



On March 18, 1988, Complainant filed a Reply to Respondent's Motion to Dismiss (also intended to be a response to the ALJ's order to show cause) and, on March 27, 1998, Respondent filed a Response to Complainant's Reply to Motion to Dismiss.

As indicated previously, Respondent's motion to dismiss is based upon the assertion that the three water systems at issue are not "public water systems" as defined by the SDWA and regulations, because the systems do not have "at least fifteen regular service connections or regularly serve at least twenty-five individuals." Respondent's Answer, Grounds of Defense, and Motion to Dismiss at 4. This contention is supported by the affidavits of Heidi Hott and one Luther Powers, dated April 24, 1997.

Ms. Hott, identified as Olan Hott's daughter in the Response to Complainant's Reply to Motion to Dismiss, 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 identified in this action. She states that the West Leisure Valley System has 11 service connections used by "year-round" residents. These 11 service connections serve 24 persons. Additionally, she states that the West System temporarily serves 24 campers for hunting and fishing [purposes].

Ms. Hott states that the Central Leisure Valley System has four service connections used by "year-round" residents. These four service connections serve five persons. Additionally, she states that the Central System serves eight campers for hunting and fishing [purposes].

Ms. Hott says that the East Leisure Valley System has ten service connections used by "year-round" residents. These ten service connections serve 21 persons. Additionally, she says that 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 Leisure Valley water systems identified herein and confirms that the West Leisure Valley System has 11 service connections used by "year-round" residents, that the Central Leisure Valley System has four service connections used by "year-round" residents and that the East Leisure Valley System has ten service connections used by "year-round" residents.

Because the Leisure Valley West, Central and East Systems do not each have at least 15 service connections or regularly serve at least 25 individuals, Respondent argues that the systems are not "public water systems" as defined by the Act, 42 U.S.C. § 300f(4) or 40 CFR § 141.2, or "community water systems" as defined by 40 CFR § 141.2. Accordingly, Respondent asserts that the SDWA does not apply and that the complaints should be dismissed for lack of jurisdiction.

#### Complainant's Reply

In reply, Complainant says that the three water systems identified in the complaints are public water systems, subject to the requirements of the SDWA (Reply at 2). Complainant alleges that in August 1991, one month after EPA issued final Administrative Orders against the Respondents, the State of West Virginia conducted a site visit of each system and found that all three respondents met both the alternative jurisdictional criteria of the SDWA. [\(1\)](#)

As support for the above assertions, Complainant has attached the Declaration of David R. Thomas, an engineer and inspector employed by the West Virginia Department of Health and Human Resources. Mr. Thomas states that among his duties as an inspector are conducting sanitation surveys and annual and routine inspections of water supply systems. He says that he has inspected numerous water supply systems and that from 1991 to 1995 he inspected the Leisure Valley East, West and Central Systems a number of times, averaging at least one or two visits per year. Referring to an inspection of the Leisure Valley Systems conducted on September 26, 1991, Mr. Thomas states that he spoke with a

Mr. Al Williamson, the operator of the Leisure Valley Systems at the time, who informed him of the numbers [of people and service connections] shown on the

attached visit report.

The Official Visit Report signed by Mr. Thomas, dated September 26, 1991, identifies the facility as the Leisure Valley MHP (Mobile Home Park) and states that the East System had 25 [service] connections serving 60 people, that the Central System had 18 [service] connections serving 40 people and that the West System had 28 [service] connections serving 70 people. The report indicates that the Park has 100 sites and a maximum population [capacity] of 250 people. Mr. Thomas says that almost all the lots were occupied by a mobile home or a camper trailer and that each lot, whether or not occupied, had a connection for drinking water. Stating that many of the trailers and mobile homes had porches, fences, metal skirts as underpinning and/or blocks under the axles and could only be moved by a great deal of effort, he opined that these trailers and mobile homes were there on a permanent basis. On November 9, 10, and 12, 1993, Mr. Thomas conducted sanitary surveys of the Leisure Valley Central, East and West Water Systems, respectively (Declaration, dated March 12, 1998, at 2). He states that Mr. Williamson was still the operator of the three systems and that the service connection and people served numbers in the survey reports were provided by Mr. Williamson.<sup>(2)</sup> The Survey Report for the Central Water System, dated March 11, 1994, which was forwarded to Mr. Hott in Great Falls, Virginia, by a letter of even date, states, inter alia, that the system provides water to 15 residential connections. The Survey Reports for the East and West Systems, dated March 16, 1994, state that the East System provides water to 20 residential connections and that the West System provides water to 21 residential connections. These reports were forwarded to Mr. Hott in Great Falls, Virginia, by letters, dated March 16, 1994.

Mr. Thomas states that almost all the lots at the sites were occupied by either mobile homes or camper trailers and that each lot, whether occupied or not, had a connection for drinking water. He reiterates assertions that many of the trailers and mobile homes were there on a permanent basis and could only be moved with a great deal of effort. Additionally, Mr. Thomas states that other unidentified visits to the Leisure Valley Systems confirmed observations he made during the visit in September 1991 and the sanitary surveys conducted in November 1993.

As further factual support for its position that the water systems at issue are subject to the SDWA, Complainant has attached the Declaration of Gary K. Wilson, dated March 12, 1998. Mr. Wilson is also an engineer and inspector employed by the West Virginia Department of Health and Human resources. He conducted a sanitary survey of the Leisure Valley Central Water System on June 11, 1997, during which time he performed a "spot check" to determine the accuracy of the number of service connections stated in Heidi Hott's affidavit.<sup>(3)</sup> He concluded that the number of service connections stated by Ms. Hott was reasonably accurate. Mr. Wilson used a "rule of thumb" of 2.5 persons per service connection to estimate the population of the Leisure Valley Systems (Campground). He confirmed observations by Mr. Thomas during visits in 1991 and 1993 that many of the trailers and mobile homes were there on a permanent basis. Mr. Wilson estimated that the campground was approximately 75% full, apparently meaning that approximately 75% of the lots or sites were occupied [by trailers or mobile homes].

The Sanitary Survey Report referred to above was forwarded to Mr. Hott at Stephenson, Virginia by a letter, dated July 8, 1997. Among other things, the report states that the systems provide water service to approximately 74 residential customers, serving a population of approximately 185 people. The report notes that 25 of the customers are full-time residences and that the remaining residences are individually owned camps. The camps are reportedly connected to the systems "year-round" and owners may come and go as they please.

Complainant points out that the complaints allege that Respondents violated Administrative Orders, dated July 31, 1991, attached to the complaints (Reply at 2). Complainant further points out that in order to be a "public water system" as defined by the regulation (40 CFR § 141.2), a system of piped water to the public for human consumption must have at least 15 service connections or regularly serve an average of at least 25 individuals daily at least 60 days out of the year.

Complainant asserts that site visits by the State of West Virginia conducted within one month of the issuance of the Administrative Orders and subsequent thereto [described above] confirm that the Respondents herein met both of the alternative jurisdictional criteria of the SDWA (Reply at 2,3). Moreover, Complainant says the Respondent's conduct, i.e., monitoring and analyses reports were submitted at least part of the time, demonstrates that the systems were "public water systems" when the violations occurred.

Complainant points to the preamble to the initial SDWA regulations, 40 Fed. Reg. 59566 (1975), as evidence that, from the inception of the regulations, EPA intended that public accommodations, serving transients and having their own water systems, be subject to the Act, if the facilities had at least 15 service connections or served a daily average of at least 25 persons (Reply at 5). Such systems specifically listed included campgrounds, trailer camps, restaurants, motels, and other facilities having the requisite number of service connections or serving the requisite number of people. Such systems were designated "non-community water systems" which were defined simply as all public water systems which were not community water systems (40 CFR § 141.2).

Complainant emphasizes that the affidavits submitted by Respondent in support of the motion are dated some 14 months after the last violations cited in the complaints and alleges that the affidavits only address the then current status of the systems, rather than the status of the water systems at the time of the violations (Reply at 8). Moreover, Complainant contends that, even if taken at face value, the affidavits at most deprive Complainant of jurisdiction of only the Central System (Reply at 8).

According to Complainant, Respondent has acknowledged that Leisure Valley West has 35 service connections and that Leisure Valley East has 27 service connections. Complainant arrives at these figures by adding the number of connections stated in the Hott and Powers affidavits, 11 for the West System and 10 for the East System, to the number of campers appearing in Ms. Hott's affidavit, 24 and 17, respectively. Complainant argues that this addition is proper, because it establishes that the jurisdictional requirement of 15 service connections has been met even if some of the connections are inactive [for portions] of the year (Reply at 9).

In support of the above argument, Complainant cites an EPA memorandum "Guidance From Hotline Compendium", issued July 1992, Subject: Incremental Service Connections. The memorandum states that 40 CFR Part 141 does not address the treatment of unused service connections. It provides, however, that EPA's policy has been that a system which serves at least 25 people or has at least 15 service connections, meets the federal definition of a public water system, regardless of whether the connections are in use. The memorandum notes that States may, and some do, regulate systems with fewer service connections. The memorandum further states that EPA policy has also been that systems which do not have at least 15 service connections in use, or serve at least 25 people, are considered not to be "active" public water systems and are, therefore not required to comply with 40 CFR Part 141. This concept of "inactivity" is explained as being limited to systems which dip below the 15-connection threshold for a substantial period of time, i.e., a year or more. The memorandum reflects EPA recognition that some systems, such as mobile home parks or small housing developments, may have more than 15 connections, but whose used or active connections frequently fluctuate above and below the 15-connection threshold. The memorandum points out that regarding such systems as alternately subject and not subject to the regulations would create havoc with regulatory tracking and oversight and states that for this reason, EPA considers such systems to be active. It provides, however, that the States are free to use their own discretion in this regard.

In view of the foregoing, Complainant argues that a finding that all three systems were public water systems during the period covered by the complaints is consistent with the SDWA and that the motion to dismiss should be denied (Reply at 13).

Respondent's Response

Respondent alleges that subsequent to the filing of the complaints, Mr. Hott, at considerable personal sacrifice, cost, and time has complied with the recommendations of the State of West Virginia and closed the East and West Systems, connected all residents to the Central System, installed a chlorination tank for that system, obtained proper certification for its chief operator, and conducted recommended testing and sampling (Response at 2). Respondent further alleges that the system, which has been centralized and reworked, meets all of the requirements of the State of West Virginia and of EPA regardless of the number of service connections. Respondent contends that EPA's objective should be compliance with the requirements for the provision of safe water rather than to punish the operators of small water facilities by insisting on a fine once the operator has met the requirements of the State and of EPA.

Respondent asserts that his conduct is not relevant to whether the SDWA applies (Response at 3). Respondent says that his representatives were informed by government agents that the SDWA applied and argues that he was justified in relying on this advice. Respondent points out that his counsel raised the jurisdictional issue and, that, notwithstanding the advice of counsel that the SDWA might not apply, Respondent proceeded to comply with requirements of the State and of EPA in this respect.

Respondent points out that the numbers of service connections and of residents reported by West Virginia inspector David Thomas in reports of his September 1991 inspection and his November 1993 sanitary surveys were based upon hearsay statements and were not independently confirmed (Response at 4). Respondent notes that the Thomas reports do not distinguish between full-time residents and service connections used on a part-time basis by those engaged in hunting and fishing. Moreover, Respondent emphasizes that the number of service connections stated in the Hott and Powers affidavits were confirmed as "reasonably accurate" by West Virginia inspector Gary Wilson and contends that these figures should be used to determine jurisdiction. Respondent emphasizes that Complainant has the burden of presenting a prima facie case and asserts that Complainant may not carry that burden by relying on unconfirmed hearsay statements.

Respondent points out that using the figures in the Heidi Hott affidavit the 12 full- and part-time connections in the Central System do not meet the requirements of a "public water system" and alleges that Complainant has conceded that fact (Response at 4). Regarding the West and East Systems, Respondent says that Complainant's position appears to be that all service connections are to be counted in determining jurisdiction irrespective of whether the connections are used full-time, once a year, or not at all. Respondent argues that as a matter of logic, service connections used on a temporary basis or not at all should not be counted in determining jurisdiction (Response at 5).

#### Discussion

SDWA § 1401(4), 42 U.S.C. § 300f(4), defines a "public water system" as follows:

The term "public water system" means a system for the provision to the public of piped water for human consumption, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals. Such term includes (A) any collection, treatment, storage, and distribution facilities under control of the operator of such system, and (B) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

The regulation, 40 CFR § 141.2, defines "regularly serves at least twenty-five individuals" as meaning "regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year":

Public water system or PWS means a system for the provision to the public of piped water for human consumption if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals at least 60 days out of the year. Such term



includes (1) any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and (2) any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. A public water system is either a "community water system" or a "noncommunity water system".

A "community water system" means a public water system which serves at least 15 service connections used by year-round residents or regularly serves at least 25 year-round residents. 40 CFR § 141.2. All other water systems are "noncommunity water systems".(Id.)

In accordance with SDWA § 1414g-3(g)(3)(A), 42 U.S.C. § 300 g-3(g)(3)(A), a civil penalty under the Act may only be assessed for violation of an [administrative] order. Administrative Orders attached to the complaints are dated July 31, 1991, and the validity of the orders depends initially upon whether the Leisure Valley Water Systems were "public water systems" on that date. As noted, Complainant relies upon the inspection conducted by Mr. Thomas of the West Virginia Department of Health on September 26, 1991, which states that he was informed by Mr. Al Williamson, identified as the operator, that the West System had 28 connections serving 70 people, that the Central System had 18 connections serving 40 people and that the East System had 25 connections serving 60 people. Respondent argues that these statements are hearsay and were not confirmed by Mr. Thomas' independent observation and thus, should not be credited over the Hott and Powers affidavits. The Administrative Orders were issued to Mr. Olin Hott [Olan Hott] as the owner and operator of the systems on July 31, 1991, and Mr. Williamson's relationship to Olan Hott whether lessee, employee or other agent is not explained. If Mr. Williamson was an agent or employee of Olan Hott, his statements may be regarded as binding admissions rather than unconfirmed hearsay.

Mr. Williamson is reported as being the operator of the Leisure Valley Systems at the time of the sanitary surveys conducted by Mr. Thomas in November 1993. The West System was reported to have 21 residential connections, the Central System was reported to have 15 residential connections and the East System was reported to have 20 residential connections. Although the reports do not distinguish between full- and part-time service connections, the survey reports prima facie reflect that the number of service connections equal or exceed the number required to be a "public water system" under the Act and regulations. The reports identify Mr. Hott as the owner and were mailed to him in Great Falls, Virginia in March of 1994.

The Administrative Orders required Mr. Hott to, inter alia, comply with 40 CFR § 141.21(a) by sampling and analyzing for coliform bacteria a minimum of one time each month, three times each calendar quarter. Violations of this requirement cited in the complaints were for various months beginning in May 1992 and ending in January 1996. In this regard, Complainant alleges that the Hott and Powers affidavits speak only as of the date executed, April 24, 1997, and may not be accepted as evidence that the systems at issue were not public water systems at earlier times, e.g., January 1996, the month of the last failure to sample and analyze alleged in the complaints. The affidavits do not state the date or dates the systems were inspected and Respondent's Response does not directly address this question. Moreover, it is not clear whether a significant number of the service connections could be considered "inactive" during all or portions of the period of the alleged violations.

Respondent's obligations under the orders are dependent upon the systems being, and continuing to be, public water systems. It is concluded that this issue should not, and may not, be decided on the present record. It follows that the motion to dismiss will be denied and the jurisdictional and, if necessary, other issues will be decided after a hearing.

#### Order

Respondent's motion to dismiss is denied.<sup>(4)</sup>

Dated this 14th day of May 1998.

Original signed by undersigned

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Spencer T. Nissen  
Administrative Law Judge

1. Administrative Orders attached to the complaints, dated July 31, 1991, identify the owner and operator of the systems as Mr. Olin Hoot.
2. The Survey Reports do not contain any data on the number of people served by the residential connections.
3. The Sanitary Survey Report, dated June 26, 1997, is confined to the Central Water Treatment and Distribution System, because the systems are being consolidated so that the well for the Central System will serve the three systems.
4. By a contemporaneous order, the parties are directed to exchange prehearing information.

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