UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Petco Petroleum Corporation,	)	DOCKET NO. UIC-5-99-003
	)	
Respondent.	)	
	)	

DECISION ON RESPONDENT'S MOTION TO DISMISS THE ADMINISTRATIVE COMPLAINT

Respondent, Petco Petroleum Corporation ("Respondent" or "Petco") has moved, pursuant to Sections 22.16 and 22.20, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138 (July 23, 1999)(to be codified at 40 C.F.R. Part 22), that the Presiding Officer dismiss the Administrative Complaint issued by the Complainant, the United States Environmental Protection Agency ("Complainant" or "EPA"), in this matter. Respondent argues that 40 C.F.R..§ 144.52(a)(6) imposes no time deadline for plugging and abandoning its "Class II" wells, as defined by the Underground Injection Control ("UIC") Program, 40 C.F.R. Parts 144-147. As a consequence, Respondent asserts that the Administrative Complaint fails to show a right to the penalty and injunctive relief demanded.

Respondent has filed its *Legal Memorandum of Respondent Petco Petroleum Corporation in Support of its Motion to Dismiss the Administrative Complaint.* Complainant, has filed *Complainant's Memorandum in Response to Petco's Motion to Dismiss Administrative*

Complaint. As the final filing on this motion, Respondent submitted *Respondent's Reply Memorandum in Support of Its Motion to Dismiss Administrative Complaint.*

After evaluation of the parties arguments, and review of the regulation and its legislative history, I have determined that 40 C.F.R. § 144.52(a)(6) requires that a Class II underground injection well must be plugged and abandoned within two years of cessation of operations, unless the owner or operator can demonstrate to the Regional Administrator's satisfaction that actions will be taken to prevent endangerment to Underground Sources of Drinking Water ("USDWs"). Respondent's Motion to Dismiss is denied.

Standard for Review

> § 22.20 **Accelerated decision; decision to dismiss**
>
> (a) *General*. The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exits and a party is entitled to a judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds that show no right to relief on the part of the complainant.

Respondent analogizes Rule 22.20(a) to Federal Rule of Civil Procedure 12(b)(6), which allows for a motion to dismiss a complaint for failure to state a claim if the complaint lacks an allegation regarding an element necessary to obtain relief. 2 Moore's Federal Practice Section 12.34[a][4](Matthew Bender 3d. Ed.). *Respondent's Legal Memorandum at* 6.

Background

EPA filed an Administrative Complaint against Petco alleging that Petco violated Section 1421 of the Safe Drinking Water Act, 42 U.S.C. § 300h, (SDWA) by failing to comply with plugging and abandonment requirements set forth at 40 C.F.R. § 144.52(a)(6). These requirements are contained in the Underground Injection Control permits for three of its salt water disposal wells: the O. Kintigh #2, the B. Wilson #7 and the J. Riley #1, located Jackson and Calhoun Counties, Michigan. The Administrative Complaint also alleges that the Respondent failed to timely advise the Regional Administrator of an alternative to plugging or abandonment. The complaint requested injunctive relief and proposes penalties for Respondent's failures.

Each permit contains similar Paragraph I. E.17 language as follows:

> The permittee shall plug and abandon the well as provided in the plugging and abandonment plan contained in Attachment A of this permit. After a cessation of operation of two years, the owner or operator shall plug and abandon the well in accordance with the plan provided in Attachment A unless the operator fulfills the other requirements in 40 C.F.R. § 144.52(a)(6). The permittee shall notify the Director of plugging and abandonment in accordance with the [permit's] reporting procedures.

40 C.F.R. § 144.52(a)(6) states:

> After cessation of operations of two years the owner or operator shall plug and abandon the well in accordance with the plan unless he :
>
> > (I) Provides notice to the Regional Administrator;
> > (ii) Describes actions or procedures, satisfactory to the Regional Administrator, that the owner or operator will take to ensure that the well will not endanger USDWs during the period of temporary abandonment. These actions and procedures shall include compliance with the technical requirements applicable to active injection wells unless waived by the Regional Administrator.

The parties have stipulated that the wells were not plugged and abandoned within two years of cessation of operations. The parties have stipulated that the O. Kintigh #2 was plugged on April 12, 1999. The Wilson #7 was plugged on June 17, 1999 and the J. Riley #1 will be plugged at some point in the future.

Legislative History

Three Federal Register notices are relevant to this inquiry. 40 C.F.R. Part 144 was originally proposed at 48 Fed. Reg. 14188 (April 1, 1983). A further Proposed Rule was published at 48 Fed. Reg. 40098 (September 2, 1983). The Final Rule was published at 49 Fed. Reg. 20138 (May 11, 1984).

1. 48 Fed. Reg. 14188 (April 1, 1983)

The original version of 40 C.F.R. § 144.52(a)(6) required that permits for Class II injection wells contain sufficient requirements for plugging and abandonment to "ensure that plugging and abandonment of the well will not allow the movement of fluids either to an underground source of drinking water or from one underground source of drinking water to another." 48 Fed. Reg. 14201 (April 1, 1983). The rule applied only to "abandoned" wells. "For purposes of this paragraph, temporary intermittent cessation of injection operations is not abandonment." *Id. at* 14201.

2. 48 Fed. Reg. 40098 (September 2, 1983)

In this notice EPA proposes to:

> amend the regulations to provide some interpretation of when, in EPA administered programs, a well is to be considered abandoned, and hence when an owner or operator would be required to plug the well in accordance with the plan. Existing EPA regulations provide that "temporary intermittent

> cessation of injection operations is not abandonment." EPA's proposal would provide that any cessation of operations for longer than two years would not be considered temporary or intermittent, unless the owner or operator demonstrates to the Regional Administrator that the well will indeed be used at some time in the future. The proposal would apply both to wells authorized by rule [144.28(c)(2)(iii)] and wells authorized by permit [144.52(a)(6)].
>
> This general interpretation is designed to prevent owners or operators from avoiding plugging requirements by unfounded claims that operations are only temporarily suspended, while recognizing that in some cases operations may be suspended for long periods with legitimate expectations of resuming operations. In the latter instance, while the Regional Administrator may accept a demonstration that this is the case, the owner or operator should also demonstrate that all necessary precautions are being taken during the suspension to prevent any migration of fluids into the underground sources of drinking water."
>
> 49 Fed. Reg. 40105.

3. 49 Fed. Reg. 20138 (May 11, 1984) Final Rule

The preamble addresses the comments received concerning the § 144.52(a)(6) issue of abandonment, as opposed to temporary and intermittent cessation of activities.

> EPA agrees in part with the comments. The requirement that the operator show that the well will be used in the future is overly restrictive for Class II enhanced recovery operations and some Class III operations, both of which are subject to fluctuations in demand, commodity prices, and to developing technologies. In addition, for Class II wells, up to 50% or more of the hydrocarbons may remain in the formation even after secondary recovery operations. This argues in favor of maintaining existing wells in a condition that will allow them to be used in the future to retrieve these resources if advances in retrieval technology or increases in the market value of the resources make it viable. For Class II and III wells, therefore, there may be good reasons for not plugging a well that has

> ceased operation for periods substantially longer than two years, even though it may not be possible to prove that the well *will* be used in the future.
>
> The intent of the proposed two year limit on the length of time a well could be considered "temporarily" out of operation was intended to prevent endangerment to drinking water that might result from the neglect of an unplugged well for a long period of time, perhaps because the owner or operator had no real intentions of ever using the well again. After considering the comments, EPA has determined that for Class II and III wells this goal can be achieved by requirements that are more flexible than those proposed.
>
> The final requirements for Class II and III wells, therefore, no longer require a demonstration that the well will be used in the future. Rather, they are designed to ensure that any well that has been taken out of operation is maintained in a manner that ensures no movement of fluids into USDWs. The regulations promulgated today explicitly require notice to the Regional Administrator any time a well is out of operation for more than two years. Second, at the time of the notice the owner or operator must explain how the well will be maintained during the period of temporary abandonment and demonstrate to the satisfaction of the Regional Administrator that such maintenance will prevent endangerment of USDWs.
>
> 49 Fed. Reg. 20147-8.

Respondent's Argument

It is Respondent's position, that assuming all of the facts alleged in the Administrative Complaint are true, such facts do not result in a violation of any statute, rule or permit condition, since no statute, rule or permit condition requires that the wells be plugged or abandoned within a specific timeframe. Respondent states that § 144.52(a)(6) does require that the wells be plugged and abandoned after cessation of operations of two years. It is Respondent's position that the two year period set forth at § 144.52(a)(6) defines when a well is considered to have ceased operations. Respondent argues that

once a well is considered to have ceased operations, the regulation does not specify any deadline for the subsequent physical act of plugging and abandonment, nor any deadline for the alternative notice to the Regional Administrator. Respondent asserts that the statute, regulations and permit are silent on these matters. Without a time specific requirement, Respondent asserts that Complainant cannot seek a penalty. Respondent argues that no cause of action exists.

> "However, 40 C.F.R. § 144.52(a)(6) makes no mention whatsoever of any time period thereafter within which the actual, physical act of plugging and abandonment must occur. The rule does not state that such plugging and abandonment shall occur "promptly," "immediately," "within 90 days," within one year," etc. It is beyond dispute in this case that the rule in question is absolutely silent on this issue.
>
> The rule is similarly silent as to the timeliness of the required notice to the Regional Administrator of an alternative plan to plugging and abandonment. There is simply no codified timeframe for the delivery of such a notice to the Regional Administrator.
>
> The same is true of the permits. At most , the permits refer to the abandonment plan, which merely sets forth the technical requirements for abandonment regarding depth of concrete placement, etc. Nowhere in the permit or the abandonment plan is there any time period specified for the actual plugging and abandonment. Likewise, nowhere in the permit or the abandonment plan is there any deadline set for notice to the Regional Administrator that plugging and abandonment will not occur."
>
> *Respondent's Legal Memorandum at 7.*

As the regulation contains no timeframe for plugging, abandonment or notification to the Regional Administrator, Respondent suggests that perhaps the time period allowed to determine cessation of operations, two years, should be allowed for plugging, abandonment or notification.

Respondent argues that the danger to the environment cannot be great, if the regulations allow a full two year period for the cessation of operations period. "If the danger to the environment is so great, one would assume that the cessation of operations period would be much shorter; for example six months or one year. Instead, a well can cease operations for at least two full years before it is required to be plugged and abandoned. Complainant would have one believe that the day immediately following the two-year period, an environmental emergency occurs which requires immediate and instantaneous plugging and abandonment." *Respondent's Legal Memorandum at 11*.

It is Respondent's position that the enabling statute, regulations and permit would need to be rewritten to contain a time limit, in order for there to be an appropriate basis for assessing a penalty. Respondent concludes with the argument that this proceeding is not the proper forum for rulemaking or permit revisions. Citing *In re Ernest E. Musgrave,* 4-UICC-0411-088 (no date in attached copy). *Respondent's Legal Memorandum at 11*.

Complainant's Argument

Complainant argues that a fair reading of the legislative history of the regulation indicates that a well must be plugged when it is abandoned, and that a well is presumed to be abandoned when operations have ceased for a two year period, unless the owner or operator can demonstrate to the Regional Administrator's satisfaction that it will take actions to prevent endangerment to Underground Sources of Drinking Water.

EPA argues that Petco's interpretation of the regulation is not supported by the legislative history and is based upon language taken out of context. While Petco argues that "U.S. EPA's failure to impose a time period for the actual plugging and abandonment was intentional" and "immediate

abandonment and plugging was the exact opposite of what U.S. EPA intended when it passed § 144.52(a)(6) in its present form," *Respondent's Legal Memorandum at 13-14*, EPA counters that when reviewed in its entirety, nothing in the preamble to this rule suggests any intent to allow significant time to elapse.

EPA also attacks Petco's argument concerning 40 C.F.R. § 144.53(b)(4). *Complainant's Memorandum in Response at 9*. Respondent argues that EPA was so sensitive to the "notion that flexibility be allowed so as not to prompt "premature" plugging and abandonment, that it enacted § 144.53(b)(4), which mandates that under certain circumstances the determination of whether a well has 'ceased operations be subject to a standard other than physical non-use of the well.' All of this legislative history militates in favor of a lengthy period following cessation of operations for the physical act of plugging and abandonment." *Respondent's Legal Memorandum at 14*. EPA argues that § 144.53(b)(4) contains regulations concerning schedules of compliance and the quoted language simply goes to situations where a permittee or applicant for a permit decides to plug and abandon a well rather than meet the permitting requirements. In those cases, § 144.53(b) allows alternative schedules of compliance, including ceasing to conduct regulated activities by plugging and abandoning a regulated well. Section 144.53(b)(4) requires this decision to cease regulated activities shall be evidenced by a firm public commitment, satisfactory to EPA. EPA argues that the requirement of firm public commitment does not negate the underlying requirement to plug and abandon the well as set forth in § 144.53(b).

Analysis

It is an axiom of statutory and regulatory interpretation that statutes and regulations should be construed so that effect is given to all of their provisions, so that no part will be inoperative or superfluous, void or insignificant. *U.S. v. Higgins*, 128 F.3d 138 (3rd Cir. 1997).

It is undisputed that the UIC program was instituted to protect the Nation's Underground Sources of Drinking Water from contamination due to the movement of fluids caused by underground injection activities of various types of wells. The scope of the regulation is to prohibit the movement of fluid containing any contaminant if the presence of that contaminant may cause violation of any primary drinking water regulation, 40 C.F.R. Part 142, or may adversely affect the health of persons, §144.12. Existing hazardous waste injection wells (Class IV) are to be eliminated over a six year period and no new hazardous waste injection wells are permitted. 48 Fed. Reg. 14190.

As the regulation moved forward through notice and comment and final rulemaking, nothing in the preambles of the later Federal Register notices, evidences any change in this focus on protection of the Nation's USDWs. It is against this framework that § 144.52(a)(6) must be interpreted.

From initial proposal on April 1, 1983, it is clear that the purpose of § 144.52(a)(6) is to require that Class II injection wells, which are no longer in use, be plugged and abandoned with safeguards to prevent the movement of fluids from the wells into USDWs. The originally proposed regulation requires that permits include conditions to ensure that plugging and abandonment will occur. The regulation exempts temporary intermittent cessation of operations from the plugging and abandonment requirement by stating that temporary intermittent cessation of injection operations is not

abandonment. The regulation contains no language defining when a well is considered abandoned, as opposed to being in a state of temporary intermittent cessation of operations. 48 Fed. Reg. 14201.

On September 2, 1983, EPA responded to comments requesting guidance and interpretation as to when a well would be considered "abandoned" and therefore must be plugged. EPA proposed that cessation of operations for more than two years would be abandonment and owners and operators would be required to plug the wells. However EPA did recognize that in some circumstances, cessation of operation for longer than two years could have a legitimate economic basis. EPA was concerned with the possibility that owners or operators might avoid plugging requirements with "unfounded claims" that operations are temporarily suspended. To prevent this, the proposal provides that with any cessation longer than two years, to avoid the requirement to plug and abandon, an owner must demonstrate that the well would be used in the future and demonstrate that current precautions were being taken during the suspension to prevent any migration of fluids into the USDWs. 48 Fed. Reg.40105.

Finally, in the Final Rule, EPA again revised the temporary abandonment exception. EPA acknowledged that for Class II and III wells, there may be good economic reasons for not plugging a well beyond the two year period. Therefore, for Class II and III wells, EPA deleted the requirement that the owner or operator need to affirmatively demonstrate that the wells would be used in the future. The regulation requires notice to the Regional Administrator and a demonstration, to his satisfaction, that the proposed maintenance will prevent endangerment of USDWs. 49 Fed. Reg. 20147.

Despite Respondent's forceful argument that the regulation contains no timeframe for plugging and abandonment, it is hard to read the preamble language and the wording of the § 144.52(a)(6) as

not imposing a deadline of two years upon the obligation to plug a well that is not being used. After the expiration of two years, an owner or operator must either treat the well as abandoned and immediately plug it; or in the alternative, the owner or operator must immediately demonstrate to the satisfaction of the Regional Administrator that current precautions are being taken to maintain the integrity of the well and prevent the endangerment of the drinking water supply. To reach any other conclusion, one must ignore the two year timeframe in the regulation and preamble and allow an owner or operator unlimited time in regulatory limbo, with neither plugging nor demonstration required.

Such an interpretation undercuts the stated statutory and regulatory purpose of protecting USDWs. It requires the reader to ignore the two year language in the regulation. Under Respondent's reading, the two year timeframe leads to no consequences, other than labeling the well as abandoned. It requires implementation of no measures protective of the USDWs. The clear intent of the regulation is to protect the USDWs. Therefore, while Respondent's interpretation is a possible reading of the regulation, but not the best reading of the regulation. See *U.S. v. Higgins*, *supra*.

Given Respondent's position in this matter, it appears that the regulation could have been more clearly drafted. However, the better reading of the regulation, which gives effect to its language and intent, imposes a two year limitation on cessation of operations, immediately after which proper plugging and abandonment or suitable notification to the Regional Administrator must occur.

This interpretation is supported by the two UIC administrative cases which have applied 40 C.F.R. § 142.52(a)(6). *In the Matter of J. Magness Inc.*, Docket No. UIC-VII-94-03 1996 EPA RJO LEXIS 9 (October 29, 1996), the Regional Administrator for Region 8 affirmed the finding of a Presiding Officer that a well owner had violated the Safe Drinking Water Act by failing to comply

with substantially identical plugging and abandonment requirements after a two year cessation of operations. The permit required that "after a cessation of operations of two (2) years, the permittee shall plug and abandon the well in accordance with the Plugging and Abandonment Plan." The Presiding Officer read the permit provision to require "the permittee to plug and abandon the well within two (2) years after ceasing operations, in accordance with the plugging and abandonment plan. *Id.* at 25. *In Re: Ernest E. Musgrave,* Docket No. 4-UICC-041-88, the Regional Administrator of Region 4 affirmed a Presiding Officer Recommended Decision which found that an owner/operator of a well violated the UIC regulations by failing to comply with the plugging and abandonment requirement two years and one day after the effective date of the UIC regulations. The primary issue in the case was whether or not the UIC regulations were applicable to wells which had been abandoned more than twenty years before the UIC regulations became effective. The Presiding Officer determined that notification to EPA by the prior owner of the wells voluntarily subjected the wells to the UIC program. While not a central issue in the decision, once the Presiding Officer found that the wells were regulated by the UIC, interpreting language identical to that at issue here, the Presiding Officer found that the owner/operator of the wells was required to plug the wells two years and one day after the regulations became applicable to the wells.

Conclusion

For the foregoing reasons, I find that 40 C.F.R. § 144.52(a)(6) imposes a two year deadline on the requirement to plug and abandon a Class II well which has ceased operations, unless the owner or operator demonstrates, to the satisfaction of the Regional Administrator, that appropriate steps will be taken to prevent the endangerment of USDWs.

The Complaint in this case states a cause of action.

Respondent's Motion to Dismiss is hereby DENIED.

SO ORDERED.

/S/
Regina M. Kossek
Presiding Officer

Dated: March 9, 2000

In the Matter of Petco Petroleum Corporation
Docket No. 5-UIC-99-003

CERTIFICATE OF SERVICE

I certify that the foregoing Decision on Respondent's Motion To Dismiss the Administrative Complaint, dated March 9, 2000, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy hand delivered to
Attorneys for Complainant:

Ann L. Coyle
Janice S. Loughlin
U.S. Environmental Protection
Agency, Region 5
Office of Regional Counsel
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy by U.S. Mail,
First Class, and facsimile to:
Attorneys for Respondent:

John M. Van Lieshout
Reinhart Boerner Van Duren Norris
& Rieselbach, S.C.
1000 North Water Street
Milwaukee, Wisconsin 53203-3400

Craig R. Hedin
Campbell, Black, Carnine, Hedin,
Ballard & McDonald, P.C.
P.O. Drawer C
Mt. Vernon, Illinois 62864

Dated:

By: _____
Darlene Weatherspoon
Secretary