

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:

Gene A. Wilson

Respondent.

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) Docket No. SDWA-04-2005-1016
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ORDER ON RESPONDENT'S MOTIONS

On June 19, 2007, the undersigned issued an order denying Respondent and Complainant their respective Motion for Summary Judgment and Motion for Accelerated Decision on Liability. There are motions pending that were filed by Respondent simultaneous with and subsequent to the filing of his Motion for Summary Judgment. These are addressed below in chronological order.

Respondent's Motion to Strike or Consolidate (Motion to Strike):

On December 16, 2006, simultaneous with his filing of a Motion for Summary Judgment, Respondent filed a Motion to Strike or Consolidate (Motion to Strike). Respondent moves to strike certain documents from the record on the basis that they are irrelevant to Complainant's issuance of the Collier Creek permit at hand. As alternative relief, Respondent requests that the permits for two other wells and records of Louisa Sand and Gravel, Inc. be consolidated and made part of this case.

Although section 22.16 of the Consolidated Rules governing this proceeding, 40 CFR § 22.16, addresses motions generally, there is no specific mention of motions to strike.¹ In such circumstances, the Federal Rules of Civil Procedure (FRCP) can provide

¹ Section 22.12, 40 CFR 22.12 governs consolidation and severance, but pertains to consolidating matters at issue in two or more proceedings subject to the Consolidated Rules. Respondent seeks consolidating permits and therefore, section 22.12 would not apply to this motion.

guidance. In re Lazarus, Inc. 7 E.A.D. 318, 330 n. 25, 1997, EPA ALJ Lexis 27 (EAB 1997). Section 12(f) of the FRCP allows for motions to strike matters that are redundant, immaterial, impertinent or scandalous. Motions to strike will usually be denied unless the allegations sought to be stricken have no possible relation to the case and may cause prejudice. See In the Matter of Richard L. Wolk and Wolk Petroleum, Inc., EPA RJO Lexis 9 (November 8, 1994) citing Poston v. American President Lines, Ltd., 452 F. Supp. 568 (D.C. Fla 1978).

Respondent seeks to strike Complainant's Exhibit ("C Ex") 1, H.I.A. Material Safety Data Sheet (MSDS), dated June 1983. Respondent seeks to strike this document on the basis that it does not apply to the well that is the subject of this proceeding and that the Fracturing Service Treating Report by Halliburton Services that is part of C Ex 1, shows a fract that existed prior to permit application. Complainant, on the other hand, claims that the MSDS is necessary to contradict Respondent's assertions that Gene Wilson # 1 well was not perforated and posed no threat to the environment. Pointing to numerous attachments to the exhibit to bolster its position, Complainant seeks to maintain this document as evidence at hearing. I am persuaded by Complainant's argument and anticipate that additional testimony on this document would shed further light on the issue of whether or not the well was perforated. Furthermore, I find that Respondent fails to meet his burden to show that the documents are redundant or immaterial. Finding no basis for striking the portion of this exhibit from the record, and that the relevance, credibility and probative value of the documents contained in Exhibit 1 will be better determined at hearing, Respondent's Motion to Strike is denied with respect to C Ex 1.

Complainant's Exhibits 29 and 31 attached to Complainant's Rebuttal Prehearing Exchange, contain a Letter of Credit and Standby Trust Agreement which Respondent contends do not apply to the well that is the subject of this proceeding. The documents purportedly are, or reflect, Respondent's submission of evidence of financial responsibility for the subject well.

The parties' dispute as to whether the necessary documents were ever submitted is irrelevant to the case at hand. The parties are referred to the June 19, 2007, Amended Order on Respondent's Motion for Summary Judgment and Complainant's Motion for Accelerated Decision on Liability (Amended Order on Motions) which finds that the "Permit KY # 10376. . . was issued, remained valid and in full force and effect during the period that is the subject of this proceeding." See Amended Order on Motions page 5. Therefore, as a matter of relevance rather than credibility or probative value of the particular documents offered into evidence, the portion of Respondent's motion seeking to strike Complainant's Exhibits 29 and 31 is granted.

In the alternative, Respondent seeks to have the permits issued for two other wells, Neeley # 10 and Sparks Heirs #2, and the records of Louisa Sand and Gravel, Inc., consolidated and part of this matter.

Respondent's request to make records of Louisa Sand and Gravel, Inc, part of this matter is denied for the same reason that documents relevant to financial assurance submitted for permit issuance are irrelevant to this proceeding. With respect to making the permits on Neeley #10 and Sparks Heirs #2 a part of this case, Respondent fails to establish that the records pertaining to these, or any other separate wells, are at all relevant to this proceeding. As a matter of fact, Respondent's Motion is void of any of

the requirements contained at 40 CFR 22.16, such as an affidavit, certificate, or other evidence or legal memorandum relied upon, so that there is nothing establishing relevance of permits on Neely # 10 and Sparks Heirs # 2 on issues pertaining to the Gene Wilson # 1 well permit or to the case at hand. As Respondent himself states when seeking to strike certain documents, it is essential that this case remain “. . . focused on the issues at hand (Collier Creek). . .”

Respondent's Motions filed February 26, 2007:

On February 26, 2007, Respondent filed two other Motions. In one he seeks to inspect records pursuant to the Freedom of Information Act (FOIA) for a number of surrounding counties; In the other filed simultaneously, he requests that two permitted injection wells, KY 10344 and KY 10503, become part of this record and that pursuant to FOIA, he be permitted to inspect the files for these two permitted wells.² As discussed above, Section 22.16 of the Consolidated Rules of Practice governing motion practice requires that motions be “accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.” 40 CFR 22.16(a)(4). Neither of Respondent's February 26, 2007 pleadings provides any of the requisite supporting information. On this basis, alone, denial is appropriate. Furthermore, a review of the administrative record in this matter indicates that earlier in the proceeding Respondent filed a “Motion to Compel Disclosure or Continuance of Hearing in the Alternative.” Respondent moved to have this Presiding Officer make an independent determination pursuant to FOIA, to release withheld documents, or in the alternative to grant a continuance subject to appeal of the FOIA decision. Argument was heard on this issue during a conference call and the

² Although not clear on the face of the Motion, these are presumed to be the permits for the aforementioned Sparks Heirs #2 and Heeley # 10, which Respondent sought to include through other motions.

Respondent was advised at that time that the proper forum for release of documents withheld pursuant to FOIA was the FOIA appeal process. Similarly, to the extent Respondent's February 26, 2007, Motions again seek relief pursuant to FOIA, rather than Part 22 of the Consolidated Rules, they are denied. As Complainant contends, if Respondent has certain documents that support his position on a matter that is relevant in this proceeding, then it is his prerogative to seek that it become part of the evidence presented in his case through the prehearing exchange process,

However, in the interests of judicial fairness, I will view Respondent's Motion "to view files on all injection well permits issued since 1990 for Lawrence County and surrounding counties of Johnson, Morgan, Elliot, Carter and Boyd, as if it were a Part 22 discovery motion seeking production of documents. Under section 22.19 of the Consolidated Rules, 40 CFR 22.19, the Presiding Officer may order additional discovery only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 CFR 22.19(e).

Viewed in this light, I would find that Respondent's broad document production lacking significant probative value and unreasonably burdensome. There are allegations throughout Respondent's pleadings that EPA did not enforce its UIC program consistently, such that other well operators failing to conduct MITs were not prosecuted. For example in his May 3, 2007 letter to Wanda Johnson, Respondent writes, "I have made a formal motion to make the permit applications and/or issued permit's [sic] a part

of the record in the Administrative Hearing against me as record of an established pattern of EPA on the permit process". In his February 20, 2007, Respondent refers to what . . . "is becoming a question of prejudicial treatment". Although not articulated as such, these are, in essence, allegations of "selective prosecution" that Respondent raises as a defense to liability. However, the decision In the Matter of: TIFA, Limited, I.F. & R. Docket No. 11-547-C (1998 EPA ALJ LEXIS 120), summarizes the standard for such discovery: "To obtain discovery in Federal court, 'a mere allegation of selective prosecution. . . does not require the government to disclose the contents of its files. . .in addition, the defendant must produce some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements.' United States v. Catlett, 584 F.2d 864, 865 (8th Cir. 1978). . . . 'mere allegations of selective prosecution do not authorize a defendant to engage in a fishing expedition.' United Sates v. Aanerud, 893 F. 2d 956, 960 (8th Cir. 1980), quoting United States v. Cammisano, 546 F. 2d 238, 241 (8th Cir. 1976)."

Therefore, for the reasons set forth above, Respondent's February 26, 2007, Motions are denied.

Respondent's May 1, 2007 Motion:

Most recently, on May 1, 2007, Respondent filed a Motion seeking a) the return of a portion of money paid for records under FOIA; b) to add Mr. Randy Poston to the witness list; and c) that all applications for injection wells assigned certain permit numbers be made a part of the Administrative action. On May 16, 2007, Complainant filed its Response to Respondent's April 26, 2007, Motion.

Respondent's May 1, 2007, motion contains two exhibits in support of his motion: Exhibit 53, a letter to Ms. Florence Telp-Johnson, requesting permission pursuant to FOIA to view files on his other wells along with all wells permitted in several Kentucky counties since 1990, and Exhibit 54, a handwritten list labeled "UIC Permits for G. Wilson FOIA". While this motion does not suffer from the same lack of supporting data as his previously filed Motion, he again fails to distinguish the FOIA process from the Part 22 administrative process in seeking the return of money paid for records under FOIA. There is neither provision nor authority for such relief in the rules governing this proceeding. Therefore, Respondent's request for return of funds is denied.

Respondent's request that all applications for injection wells assigned certain permit numbers be made a part of the administrative action is denied based upon the finding that it lacks probative value *on a disputed issue of material fact relevant to liability or the relief sought*. (See discussion above pertaining to Respondent's February 26, 2007 Motion) To reiterate, the purpose of the evidentiary hearing to be held in this case is not to evaluate Complainant's overall handling and administering of the SDWA UIC program. The issue germane to this proceeding is whether Respondent violated the terms and conditions of Permit KY 10376 regarding conducting mechanical integrity tests and submitting annual monitoring reports.

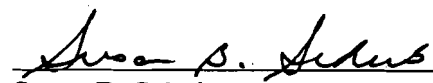
Having said this, however, as set forth in the undersigned's June 19, 2007, Order on Motions, the unsupervised mechanical integrity test claimed to have been conducted in 1999, as a defense to liability merits exploration. See Order on Motions, paragraph 9 paragraph 3. However, it will first need to be sufficiently established at hearing that

c) that an unsupervised test met the permit terms and conditions. Therefore, if Respondent, through his document search has discovered documents specifically supporting his claims, then upon sufficient showing he may move to supplement his prehearing exchange of information to include the specific document or evidence. Witness testimony will also be considered on this issue. However, as noted by Complainant in its Response to Respondent's April 26, 2007, Motion, Mr. Poston's testimony will not add to or differ from testimony of his other witnesses on the issue of unsupervised mechanical integrity tests. Mr. Wilson already seeks a subpoena for the appearance of Doug Hamilton, Inspector for the Commonwealth of Kentucky, Department of Mines and Minerals, who will testify to his knowledge that EPA had problems with its contracted inspectors. Therefore, Respondent's motion to add Randy Poston to his list of witnesses is hereby denied.

IT IS ORDERED:

1. Respondent's December 16, 2006, Motion to Strike is granted in part and denied in part: Complainant's Exhibit 1 is retained as part of the record; Complainant's Exhibits 29 and 31 are stricken from the record.
2. Respondent's February 26, 2007, Motions are denied.
3. Respondent's May 1, 2007, Motion is denied.

Date: June 28, 2007


Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Order on Respondent's Motions, in the Matter of Gene A. Wilson, Docket No., SDWA-04-2005-1016, on the parties listed below in the manner indicated:

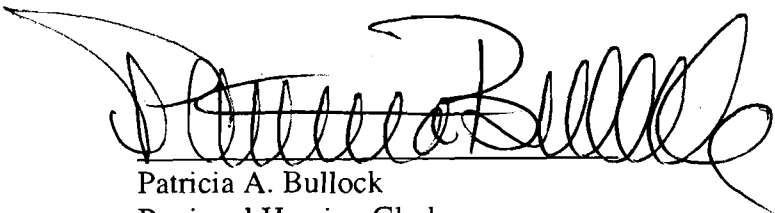
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