of Count II, Respondent denies that there
25 was a failure to monitor the chlorine residual on December 6, 2007.
26 Respondent affirmatively alleges that the employee responsible for
27 monitoring the chlorine residual did so, but simply failed to record the
28 reading, likely out of inadvertence. Without waiving any defense, and in

1 the spirit of cooperation, Respondent affirmatively alleges that the
2 procedure for monitoring the chlorine residual has been improved since
3 receipt of the Complaint. Instead of 4, 5 or 6 different employees being
4 responsible for the monitoring, Respondent has now instituted a plan
5 involving only two employees being responsible for the monitoring and
6 he has selected employees deserving of high trust and confidence.

7 **Count III**
8 **Failure to Maintain Chlorine Residual of at least 0.2 mg/L**

- 9 1. Answering paragraphs 1 and 2 of Count III, Respondent admits that the
10 Continuous Disinfection System approved by DEQ and EPA
11 apparently failed to maintain a chlorine residual of at least 0.2 mg/L on
12 various of the dates identified in the Complaint. However, Respondent
13 denies that such failure to maintain was in violation of any order dated
14 July 11, 2008. Without waiving any defense, and in the spirit of
15 cooperation, Respondent affirmatively alleges that both the engineer of
16 the System and its installer have been actively involved in solving the
17 inconsistency problem since receipt of the Complaint. The
18 inconsistencies could have been caused by operator error or plumbing
19 problems related to an order and somewhat unknown system. In addition,
20 the Craig Bar uses so little water that the “tiny usage” factor leads to
21 inconsistent results. The installer has identified that two different types
22 of “pillows” for chlorinating the System were being used, one being five
23 (5) milligrams and one being ten (10) milligrams. In addition, some
24 operators were measuring total chlorine, while others were measuring free
25 chlorine. At this time, and for the future, only the ten (10) milligram
26 pillow will be used and only free chlorine will be measured. The
27 procedure for monitoring the chlorine residual has also been improved.
28 Instead of 4, 5 or 6 different employees being responsible for the

1 monitoring, Respondent has now instituted a plan involving only two
2 employees being responsible for the monitoring and he has selected
3 employees deserving of high trust and confidence. The time for
4 monitoring has been changed so that samples are taken in the evening
5 after water has run through the pipes, rather than being taken in the
6 morning, when the System has been at rest for a number of hours. A
7 greater degree of consistency has resulted from all of these changes and
8 the chlorine residual has been maintained of at least 0.2 mg/L since the
9 improvements discussed above were implemented.

10 **Count IV**
11 **Failure to Submit Plans for Installing Continuous Disinfection System**

12 1. Answering paragraphs 1 and 2 of Count IV, Respondent admits
13 that his engineer failed to submit plans and specifications for review and
14 approval to the State of EPA by the alleged deadline of August 14, 2007.
15 Respondent affirmatively alleges that the purported Order of July 11,
16 2007 was issued without first affording Respondent due process of law.
17 In addition, the alleged deadline of August 14, 2007, was before
18 Respondent retained counsel, which occurred on September 4, 2007.
19 Respondent was not informed by EPA of the need to retain counsel, and
20 was left with the understanding in July 2007 that all issues were resolved.
21 Further, as alleged above, the Craig Bar was closed from August 29, 2007
22 until November 2, 2007, and it was not clear until very close to the
23 reopening date whether variances would be granted by the Lewis and
24 Clark County Health Department such that the Craig Bar could be
25 reopened. Respondent further alleges that EPA waived any objection to
26 submission of plans after August 14, 2007, as the result of its
27 Administrative Order Addendum, dated November 5, 2007
28 (Complainant's Exhibit 4), issued three days after the Craig Bar reopened.

1 In that Addendum, EPA admitted that the “Action” item of “Submit to
2 EPA and the State detailed plans for providing continuous chlorination
3 and required well improvements” was completed on October 9, 2007.
4 The Addendum specifically provided that it constituted “written approval
5 by EPA of the schedule set forth in this letter,” which would have
6 included the submission of plans on October 9, 2007. Without waiving
7 any defense, and in the spirit of cooperation, Respondent affirmatively
8 alleges that even before counsel was retained, he had been working with
9 an engineer to develop an appropriate plan to address the need for
10 chlorination, however, the plans were never approved by the Department
11 of Environmental Quality [DEQ]. Once counsel was retained on
12 September 4, 2007, a different engineer was hired, and ultimately, that
13 engineer was able to develop a system for the Craig Bar which would
14 work, given the extremely small amount of water usage. Respondent’s
15 engineer submitted plans and specifications on October 9, 2007; a letter
16 of certification was mailed on November 11, 2007, and Respondent’s
17 engineer mailed copies of the as-built plans on December 24, 2007.
18 Respondent, through his engineer, worked diligently with government
19 regulators to achieve a workable system, under difficult circumstances.

20 **Count V**
21 **Failure to Provide Notice of Violations**

- 22 1. Answering paragraphs 1 and 2 of Count V, Respondent denies that he
23 failed to post public notices. Respondent admits that no EPA- approved
24 notice was posted within 30 days of the purported Order, which would
25 have been by August 14, 2007. Respondent affirmatively alleges that the
26 purported Order of July 11, 2007 was issued without first affording
27 Respondent due process of law. Respondent did not retain counsel until
28 September 4, 2007, and was not informed of the need to retain counsel.

1 Respondent further alleges that EPA waived any objection to any
2 failure to post a public notice by August 14, 2007, as the result of its
3 Administrative Order Addendum, dated November 5, 2007
4 (Complainant’s Exhibit 4), issued three days after the Craig Bar reopened.
5 (As alleged above, the Craig Bar was closed from August 29, 2007 until
6 November 2, 2007, thereby obviating any need to post a public notice
7 during that time – in a closed business). In its Addendum, EPA admitted
8 that the “Action” item of “Issue public notices for violations included in
9 the Administrative Order” was not required until “within two weeks of
10 reopening Craig Bar (November 15, 2007).” The Addendum specifically
11 provided that it constituted “written approval by EPA of the schedule set
12 forth in this letter,” which would have included posting of a public notice
13 by November 15, 2007. Without waiving any defense, and in the spirit of
14 cooperation, Respondent affirmatively alleges that his counsel worked
15 closely with the “primary agency” or DEQ as instructed by EPA,
16 beginning about October 31, 2007, to develop an approved notice for
17 posting. Approval of two different notices by DEQ [Sandi Ewing] and
18 EPA [Kimberly Pardue-Welch] was obtained and the notices were posted
19 for the required time, beginning within two weeks of reopening Craig
20 Bar, or by November 15, 2007.

21 **Count VI**
22 **Failure to Report Violations**

- 23 1. Answering paragraphs 1 and 2 of Count VI, Respondent denies that he
24 failed to report any nitrate monitoring violations during the first quarter in
25 2008 to EPA. Respondent, in good faith, took a sample to be tested for
26 nitrate on December 4, 2007, knowing the length of time it would take for
27 the Montana Environmental Laboratory to report its results. As expected
28 by Respondent, the results were reported during the first quarter of 2008,

1 on January 2, 2008. Rather than committing a violation, Respondent was
2 more diligent than required. Respondent affirmatively alleges that he
3 cannot report a violation when he did not realize one had been committed.
4 Without waiving any defense, and in the spirit of cooperation,
5 Respondent affirmatively acknowledges that he now understands EPA's
6 position that a water sample to be tested for nitrate needs to be taken,
7 rather than reported, during the applicable quarter.

8 THIRD DEFENSE

9 EPA delayed an unreasonable period of time before notifying Respondent as to
10 its position that he had violated the purported Order and is prevented from now
11 complaining as the result of the doctrine of laches.

12 FOURTH DEFENSE

13 EPA waived any right to raise certain alleged violations as a result of its
14 Addendum of November 5, 2007, and other conduct of EPA.

15 FIFTH DEFENSE

16 EPA worked with Respondent on many of the issues now claimed to be
17 violations and therefore is estopped to now assert that such issues are violations.

18 SIXTH DEFENSE

19 If EPA were worried about health issues, it would not have waited more than a
20 year from certain of the alleged violations, therefore has acquiesced in any alleged
21 violations by Respondent, and cannot now impose any penalties.

22 SEVENTH DEFENSE

23 EPA lacks jurisdiction over this matter, in whole or in part.

24 EIGHTH DEFENSE

25 EPA is to be the prosecutor and judge in this matter, which is inherently unfair
26 and denies Respondent due process of law. This matter cannot be decided by a
27 Hearing Clerk employed by EPA and must be transferred to a neutral forum with an
28 impartial judge.

1 **PROPOSED ADMINISTRATIVE PENALTY**

2 EPA is proposing an administrative civil penalty of \$1,250 against Respondent.
3 Respondent suggests that had EPA sent a warning letter, or even made a telephone
4 call, the filing and service of this Complaint and assessment of any penalty would
5 have been unnecessary.

6 If any penalty is to be assessed, it should be greatly reduced. If there were any
7 violations, they were not serious. Also given that there is not a large population at risk
8 (particularly since water is not consumed by very many patrons of the Craig Bar); that
9 there was absolutely no willfulness on the part of Respondent; that Respondent made
10 all efforts to comply once he understood the requirements; and given the tiny size of
11 the business, the town, and the enormous price tag paid to built a System meeting
12 EPA's requirements, the fine must be reduced.

13 **DEMAND FOR HEARING ON THE RECORD**

14 Pursuant to section 554 of the Administrative Procedure Act, 5 USC §§ 551 *et*
15 *seq.*, Respondent hereby demands a hearing on the record.

16 **REQUEST FOR SETTLEMENT CONFERENCE**

17 Pursuant to the invitation in the Complaint, Respondent hereby requests a
18 settlement conference on the issues of violation, and the amount of the proposed
19 penalty.

20 WHEREFORE Respondent prays for relief as follows:

- 21 1. That EPA's Complaint be dismissed with prejudice and no fine
22 whatsoever be imposed;
- 23 2. That Respondent be awarded his attorney fees and costs in defending this
24 action;
- 25 3. That if a hearing be held, a judge be appointed who is not associated with
26 EPA.
- 27 4. That if a hearing is held, the hearing be on the record;
- 28 5. That a settlement conference be conducted;

1 6. For such other and further relief as the judge or Hearing Clerk shall deem
2 just and appropriate.

3 DATED this 25th day of September, 2008.

4 THE MISSOURI RIVER LAW OFFICE P.C.

5
6 By JS
7 Kristi Blazer
8 Attorney for Respondent, Joseph Duvall
9

10
11 CERTIFICATE OF SERVICE

12 I HEREBY CERTIFY that a copy of the foregoing was served upon the persons
13 named below by mailing, hand-delivery, Federal Express or other overnight mail
14 service, or by telecopying to them a true and correct copy of said document.

15 U.S. Mail Hand-delivery Federal Express Fax
16 *Overnight mail*

17 Tina Artemis
18 Region 8 Hearing Clerk (8RC)
19 U.S. Environmental Protection Agency
20 1595 Wynkoop Street
21 Denver, Colorado 80202

22 Jean Belille
23 Enforcement Attorney
24 Office of Enforcement, Compliance
25 and Environmental Justice
26 U.S. EPA Region 8
27 1595 Wynkoop Street
28 Denver, CO 80202

this 25th day of September, 2008.

JS
Kristi Blazer