UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGION 8
Denver, Colorado

IN THE MATTER OF:	)	
	)	
STAPLETON INTERNATIONAL AIRPORT	)	
	)	
	)	
RESPONDENTS	)	DOCKET NO. UIC-AO-90-08
	)	
	)	

RECOMMENDED DECISION

APPEARANCES

Margaret Livingston Esq., for the Complainant
Lee Marable Esq., for the Respondent

I. INTRODUCTION

This is a proceeding under Section 1423(c) of the Safe Drinking water Act ("SDWA" or the "Act"), 42 U.S.C. 300h-2(c), for assessment of a civil penalty for violations of the Act.

On January 16, 1990, the United States Environmental Protection Agency, Region VIII ("EPA" or "Agency"), issued an administrative complaint to Stapleton International Airport, Department of Public Works, City and County of Denver ("Stapleton" or "Respondent") alleging violations of the underground injection control (UIC) regulations promulgated pursuant to the Act.[1] Specifically, EPA alleged that Respondent failed to submit the required monitoring reports for operating a Class V rule authorized injection well, thereby losing authorization. EPA proposed to assess an administrative penalty of $21,100,

On February 16, 1990, the Respondent filed a timely request for a Hearing.[2]After two prehearing conferences and two

continuances granted the Respondent, a Hearing was held on November 1, 1990, in the EPA Region VIII Conference Center, Denver, Colorado. Each of the parties submitted Post Hearing Statements, with the Agency also submitting proposed Findings of Fact and Conclusions of Law, on or before November 16, 1990, and the record was closed as of that date.

II FINDINGS OF FACT[3]

1. The City and County of Denver ("City") owns and operates Stapleton International Airport ("Stapleton") in Denver Colorado.[4]

2. In a letter dated February 11, 1988, Groundwater Technology, Inc. ("GTI"), an independent contractor retained by the City, on behalf of the City, requested approval from the U.S. Environmental Protection Agency, Region VIII ("EPA") to construct and operate a temporary infiltration gallery.[5]

3. The temporary infiltration gallery is a Class V injection well subject to EPA's underground injection control (UIC) regulations set forth in 40 C.F.R. Part 144.[6]

4. Under Section 1422 of the Act, 42 U.S.C. 300h-1, and 40 C.F.R. Part 147, Subpart G, EPA administers the UIC program for Class I, III, IV, and V wells in Colorado.

5. In a letter to GTI dated February 25, 1988, EPA approved construction and operation of the temporary infiltration gallery,[7]as a class V well, authorized by rule pursuant to 40 C.F.R. 144.24.

6. Operation of the gallery was contingent upon the submission to EPA of monthly reports on weekly monitoring of the gallery's operation and monthly analyses of the water being injected.

7. The required reports were only submitted to EPA through the week ending March 26, 1988.[8]

8. The volume of water injected into the temporary infiltration gallery from March 27, 1988 to April 5, 1988, was at least 736,766 gallons.[9]

9. The volume of water injected into the temporary infiltration gallery from April 6, 1988 to May 12, 1988 was at least 786,095 gallons.[10]

10. The temporary infiltration gallery remained in operation until approximately June 15, 1988.

11. Stapleton did not submit any contaminant analysis data to EPA for the time period from March 27, 1988 to June 15, 1988.

12. Stapleton did not report the weekly volume of fluids for the time period from March 27, 1988 to June 15, 1988.

13. By not submitting the required information, the Respondent automatically lost authorization to inject into the infiltration gallery on or about March 26, 1988.

14. Fluids injected into the infiltration gallery after March 26, 1988, were in violation of the SDWA and the UIC regulations.

15. The cost for performing the field work, analytical work,

and report preparation associated with monitoring and reporting requirements was approximately $2,875 per month. The total cost for the period from March 27, 1988 to June 15, 1988, was approximately $7,571.

III ISSUES/DISCUSSION

In its Request for a Hearing the Respondent admitted the jurisdiction of EPA in this matter. The pertinent issues raised: (1) The violation, (2) Timeliness of the agency's action, and (3) Whether the penalty assessment is excessive and unreasonable, are discussed below.

A. VIOLATION

Under 40 C.F.R. 144.24, "... the injection into Class V wells is authorized until further requirements under future regulations become applicable".

The EPA administers the UIC program for Class I, III, IV and V wells in Colorado.

"(a) For EPA administered programs only, ..., the Regional Administrator may require the owner or operator of any well authorized by rule ... to submit information as deemed necessary by the Regional Administrator to determine whether a well may be endangering an underground source of drinking water in violation of 144.112 .... Any authorization by rule under this subpart automaticallyterminates for any operator who fails to comply with a request for information under this section (emphasis added)."[11]

A review of the Administrative Record indicates that, in a letter dated February 11, 1988, through its contractor, Ground Water Technologies, Inc. ("GTI"), the Respondent applied to EPA for permission to construct and operate a temporary infiltration gallery on its premises adjacent to Sand Creek. The infiltration gallery was determined to be a Class V injection well.[12] The purpose of the well was to intercept and recover an underground plume of petroleum product moving toward Sand Creek, in partial compliance with a "Notice of Violation, Cease and Desist and Clean-up Order" from the Colorado Department of Health ("CDH"), dated December 23, 1987.[13]

In a letter dated February 25, 1988, EPA approved the construction and operation of the infiltration gallery, as a class V well.[14] The Respondent, as owner/operator of the well, under the authority of 40 C.F.R. 144.7, was required to perform weekly monitoring and submit information on (1) the volume of water being injected, (2) the volume of product recovered, and (3) the total volume of fluids recovered from the plume. Also, a monthly sample of the water injected into the gallery was to be

analyzed for specified contaminants.

The Respondent operated the injection gallery from approximately February 25, 1988, to June 15, 1988. During this period at least 3,741,700 gallons of fluids were injected into the temporary infiltration gallery. Starting, on or about, June 15, 1988, fluids recovered from the wells, after hydrocarbon separation, were discharged into the Denver Sewage Disposal District, No.1, under a permit.

The weekly monitoring results were submitted to EPA, only through March 26, 1988. Further, the results for only one monthly set of analyses, for contaminants, for samples taken on February 24, 1988, were submitted to EPA.[15] No information was submitted to EPA for the period from March 27, through June 14, 1988, during which time the well continued to operate.

It is found that the Respondent violated EPA's underground injection regulations by not performing the required tests and submitting the required reports to EPA for the period from March 27 - June 14, 1988. As a result the Respondent automatically lost authorization to inject, as of March 27, 1988.[16] The injection of fluids into the gallery after that date was in violation of EPA's UIC regulations.

B. TIMELINESS OF AGENCY'S ACTION

In its pre-hearing "Statement of the Case" and again in the Hearing, the Respondent raised questions concerning the timeliness of EPA's actions. The Respondent argues "... that EPA waived [its rights] any further duty or obligation of the City to continue monitoring reports by its acquiescence of GTI's proposal sent to EPA on March 28, 1988."[17] This allegation of delay implicitly raises a defense of laches. However, the Court has consistently held that laches is not a defense against the sovereign. See for example, U.S. v. Kirkpatrick, 22 U.S. 720 (1824); Hart v. U.S., 95 U.S. 316 (1877); Board of Commissioners of jackson Count Kansas v. U.S., 308 U.S. 343 (1939); Costello v. U.S, 365 U.S. 265 (1961).

In Costello, the Court arguendo assumed the applicability of laches. It noted that their are two elements to the defense of laches: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

In examining the record, I find that the February 25, 1988, letter which approved construction and operation of the infiltration gallery, as a Class V rule authorized well, placed an affirmative duty on the Respondent to periodically perform the certain tests and submit the results to EPA. This duty continued for so-long-as the gallery continued to operate. Therefore, it was the Respondent's responsibility to notify the Agency of any

change in the operation of the well. The failure to do this, and submit the required reports, was a lack of diligence by the Respondent. This lack of diligence by the Respondent defeats any claim of a lack of diligence by the Agency, the party against whom the defense is alleged.

Although it is not necessary to consider the second element of the defense, the Respondent was not prejudiced by any delay in the EPA's request for information. On the contrary, the Respondent benefited from any delay. From March 27, 1988 through June 14, 1988, the Respondent continued to dispose of fluids by their unauthorized injection into the infiltration gallery. A review of the record indicates the cost of off-site disposal could possibly have exceeded $1,000,000. The record further indicates the Respondent saved money by not performing the required tests.

I therefore find (1) no lack of diligence by the Agency, and (2) no prejudice to the Respondent.

B. CIVIL PENALTY

The primary issue in this case is the appropriateness of the civil penalty. In determining the appropriate administrative penalty, Section 1423(c) of the Act provides that the Administrator shall:

"... 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 of the penalty on the violator; and (vi) such other matters as justice may require".

In determining the appropriateness of the proposed civil penalty, the Respondent's conduct is analyzed considering the above factors.

(1) Seriousness of the Violation

The Respondent argues that the violations were only technical, no underground source of drinking water was endangered, and there was no possibility for endangerment to actual drinking water supplies. In examining this penalty factor, I find that the Agency need not establish that the violation resulted in demonstrable harm to human health, the environment, or an underground source of drinking water (USDW). The Respondent's authorization to inject automatically terminated when the required reports were not submitted in a timely manner. The Respondent's failure to perform certain tests aggravated the violation.

The Respondent further argues that the information and data that was obtained by the City was eventually submitted to the EPA. The data was submitted to the Agency over a year late and was incomplete. From this incomplete data, it was not possible for the Agency to determine either the quantity or the quality of the water injected into the ground. The purpose of requiring the Respondent to report to EPA was to allow EPA to timely determine any adverse impacts of the injection. This untimely and incomplete submission of information frustrated the purpose of the regulatory scheme established to protect underground sources of drinking water, thereby violating the Act.

It is found that the unauthorized injection continued over a three month period, from approximately March 27, 1988 to June 15, 1988. This further aggravated the violation, and is a measure of the lack of a good-faith effort to comply.

The evidence of the Respondent's failure to perform certain tests, submit the required information and the duration of the violation is sufficient to establish the degree of seriousness of the violation. I find that the Respondent's deviation from the requirements and the duration of the violation are significant, and therefore serious. Given the nature of the violation, a substantial penalty is appropriate for this component, as a deterrent.

I further find that a civil penalty of $18,225, is appropriate for this component.[(18)]

(2) Economic Benefit

The Respondent argues that there was no real economic benefit to the City and County of Denver; however, submitted no evidence to substantiate this claim. On the other hand, the Agency submitted creditable evidence that, at a minimum, by not fulfilling the monitoring, contaminant analysis and reporting requirements set forth in the February 25, 1988, letter from EPA, Stapleton avoided payment of approximately $2875 per month or, for the time period March 27, 1988 to June 15, 1988, approximately $7,571. The Agency inadvertently included only one month's benefit in calculating the proposed civil penalty.

Further, the Agency introduced evidence that if the Respondent disposed of the water at an approved off-site disposal site, the cost of disposal might possibly exceed $1,000,000.

It is found that the economic benefit to the Respondent is $7,571. I therefore recommend that the civil penalty assessed for this component be increased by $4696, the economic benefit inadvertently omitted by the Agency.

(3) History of such Violations

The Respondent argues that Stapleton has no history of prior violations of the Safe Drinking Water Act (SDWA). The Respondent

further argues that Stapleton has no history at all of dealing with the UIC program, and consequently had no experience whatsoever in dealing with this regulatory requirement, especially under such an emergency situation. The Courts have repeatedly held ignorance of the law is no excuse. This is especially true for a City the size of Denver, which has both large technical and legal staffs to advise it of the law. Nevertheless, the Agency submitted no evidence of a history of such violations by the Respondent (emphasis added). Therefore, I find that this factor should be given no weight in determining the appropriate civil penalty.

(4) Any Good-Faith Efforts to Comply

The Respondent argues that in good faith it relied upon its contractor GTI to submit the required information and data. Not-withstanding, the UIC regulations make the owner/operator responsible for compliance with the regulations. Owner or operator means the owner or operator of any "facility or activity" subject to regulation under the UIC program, 40 C.F.R. 144.3. I find that the City and County of Denver is the owner/operator of Stapleton and, as such, is solely responsible for compliance with the UIC regulations.

The Respondent had an affirmative duty to perform the required tests and submit the results to EPA in a timely manner, for so long as the well was in operation. Notwithstanding, the Respondent did not comply with these requirements for nearly three months. Further, it was only after repeated requests that the Respondent submitted additional information to EPA, a year later. This information was incomplete. I therefore find that the Respondent did not make a good-faith effort to comply; however, the weight given this component is incorporated into (l) above, as an aggravating factor.

(5) Economic Impact of Penalty on Violator

The Respondent argues that the economic impact is burdensome when examined as part of the total cost to abate and remediate the jet fuel plume contamination that exists at the Airport. The Respondent claims to have already spent over a million dollars on clean up. Completion of the cleanup is estimated to cost an additional three to five million dollars. However, the Respondent submitted no evidence of economic hardship at the Hearing, or for the Administrative Record. I therefore find that the proposed penalty will not have an adverse impact on the Respondent.

(6) Other Factors

I find that justice does not require the consideration of any

ther matters.

V. CONCLUSION AND RECOMMENDATION

On the basis of a preponderance of the evidence in the record, I find that Respondent, Stapleton International Airport, Department of Public Works, City and County of Denver, violated Section l44.27 of the UIC regulations promulgated pursuant to the SDWA, as amended. Therefore, pursuant to Section l44.lll of the UIC Administrative Order Issuance Procedures Guidance, I recommend that an adjusted civil penalty of $25,796 be assessed the City and County of Denver.

_____ _____ Dated
ALFRED C. SMITH, Presiding Officer

1. 40 C.F.R. Part l44
2. Administrative Record, Exhibit 21
3. All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this recommended decision they are accepted.
4. Stipulation, No. l
5. Stipulation, No. 3
6. Stipulation, No. 4
7. Stipulation, No. 6
8. Administrative Record, Exhibit - 5
9. Stipulation, No. 8
10. Stipulation, No. 9
11. 40 C.F.R. l44.27
12. 40 C.F.R. l44.6(e)
13. Administrative Record, Exhibit l
14. Administrative Record, Exhibit - 4
15. Administrative Record, Exhibit - 5
16. 40 C.F.R. l44.27
17. See Respondent's Prehearing Statement and Proposed Findings of Fact and Conclusions, filed October 26, l990
18. Administrative Record, Exhibit - l7