UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 3
Philadelphia, Pennsylvania

IN THE MATTER OF:	)	
	)	
Marley Industries Corporation	)	
	)	
	)	
RESPONDENTS	)	DOCKET NO. III-89-011-DS
	)	
	)	
	)	

DECISION AND FINAL ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the issuance of an administrative order requiring compliance and assessing a civil penalty under subsection 1423(c)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. 300h-2(c)(2). The proceeding is governed by the United States Environmental Protection Agency's (EPA) "GUIDANCE ON UIC ADMINISTRATIVE ORDER PROCEDURES," issued November 28, 1986 (GUIDANCE). This is the DECISION AND FINAL ORDER OF THE REGIONAL ADMINISTRATOR under 144.111 of the GUIDANCE.

The parties are the Director of the Water Management Division, U.S. EPA Region III, and Marley Industries Corporation, a New Jersey corporation engaged in the business of drilling for oil and gas in northwestern Pennsylvania. The dispute involves the drilling and operation of Well No. 88, a gas flood enhanced oil recovery injection well, on the Dunn Lease in Allegheny Township, Venango County, Pennylvania, in 1987 and 1988.

STATUTORY BACKGROUND The objective of the SDWA is to protect public health by assuring a continuing supply of high-quality drinking water. The SDWA established mechanisms for the regulation of public drinking water supply systems, for designation of wellhead protection areas and sole source aquifers, and for the protection of underground sources and potential sources of drinking water from underground injection of hazardous wastes, oil and gas extraction wastes and other fluids. This latter program, under Part C of the SDWA, "Protection of Underground Sources of Drinking Water," is the statutory

mechanism for Underground Injection Control (UIC), a system of requirements for the design, construction, operation and monitoring of underground injection wells.

EPA published regulations for all UIC programs (40 C.F.R. Parts 144 and 146) and for state UIC programs (40 C.F.R. Parts 145 and 147) pursuant to section 1421 of the SDWA, 42 U.S.C. 300h. The states were to assume primary authority for UIC program administration under section 1422 of the SDWA, 42 U.S.C. 300h-1, but many states, including Pennsylvania, did not qualify for UIC program primacy, so EPA administers the program in those states under subsection 1422(c) of the SDWA, 42 U.S.C. 300h-1(c).

Any underground injection, except as authorized by permit or by rule, is prohibited by subsection 1421(b)(1)(A) of the SDWA, 42 U.S.C. 300h(b)(1)(A), and 40 C.F.R. 144.11. Rule authorization, for existing wells only, is covered at 40 C.F.R. 144.2l-144.28. The construction of any well required to have a UIC permit is prohibited until the permit has been issued. 40 C.F.R. 144.11.

Section 1423 of the SDWA, 42 U.S.C. 300h-2, provides for administrative, civil judicial and criminal enforcement actions against persons subject to UIC program requirements found to be in violation of those requirements. (Only willful violations may result in criminal prosecution) . Administrative enforcement by compliance order with or without penalty assessment ($125,000 maximum assessment) is provided for in subsection 1423(c) of the SDWA, 42 U.S.C. 300h-2 (c), which distinguishes between UIC activities related to oil and gas production or extraction ($5,000 per day maximum penalty) and UIC activities not related to oil and gas production or extraction ($10,000 per day maximum penalty). Before issuance of an order under this subsection, EPA must give the person to whom it is to be directed ritten notice of the proposed order and the opportunity to request, within 30 days of receipt of the proposed order, a hearing on the order's terms. Subsection 1423 (c)(3)(A) of the SDWA, 42 U.S.C. 300h-2 (c)(3)(A) EPA must also provide public notice of, and a reasonable opportunity to comment on, any proposed order. Subsection 1423(c)(3)(B) of the SDWA, 42 U.S.C. 300h-2(c)(3)(B).

PROCEDURAL BACKGROUND

The Water Management Division Director of Region III of EPA initiated this action under 144.102(a) of the GUIDANCE on March 2, 1989, issuing to Marley Industries Corporation (Respondent or Marley) a Notice of Violation, Intent to Issue Administrative Order with Penalty and opportunity to Request a Hearing (Proposed order). In the Proposed Order EPA alleged in substance that Respondent was in violation of the SDWA and the UIC regulations for constructing and operating an injection well without a UIC

permit. EPA proposed to assess a Civil penalty of $33,500 and to prohibit Respondent from operating the well in question as an injection well "unless and until it applies for and obtains a permit from EPA to construct and operate this well." EPA published public notice of the Proposed Order and provided an opportunity for public comment in accordance with subsection 1423(c)(3)(B) of the SDWA, 42 U.S.C. 300h-2 (c)(3)(B), and 144.102(b) of the GUIDANCE in The Derrick (Oil City, Pennsylvania) and in The News-Herald (Franklin, Pennsylvania) on March 7, 1989. EPA received no public comment.

Counsel for Respondent (who later withdrew his appearance) requested a hearing in accordance with 144.104(a) of the GUIDANCE by letter dated March 21, 1989, and supplemented that request by letter dated April 5, 1989.

By Order of Assignment dated June 14, 1989, I delegated the authority to act as Presiding Officer under 144.103 of the GUIDANCE to Elizabeth S. Spencer. Ms. Spencer withdrew as Presiding Officer on August 10, 1989, and I appointed Joseph J.C. Donovan as Presiding Officer on September 29, 1989.

Counsel for Respondent withdrew his appearance on January 20, 1990 and thereafter Respondent was represented by its president, Mr. Harry Zucker. The Presiding Officer scheduled a hearing for October 3, 1990, but then postponed the hearing to November 7, 1990 because Federal funding problems. On Repondent's uncontested motion, the hearing was further postponed sine die and a prehearing exchange was scheduled by Order of the Presiding Officer dated October 31, 1990. After the prehearing exchange the Presiding Officer ordered the parties to file a Statement of Stipulated Facts by December 6, 1991, and rescheduled the hearing for January 28, 1992. The parties filed their Statement of Stipulated Facts as ordered, but EPA moved to reschedule the hearing. This motion was granted and the hearing was set for February 11, 1992. The administrative record of this case does not show why the hearing was not held on February 11, 1992, but the Presiding Officer issued an Order on May 5, 1992, scheduling the hearing for June 23, 1992.

Mr. Donovan withdrew as Presiding Officer on May 15, 1992 and I designated Benjamin Kalkstein as Presiding Officer on May 18, 1992. The hearing was held on June 23, 1992. After the hearing the Presiding Officer set a deadline of August 14, 1992 for submission of written post-hearing statements by the parties under 144.109(j) of the GUIDANCE. Both parties submitted post-hearing written statements for consideration by the Presiding Officer.

On August 18, 1992, the Presiding Officer issued orders excluding certain settlement-related information from the administrative record, granted EPA's motion to amend the Proposed Order to conform to the evidence adduced at the hearing, and closed the administrative record to further submissions by the

parties.

STATUTORY ELEMENTS OF LIABILITY AND REMEDY

To support issuance of a final order under subsection 1423(c) of the SDWA, 42 U.S.C. 300h-2(c), and 144.111(a) of the GUIDANCE, the administrative record must show, by a preponderance of the evidence that:

The conduct alleged to be in violation of the SDWA and UIC regulations took place while Pennsylvania did not have primary enforcement responsibility for underground water sources;

Respondent was and is a "person" as the term is defined in subsection 1401(12) of the SDWA, 42 U.S.C. 300f(12), and 40 C.F.R. 144.3;

Respondent was subject to a requirement of the applicable UIC program in Pennsylvania in 1987 and 1988;

Respondent violated a requirement of the applicable UIC program in 1987 and/or 1988;

The nature of the violation(s) is stated in the order with reasonable specificity;

The requirement for compliance does not specify an unreasonable time for compliance; and

The penalty assessment, if any, takes into account appropriate factors, including (i) the seriousness of the violation, (ii) the economic benefit (if any) resulting from the violation, (iii) any history of such violations, (iv) any good faith efforts to comply with the applicable requirements; (v) the economic impact on the violator; and (vi) such other matters as justice may require.

DISPUTED ISSUES

EPA originally asserted in the Proposed Order that Marley was subject to and in violation of the UIC regulations first as an owner (since March, 1987) and then as an owner/operator (since July 15, 1987) of Well 88. The record contains no evidence that Marley ever owned Well 88. The record shows that Marley acted as a contractor for the lease owner, Prime Petroleum Group, L.P. (Prime), not a party to this action, in its activities on the Dunn Lease. Prime's leasehold covers about 22.5 acres of the 210-acre "Dunn lease; there are a total of nine wells, including Well No. 88, on Prime's leasehold. At hearing and in her post-hearing submission, counsel for EPA asserted that Marley was subject to the UIC program as an operator from March 6, 1987 until July 15, 1987, while Olympia Oil Services, Inc., Marley's contractor, drilled and operated Well No. 88, because of Marley's contractual relationship with Olympia, and from July 15, 1987 until injection ceased in February 1988, as sole operator of Well No. 88, Counsel for EPA moved at the hearing to have the Proposed Order conform to the evidence in this regard.

Respondent denies that it was subject to any requirements of the applicable UIC program and that it violated any UIC program requirements. Respondent takes the position that Olympia drilled and operated Well No. 88 in partial performance of Olympias obligations under the "Turnkey Drilling Agreement," discussed below, and that Olympia employees retained physical control over Well No. 88 and prevented Marley from exercising any degree of control over the well until early 1988. Marley maintains that injection operations ceased before it gained physical control of the well and that Marley never injected into the well. Marley believes that if there is any SDWA liability arising out of the drilling and operation of Well No. 88, that liability is Olympia's under the terms of the "Turnkey Drilling Agreement." Marley did not object at the hearing to EPA's motion to conform the pleadings to the evidence, since Marley would not have presented a different defense to the allegation that it was an operator prior to July 15, 1987. The record does not show what notice, if any, EPA gave Marley with respect to the change in legal theory. The Presiding Officer granted EPA's motion to conform the Proposed Order to the evidence by Order dated August 18, 1992.

WHAT THE EVIDENCE SHOWS

The "Turnkey Drilling Agreement" for the Prime/Marley project on the Dunn Lease established the terms of the relationship between Respondent and Olympia, at least for the period of its amended term, December 26, 1986 through July 15, 1987. EPA asserted that this relationship was one of principal and agent, pointing to Marley's ability to halt the project by withdrawal of its financing and to certain aspects of Marley's "managerial authority" over the project. EPA asserts that Marley's SDWA liability during the March 6-July 15, 1987 period is based on that principal/agent relationship.

Respondent raised the "Turnkey Drilling Agreement" as a shield from SDWA liability, pointing to the terms that required Olympia to acquire all necessary permits and to abide by all applicable laws and to the nature of "turnkey" agreements.

The term "turnkey" has a fixed and definite meaning in the drilling industry inferring completion of a project to the point of operational readiness. In a true turnkey drilling agreement the contractor delivers a finished, ready to operate capital asset, a well, in exchange for the specified consideration, normally a sum of money, from the well owner. The contractor bears all of the risk of inclement weather, technical obstacles and unforeseen problems as an independent contractor, but the contractor is not under the control of the well owner. The well owner is not liable for the acts or omissions of the independent contractor. The relationship is not one of principal and agent.

The "Turnkey Drilling Agreement" between Respondent and

Olympia contains several provisions that run counter to the notion of independence and instead suggest a relationship of agency between the parties to the contract. In Paragraph 3 Marley retained the right to decide whether completion of the wells was economically feasible and if so, to require completion. In Subparagraphs 4 D and F Marley retained a measure of control over Olympia's costs associated with the completion of the wells. Paragraph 7 provided for periodic payments by Marley and prohibited Olympia's use of the injection well compressor for other purposes without Marley's consent. In Paragraph 8 Marley retained the right to approve the cost of additional fracts (measures used to induce the flow of oil in production wells). Paragraph 9 provided that the cost of compliance with any laws presently existing and subject to changes in enforcement or interpretation as they relate to the business of Marley, were to be borne by Marley. Under Paragraph 10, Marley was to have been named as an insured party in Olympia's insurance coverage for the project. Paragraph 12 required Olympia to file weekly written field reports with Marley. These provisions undercut Marley's position that it had no control over Olympia during the drilling and initial operation (March-July 15, 1987) of Well No. 88. Marley had the legal right to a measure of operational control over the drilling, completion and initial operation of Well No. 88. Although Marley may have had a good deal of difficulty exercising that right, the existence of the right to some measure of operational control is a sufficient basis to treat Marley as an operator under the UIC program between March 6 and July 15, 1987.

Olympia applied to the Pennsylvania Department of Environmental Resources (PADER) for a permit to drill Well No. 88, a new oil well, on February 5, 1987. Olympia was designated the well operator in the application. PADER's Regional Director of the Bureau of Oil and Gas Management approved the application and issued Olympia, as well operator, Permit No. (OSS-4) 37-121-42222-00 on February 18, 1987. The Well Record, showing Olympia as well operator, indicates that Well No. 88 was drilled March 6-7, 1987. The Well Record was dated May 18, 1987 and was stamped "received" by PADER on June 17, 1987. The Request to Transfer Well Permit or Registration, signed by Olympia and Marley, was dated July 2, 1987, was stamped "received" by PADER on July 7, 1987 and was approved by PADER's Regional Director on August 20, 1987, transferring the status of operator, for purposes of Pennsylvania law, from Olympia to Marley.

A series of letters beginning in August of 1987 and ending in February of 1988, from R. Kim Clark, Marley's agent, to Marley's president indicates that Marley continued operation of Well No. 88 after Olympia terminated its performance under the "Turnkey Drilling Agreement." Mr. Clark paid Barney Hanlon, who apparently had been pumping oil elsewhere on the Dunn Lease for Olympia, to maintain the pumping and injection operations on

Prime's portion of the Dunn Lease or Marley until January 1, 1988 when Mr. Clark took over this responsibility. In his letters of January 14 and February 13, 1988, Mr Clark recommended conversion of Well No. 88 from injection to production because of declining oil production on the lease and because, based on his personal observation, "the gas injection system freezes" and "we really don't get results from it."

By letter dated December 28, 1987, Marley's attorney notified Olympia that Marley intended to seek redress for Olympia's alleged breaches of the "Turnkey Drilling Agreement," specifying, among other things, Olympias failure to obtain a UIC permit for Well No. 88. According to this letter, Marley's president reminded Olympia in June of 1987 of the need for a UIC permit for Well No. 88. This letter suggested that Marley, its president and Prime Petroleum Group, L.P., were all exposed to civil and criminal penalties under EPA regulations because of Olympia's actions and omissions.

According to Mr. Clark's February 13, 1988 letters, Marley learned from PADER's Oil and Gas Inspector, Roy Pittman, that Olympia had presented Well No. 88 to PADER as a producing oil well rather than as an injection well and Marley intended to advise EPA about the matter Marley asked Mr. Pittman for a copy of the Well Record on April 12, 1988, Marley's attorney requested an EPA inspection by letter dated April 28, 1988. Mr. Pittman and EPA's inspector, David Rectenwald, went to the Dunn Lease on May 20, 1988, and located, observed and photographed Well No. 88, confirming that it had been set up as an injection well, although it was not in operation that day. Mr. Rectenwald's photographs of the well, which was clearly marked "88 INJ," are in the record.

Mr. Rectenwald's inspection report was reviewed by EPA's UIC personnel, who confirmed that no UIC permit had been issued by EPA for Well No. 88, and they decided to seek further information regarding its construction and to determine whether Well No. 88 had been used for unauthorized injection. On August 15, 1988, EPA sent Olympia a letter requesting information. EPA's letter did not cite any statutory or regulatory authority to compel the submission of the information requested, Olympia's response, dated August 23, 1988 (but not signed), provided dates of construction consistent with the Well Record and stated that injection of natural gas, obtained from surrounding producing wells, had commenced at 12:00 Noon, May 9, 1987. The letter stated that Olympia transferred the PADER permit to Marley and terminated all its connection with the Marley-Dunn Lease on July 15, 1987, that injection into Well No. 88 ended sometime in 1988 and provided general information on Olympias business operations. EPA confirmed that this letter was submitted by Olympia's president, William Henderson, in later telephone discussions with

him.
EPA discussed the UIC program requirements with Marley on September 23, 1988, and then provided written materials on the UIC program by letter dated October 6, 1988. In this letter EPA asked for a copy of the contract between Marley and Olympia. EPA cited no statutory or regulatory authority to compel the submission of the contract. "This information is needed in order to relieve you from any liablity for illegal injection on the Dunn property," EPA wrote. Marley's attorney responded by letter dated November 1, 1988, enclosing a copy of the "Turnkey Drilling Agreement" and amendment.

The parties did not file any written direct testimony in the prehearing exchange, although they did submit narrative summaries signed by their representatives entitled "Complainant's Direct Testimony," "Direct Testimony of Respondent" and "Complainant's Rebuttal Evidence." In the Background section of "Complainant's Direct Testimony," counsel for EPA explained: "Complainant is only required to summarize the basis for the administrative order in its presentation at the hearing and, presumably, in its direct testimony. (See Guidance 144.109(e).)" Respondent adopted this approach in its prehearing exchange. The parties seem to have overlooked 144.108 of the GUIDANCE, which calls for the submission of all evidence in written form unless the Presiding Officer authorizes oral presentation, and which contemplates cross examination by both parties. The prehearing exchange should have included sworn witness testimony rather than the narrative summaries actually submitted, because at that point the Presiding Officer had not authorized the oral presentation of evidence. Such authorization was granted prior to the June 23, 1992 hearing.

At the hearing, EPA presented the testimony of four witnesses. Steven Platt, EPA's Regional UIC Expert, described the UIC program, the general purpose and structure of an enhanced recovery injection well, and testified that EPA had never received an application for Well No. 88. Mr. Platt said he had never been on the Dunn Lease, and had never seen Well No. 88.

Roy Pittman, PADER's Oil and Gas Inspector, presented the PADER Permit Application, Well Permit, Well Record, and Request to Transfer Permit from PADER's files. (The Presiding Officer returned the originals to Mr. Pittman after the hearing, retaining copies for the record.) Mr. Pittman summarized his communications with Marley and EPA, and described his inspections of Well No. 88. On May 20, 1988, Mr. Pittman saw the well set up for injection, but not in operations; on January 14, 1992, he saw the well set up as a production well.

David Rectenwald, a geologist employed by the Cadmus Group, is a UIC field inspector under government contract. Mr.

Rectenwald described his receipt of the April 28, 1988 letter from Marley's attorney requesting an EPA inspection of Well No. 88, his May 20, 1988 inspection, conducted with Mr. Pittman, the photographs of Well No. 88 he took that day and the report he forwarded to EPA after the inspection.

Roger Reinhart, UIC Compliance Enforcement Team Leader for EPA, described EPA's review of the PADER documents and Mr. Rectenwald's inspection report and outlined EPA's subsequent information-gathering activities involving Olympia and Marley. Mr. Reinhart testified that EPA determined, after reading the "Turnkey Drilling Agreement," that Marley and Olympia both fit the UIC Program definition of "operator," and that EPA then issued proposed administrative orders to Olympia and Marley, proposing identical penalties of $33,500 for both. Mr. Reinhart did not explain why EPA initially alleged that Marley was an owner, rather than an operator, in the March 6-July 15, 1987 time period. Mr. Reinhart said EPA based Marley's proposed penalty for unauthorized construction of the well and for unauthorized injection on a 67-day period (May 9-July 15, 1987) of violation, calculated at $500 per day. EPA used 67 days as the period of violation because that was the period Olympia's president had confirmed that injection took place, according to Mr. Reinhart. Mr. Reinhart said EPA also took into account the expected economic impact of the penalty and the cooperation that Marley had shown EPA in its information-gathering. Mr. Reinhart was never on the Dunn Lease and never saw Well No. 88.

Marley presented only the testimony of its president, Harry Zucker. Mr. Zucker presented a proposed joint statement of stipulated facts, which EPA had declined to sign, as the only document Marley wanted included in the record that was not already admitted. Mr. Zucker recited the substance of the self-serving language in the proposed statement that EPA had refused to sign. On cross-examination, Mr. Zucker attempted to rationalize the Clark letters that recite Mr. Clark's observation of operation of Well No. 88 as an injection well in January and February of 1988. After insisting that Marley never employed Barney Hanlon, and after asserting that Olympia operated the Prime project until January of 1988, Mr. Zucker eventually conceded that Barney Hanlon took care of the Prime/Marley project on the Dunn Lease on Marley's behalf until January, 1988. Mr. Zucker admitted that he knew a UIC permit was required for Well No. 88 in June of 1987, but testified that he knew of no way to determine whether a UIC permit had been issued. Mr. Zucker stated that he was still studying the UIC permit application materials EPA sent Marley in October of 1988. Mr. Zucker also testified that he is the general partner in Prime Petroleum Group, L.P. Mr. Zucker insisted that Olympia was the operator of Well No. 88 during drilling and construction, and at all times

the well was operating as an injector.

FINDINGS OF FACT

The parties filed a Joint Statement of Stipulated Facts on December 6, 1991 in accordance with the Presiding Officer's Order of November 21, 1991. I adopt those stipulated facts, as modified by evidence in the record, as findings of fact as follows:

1) Respondent, Marley Industries Corporation (Marley), is a New Jersey corporation having its principal offices in White Plains, New York. Its corporate purpose, according to its certificate of incorporation, is to engage in the business of drilling for oil and gas in northwestern Pennsylvania.

2) Olympia Oil Services, Inc. (Olympia) is a Pennsylvania corporation having its principal offices in Pleasantville, Pennsylvania.

3) On December 26, 1986, Marley and Olympia entered into a "Turnkey Drilling Agreement" which was subsequently amended on June 30, 1987. The original agreement defined Marley as the "Driller" and Olympia as the "Subcontractor" and provided among other things that:

> Olympia shall drill and complete or plug eight (8) production wells (numbered 80, 82, 83, 84, 85, 86, 87, and 89) and one (1) injection well (numbered 88), according to the specifications in the agreement, on a leasehold (known as the Dunn Lease, the subject of this action) held by Marley in Venango County, Pennsylvania;
>
> Olympia shall make all data pertaining to the drilling, logging and completion of the wells available to Marley, and the logs shall become the property of Marley;
>
> Olympia shall acquire all tools and equipment necessary to complete the drilling operation at its own expense and [that] all materials, pipes and supplies used in the fulfillment of Olympia's obligations under the agreement shall become the property of Marley;
>
> Olympia shall obtain all necessary permits for drilling the wells and shall comply with all Federal, State and local rules and regulations together with all rules and regulations of any governmental agency having jurisdiction;
>
> Marley shall pay Olympia $22,516.88 for each production well, $17,516.88 for the injection well and $5,000.00 for one compressor, in four equal segments from the execution of the contract to the completion of the project and the commencement of production.

4) The original agreement provided that the project would be

completed by June 30, 1987. The June 30, 1987 amendment extended the completion date to July 15, 1987, required Marley to make a final payment of $50,625.00 in consideration of Olympia's agreement to perform specific tasks as outlined in the amendment, required Olympia to transfer all well permits issued by the Pennsylvania Department of Environmental Resources (PADER) to Marley by July 15, 1987, and Olympia indemnified Marley for all liabilities arising out of work done by Olympia under the agreement.

5) On February 18, 1987, Olympia acquired a permit from PADER to drill Well No. 88 on the Dunn Lease.

6) Olympia drilled Well No. 88 to approximately 600 feet on March 7, 1987. On May 18, 1987, Olympia's president signed a completion report for Well No. 88, and that report was received by PADER on June 17, 1987. Olympia reported Well No. 88 as a producer and not as an injector.

7) On July 7, 1987, Olympia and Marley requested that PADER transfer the permits for all nine wells to Marley. PADER approved that request on August 20, 1987.

8) Marley appointed R. Kim Clark of Seneca, Pennsylvania to monitor Olympias performance and its compliance with the Turnkey Drilling Agreement and to report back on the same to Marley. However, on May 17, 1987, Clark was physically attacked by Olympia employees or agents and ordered to leave the premises and not to return. Olympia then built a chain link fence and gate at the entrance road to the Dunn Lease and padlocked the gate.

9) Olympia acted as the on-site driller and on-site operator of the Marley wells on the Dunn Lease until July 15, 1987. Olympia's performance under the "Turnkey Drilling Agreement" ended on July 15, 1987. The maintenance of the completed wells was assigned to Barney Hanlon. Under duress and fear, Clark consented to Hanlon's request that he (Hanlon) be allowed to continue pumping the oil wells after Marley received the permits.

10) By letter dated January 14, 1988, Clark reported to Marley regarding a fire on the Dunn Lease which occurred during the "last month." Clark stated that he had notified Hanlon that he (Clark) would be "pumping the lease" as of January 1, 1988. He stated that "the gas injection system freezes," and "we really don't get results from it."

11) In February, 1988, Marley contacted PADER and asked its inspector, Ray Pittman, to inspect the Dunn Lease, with specific attention to Well No. 88, and to send a copy of his report to Marley.

12) In a letter to Marley dated February 13, 1988, Clark stated that he understood "that you learned from Roy Pittman that the injection Well No. 88 was presented to [PADER] as a producing oil well and that you plan to contact the [EPA] representative. Dave Rectenwald, to advise him about it."

13) Marley contacted EPA by letter dated April 28, 1988 to request that an EPA inspector visit the lease to inspect Well

No. 88.

14) EPA inspector David Rectenwald inspected the site on May 20, 1988. According to his report, the compressor was not attached to the pressure plant as of May 20, 1988, and there was no injection into the well at that time.

15) On December 19, 1988, a second fire broke out at the Dunn Lease, twelve days after Marley and others filed a lawsuit in federal court, naming Olympia and its president as defendants, alleging multiple violations of the RICO statute in Olympia's activities on the Dunn Lease.

16) In October 1990, Halliburton Oil Services, under a contract with Marley, completed for Marley the drilling and completion of Well No. 88 as a producer, and it has been on pump since that time.

In addition to the foregoing stipulated findings, the record shows, by a preponderance of the evidence, that:

17) Natural gas was injected into Well No. 88 for 155 days, more or less, from May 9, 1987, through February 1, 1988.

18) No application for a UIC permit for Well No. 88 was ever filed with EPA, and no UIC permit for Well No. 88 was ever issued.

19) As required by subsection 1423 (c) (3) (B) of the SDWA, 42 U.S.C. 300h-2(c)(3)(b), and 144.102(b) of the GUIDANCE, EPA has provided public notice of, and a reasonable opportunity to comment on, the Proposed Order.

CONCLUSIONS OF LAW

The parties were unable to stipulate to the "applicable underground injection control program," in Pennsylvania, defined at subsection 1422(d) of the SDWA, 42 U.S.C. 300h-1(d), as:

> the program (or most recent amendment thereof) (1) which has been adopted by the State and which has been approved under subsection (b) of this section, or (2) which has been prescribed by the Administrator under subsection (c) of this section.

At the hearing, the Presiding Officer took official notice, in accordance with 144.109(i) of the GUIDANCE, of 40 C.F.R. Part 147, Subpart NN, the EPA-administered UIC program prescribed for Pennsylvania pursuant to subsection 1422(c) of the SDWA, 42 U.S.C. 300h-1(c), in effect since June 25, 1984. I adopt this as a conclusion of law:

1) At all times relevant to this action, Pennslyvania did not have primary enforcement authority for the UIC program. The applicable UIC program was and is 40 C.F.R. Part 147, Subpart NN, the EPA-administered UIC program prescribed for Pennsylvania pursuant to subsection 1422(c) of the SDWA, 42 U.S.C. 300h-1(c), in effect since June 25, 1984.

I also conclude that:

2) Marley was and is a "person" as the term is defined in

"subsection 1401(12) of the SDWA, 42 U.S.C. 300f(12), and 40 C.F.R. 144.3.

3) Marley had the legal right to exercise operational control over the drilling, construction and completion of Well No. 88 under the terms of the "Turnkey Drilling Agreement" with Olympia.

4) Marley was an operator of Well No. 88 in 1987 and in 1988.

5) Marley was subject to the requirements of the applicable UIC program in Pennsylvania in 1987 and 1988.

6) Marley violated 40 C.F.R. 144.11 and 144.31(a), requirements of the applicable UIC program, by constructing Well No. 88 without a UIC permit and by injecting natural gas into well No. 88 without a UIC permit.

7) Given that Well No. 88 has been converted to a producing well, it is not unreasonable that the Order for compliance forbid Marley from operating it as an injection well unless and until Marley obtains the necessary UIC permit.

DETERMINATION OF REMEDY

Having determined that Marley violated requirements of the applicable UIC program and is therefor liable for a civil penalty, I must take into account "...appropriate factors including (i) the seriousness of the violation, (ii) the economic benefit (if any) resulting from the violation, (iii) any history of such violations, (iv) any good faith efforts to comply with the applicable requirements; (v) the economic impact on the violator; and (vi) such other matters as justice may require." Subsection 1423(c) (4) (B) of the SDWA, 42 U.S.C. 300h-2(c)(4)(B). Based upon the administrative record, I have considered the following matters in taking the statutory factors into account in assessing an appropriate civil penalty:

(i) the seriousness of the violation; Roger Reinhart testified that UIC enforcement personnel considered construction of an injection well without the proper UIC permit to be a moderately serious violation of the SDWA, depending on the extent to which technical aspects of construction conformed to the standards of the UIC program. Mr. Reinhart testified that injection without a UIC permit was a very serious violation, depending on the nature of the fluid injected, on the extent to which technical aspects of well construction conformed to UIC program standards and on the extent to which other permit-related requirements have been observed.

The only documentary evidence in the record regarding construction of Well No. 88 is the Well Record Olympia filed with PADER on June 17, 1987. The well Record shows that the surface casing reached to a depth of 250 feet and that 30 sacks of cement were used in construction of the casing, Both Steven Platt (who was qualified as an expert witness) and David Rectenwald testified that 30 sacks of cement would be sufficient for

construction of a 250-foot surface casing. Mr. Platt's opinion was given during his direct testimony, suggesting that EPA had no reason to suspect the structural integrity of Well No. 88. In proposing a civil penalty, EPA based its calculation on the 67 days of injection asserted by Olympias president, and did not include a separate amount for the less serious violation of construction of the well. There is no evidence indicating inadequate construction of Well No. 88.

Mr. Platt was also asked on direct examination what requirements the UIC permit application process imposed to prevent contamination of underground sources of drinking water (USDWs). He testified that a UIC applicant must identify the lowermost USDW so that the casing may be required to extend 50 feet below the lowermost USDW. Mr. Platt also testified that UIC permit applicants are required to conduct an "area of review," to determine whether there are any abandoned unplugged wells within a given radius that require corrective action before injection into a permitted well may commence without endangering USDWs. Finally, he described a requirement for "reservoir data" to be submitted to assure that injected fluid does not migrate out of the injection zone. The record does not include any information regarding the depth of the lowermost USDW, any "area of review" or "reservoir data" relative to Well No. 88.

The only evidence in the record directly addressing the nature of the fluid injected into Well No. 88 is in Olympia President William Henderson's August 23, 1988 letter to EPA, in which he stated that natural gas, obtained from surrounding producing wells, was injected "up to July 15, 1987." Mr. Clark's January 14, 1988 letter mentions the gas injection system and Mr. Rectenwald's May 20, 1988 photographs show the natural gas conveyance lines still in place, so it is reasonable to infer that any fluid injected after July 15, 1987, was also natural gas from the surrounding production wells.

(ii) the economic benefit (if any) resulting from the violations; EPA suggested in its Direct Testimony that Marley's economic benefit resulting from the violation consisted of the saved costs of obtaining a permit and reworking the well to comply with UIC requirements. EPA offered no evidence in support of this suggestion, either in terms of permit application costs or in terms of estimated well-rework costs. Indeed, EPA witness testimony regarding well construction tended to suggest that no reworking would be necessary. Respondent's Direct Testimony suggests that there was no economic benefit, that permit costs are only nominal, and that Respondent has already incurred the cost of converting Well No. 88 into a producer. The record does not show what, if any, economic benefit Respondent enjoyed from these violations.

(iii) any history of such violations; The parties agree that Respondent has no history of UIC program violations.

(iv) any good faith efforts to comply with the applicable

requirements; As an operator, Marley always had the option to apply for a UIC permit for Well No. 88. Even assuming Marley did not believe it was then an operator, Marley had the legal right under the "Turnkey Drilling Agreement" to compel Olympia to apply for a UIC permit. Marley sought "operator status" under Pennsylvania law as early as July 7, 1987, when Olympia and Marley applied for a transfer of the PADER permits from Olympia to Marley. Certainly, by that time, Marley could have been making good faith efforts to seek UIC authorization, EPA sent Marley materials describing the UIC permit process in October of 1988, but Marley was still studying those materials at the time the hearing was held in June of 1992. It was not until sometime in 1990, when Marley contracted to have Well No. 88 converted to a production well, that Marley did anything that could even arguably be characterized as an effort to comply with UIC requirements. The record shows that Marley made no good faith efforts to comply with the applicable UIC program requirements.

(v) the economic impact on the violator; The record contains no evidence regarding the economic impact of a penalty on Marley. Marley argued in its Direct Testimony: "The economic impact of the proposed $33,500 penalty would be devastating." No evidentiary support for this argument was offered to EPA either before or during the hearing.

(vi) such other matters as justice may require EPA first learned about these violations through the April 28, 1988 letter from Marley's attorney to David Rectenwald. That letter requested an EPA inspection and identified Well No. 88 as an injection well. Mr. Pittman of PADER learned that Well No. 88 was an injection well from Marley's president, apparently a short time before the May 20, 1988 EPA-PADER inspection. That inspection was the first time either Mr. Rectenwald or Mr. Pittman actually saw the well. According to the testimony of both inspectors, but for Marley's invitations to inspect, it might have been possible for Well No. 88 to have continued as an injection well indefinitely. Thus, Marley is a "self-confessor" of the UIC program violations.

Marley has also been fully cooperative with EPA in its investigation of the matter. Marley never denied EPA access to the site nor refused to provide information EPA requested. When EPA sought from Marley a copy of the "Turnkey Drilling Agreement," it did not invoke any regulatory information-gathering authority. Instead, EPA wrote: "This information is needed in order to relieve you from any liability for illegal injection on the Dunn property." Roger Reinhart testified that this was an unauthorized statement that could have been better phrased, and that EPA could have required Marley to submit any requested information. He did not cite any statutory or regulatory authority available to EPA. Although subsection

1445(a) of the SDWA, 42 U.S.C. 300j-4(a), provides that every person who may be subject to an applicable UIC program shall provide such information as EPA may reasonably require by regulation to assist in determining whether such person has acted or is acting in compliance with the SDWA, the only UIC information-gathering regulation (40 C.F.R. 144.27) applies to owners and operators of rule- authorized wells, which Marley was not. In any event, Marley cooperated. Mr. Reinhart testified that EPA took this cooperation into account in proposing the civil penalty of $33,500. According to Mr. Reinhart's testimony, when EPA calculated this proposed penalty, it had no evidence considered reliable enough to support a civil penalty for the post July 15th 1987 violation. Marley provided the Kim Clark letters that supported the finding of violation continuing into February of 1988 as attachments to its Direct Testimony. Since EPA's only other evidence of post-July 15, 1987 violations is the Henderson letter, which EPA itself considered inadequate to support a proposed penalty, the Clark letters provide the only circumstantial evidence in the record for this latter period of SDWA violation. Thus, Marley not only confessed the violations to EPA, it also voluntarily provided the evidence essential to proving the violations and supporting the penalty assessment. In this regard, it is significant to note that, contrary to Mr. Reinhart's testimony, EPA had no authority to compel the submission of the information that Marley provided on request (the "Turnkey Drilling Agreement") and on its own (identification of Well No. 88 as an injection well and the Clark letters). Justice requires that these matters be taken into account as mitigating factors in assessment of an appropriate civil penalty.

Taking all of these matters into account, I find that a civil penalty of $15,500 is appropriate.

ORDER

On the basis of the preponderance of the evidence in the administrative record and the applicable law, including 144.111 of the GUIDANCE, Respondent is hereby ORDERED to comply with all of the terms of this ORDER:

A. Marley shall not operate Well No. 88 as an injection well unless and until it applies for and obtains a UIC permit for this well from EPA;

B. Respondent is hereby assessed a civil penalty in the amount of $15,500 and ORDERED to pay the civil penalty as directed in this ORDER.

C. Pursuant to 144.113 of the GUIDANCE, this ORDER shall become effective 30 days following its issuance unless, an appeal is taken pursuant to subsection 1423(c)(6) of the SDWA, 42 U.S.C. 300h-2(c)(6).

D. Respondent shall, within 30 days after this ORDER becomes effective forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of $15,500. Respondent shall mail the check by certified mail,

return receipt requested, to:

United States Environmental Protection Agency Region III P.O. Box 360515 Pittsburgh, PA 15251-6515

In addition, Respondent shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (3RC00) United States Environmental Protection Agency Region III 841 Chestnut Building Philadelphia, PA 19107

E. In the event Respondent fails to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney to bring a civil action in the appropriate United States Distict court pursuant to subsection 1423(c)(7) of the SDWA, 42 U.S.C. 300h-2(c)(7).

F. Pursuant to 31 U.S.C. 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefor begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. 102.13(c).

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. 102.13(e).

JUDICIAL REVIEW

Respondent has the right to judicial review of this ORDER. Under subsection 1423(c)(6) of the SDWA, 42 U.S.C. 300h-2(c)(6), Respondent may file an appeal of this ORDER with the United States District Court for the District of Columbia or with the United States District Court for the Western District of Pennsylvania. Such an appeal may only be filed within the 30-day period beginning on the date this ORDER is issued, and Respondent must send a copy of the appeal to the Administrator and a copy to the Attorney General of the United States by certified mail.

IT IS SO ORDERED.

DATE: SEP 8 1992

/s

EDWIN B. ERICKSON Regional Administrator

Prepared by: Benjamin Kalkstein, Presiding Officer