

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF)

Docket No. SDWA-04-2005-1016)

Gene A. Wilson)

Respondent)

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COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

COMES NOW, Counsel for Complainant and files this Motion for Accelerated Decision on Liability pursuant to 40 CFR § 22.20(a).

An accelerated decision is appropriate when there are no material facts in genuine dispute and the moving party is entitled to judgment as a matter of law. The standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 793 (EAB 1997); In re CWM Chem. Serv., 6 E.A.D. 1, 12 (EAB 1995); In the Matter of Hing Mau, Inc., Docket No. FIFRA-9-2001-0017 (August 13, 2002). Thus, under the Consolidated Rules of Practice, 40 C.F.R. § 22.20:

(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 . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law"

Complainant moves this forum to find that no genuine issue of material fact exists and that Complainant is entitled to judgment as a matter of law.

ARGUMENT

1. RESPONDENT FAILED TO DEMONSTRATE THE MECHANICAL INTEGRITY OF OR PLUG THE GENE WILSON #1 WELL, AS REQUIRED BY HIS PERMIT AND THE UNDERLYING REGULATIONS, FROM OCTOBER 1995 TO JUNE 2005.

The Underground Injection Control (UIC) Permit issued to Respondent on January 12, 1990, [Complainant's Exhibit 6], states in Part II G. 3. that, in accordance with 40 CFR §§ 144.28(g)(2)(iv)(A) and 144.51(q), a demonstration of the mechanical integrity of the subject well shall be made no later than five years from the date of the last approved demonstration. Part II F. 3. of the permit states further that inactive wells must be plugged and abandoned unless the

permittee can describe, to the satisfaction of EPA, actions or procedures he will take to ensure that the well will not endanger underground sources of drinking water (USDWs) during the period of temporary abandonment. This provision is in accordance with 40 CFR §144.52(a)(6) . Respondent has admitted that he made an approved demonstration of mechanical integrity on October 15, 1993, and that the well was inactive until it was plugged in June 2005. In accordance with his UIC permit, the permittee should either have plugged the well after two years of inactivity, that is by October 15, 1995, or he should have demonstrated that it had mechanical integrity by that date. The record reveals that Respondent made no approved demonstration of mechanical integrity after the October 15, 1993 demonstration, and that he did not plug the well until June 2005. Respondent makes several specious arguments which fail to relieve him of the requirement to timely demonstrate the mechanical integrity of or plug the subject well.

First, he states that the permit should not have been issued because he failed to satisfy certain requirements for its issuance. Specifically, Respondent alleges that he never submitted evidence of financial responsibility. However, the record shows that the well was covered by a standby trust agreement and a letter of credit. [Complainant's Exhibits 3, 29, and 31]. Regardless of whether Respondent had financial responsibility in place or not, a permit, which had been public-noticed, was issued to him for the subject well, and he never objected to its issuance. There is no basis for a finding that the permit for the Gene Wilson #1 well was anything other than a valid UIC permit.

Secondly, Respondent alleges that EPA verbally agreed to allow him to modify the permit to take fluids from other operators. The regulations pertaining to UIC permit modifications are found at 40 CFR §§ 124.5 and 144.39. Those regulations specify that permits may only be modified for certain specified reasons, and that the reasons supporting the request must be stated in writing. Respondent's permit modification request does not fall within one of the categories of bases for allowing a modification, nor did he assert one of these bases as the reason for his request. EPA would not have agreed to allow him to modify the permit contrary to the regulations. The record shows a 1992 letter from Respondent requesting a modification and a 1993 letter from Respondent reiterating that request. [See Complainant's Exhibit 8 and

Respondent's Exhibit 3]. The fact that Respondent did not mention a permit modification in any of his subsequent correspondence, undermines his claim regarding a verbal agreement to modify the permit. When the decision is tentatively made to modify a permit for one of the permissible reasons contained in 40 CFR § 144.39(a), a draft permit is prepared incorporating the proposed changes, and it must be issued for public notice. None of this took place in response to Respondent's 1992 and 1993 letters because Respondent's permit was never modified. In any event, the issue of Respondent's attempt to modify the permit has no bearing whatsoever on his obligation to plug or demonstrate the mechanical integrity of his well, and thus his claim does not create an issue of fact as to Respondent's liability for the violations alleged in the Complaint.

Thirdly, Respondent alleges that his well was scheduled to be tested for mechanical integrity on April 26, 1999, but EPA's representative failed to appear to witness the testing. EPA has no record of a test being scheduled for the Gene Wilson #1 well on that date. Respondent has submitted a November 24, 2006 affidavit by one of his former employees stating that EPA's inspector failed to appear for a mechanical integrity test on April 26, 1999. [Respondent's Exhibit 51]. But in an August 18, 2000 letter responding to an August 2, 2000 request from EPA for evidence of a mechanical integrity test, Respondent made no mention of a test having been scheduled for April 26, 1999. [Complainant's Exhibits 16 and 17]. His employee stated further in his affidavit that he and another man performed a mechanical integrity test on the subject well on April 26, 1999. However, Respondent also failed to mention this alleged mechanical integrity test in his August 18, 2000 letter to EPA. Surely if EPA's inspector had failed to appear as scheduled on April 26, 1999, Respondent would have mentioned this failure 16 months later when EPA requested evidence of a mechanical integrity test. Just as surely, if Respondent's employee had tested the well for mechanical integrity on April 26, 1999, Respondent would not have written in that August 22, 2000 letter to EPA that "Only the initial mechanical integrity was performed." Respondent's assertions and the assertions of his employee regarding the circumstances of April 26, 1999, are highly suspect.

More importantly, only a mechanical integrity test witnessed by an EPA authorized inspector and properly documented can discharge the Respondent's obligation under the permit. [See Complainant's Exhibit 6, Part I, Section A., 3.(a)]. Thus, Respondent is liable regardless of

whether his claim to have conducted a test on April 26, 1999 is true or not, and therefore there is no issue of fact regarding Respondent's liability. Respondent's assertions regarding an April 26, 1999 test, if determined to be true, would only be relevant to determining the amount of the penalty.

The facts reveal that although it had no legal obligation to do so, EPA reminded Respondent on several occasions of the requirement to demonstrate the mechanical integrity of his well. EPA sent a letter to Respondent on October 1, 1998, indicating that annual monitoring reports, a recent mechanical integrity, and fluid analyses were missing from his files. [Complainant's Exhibit 12].¹ On January 5, 1999, EPA sent a letter to Respondent notifying him that he would be required to demonstrate the mechanical integrity of his well on January 21, 1999. [Complainant's Exhibit 14]. However, a letter sent to EPA's contractor transmitting testing schedules includes a notation in the redacted attachment that the test for the Gene Wilson #1 well had been cancelled.[Complainant's Exhibit 15]. Carol Chen, who schedules mechanical integrity testing and pluggings, can testify that any such cancellation would have been made by the well owner or operator, in this case, Respondent. [See Carol Chen's Affidavit, attached hereto]. By letter dated August 2, 2000, EPA again alerted Respondent of the need to test his well and provide monitoring reports and fluid analyses by requesting that he provide documentation of these activities. [Complainant's Exhibit 16]. Respondent wrote in reply that he planned on plugging the well as soon as a certain individual was available to do so. Respondent did not make any effort to plug the well until EPA notified him of the violations herein, by letter dated February 9, 2005. He then proceeded to plug the well in June 2005.

What is evident is that Respondent never took seriously his responsibilities as the owner/operator of a permitted mechanical integrity well. This is apparent from the February 21,

¹Oddly, Respondent states on page 4 of his Rebuttal that he did not receive this letter, although it was sent to the same address as all the other letters. The difference between this letter and the others is that EPA did not send it certified and therefore can not prove that he received it. Handwritten dating, as is found on this letter, is done when correspondence has been sent out without being date-stamped. Respondent also states that he did not receive Complainant's Exhibit 18, an inspection form. However, this form was not sent to him. In accordance with standard procedures, a notice of the inspection was left at the well location.

2005 letter he wrote to Alfreda Freeman, a supervisor in the Water Branch. In discussing a statement he made to this attorney, Respondent wrote "I told her I intended on plugging the well but didn't know there was a hurry..." EPA bent over backward in sending Respondent reminders and even scheduled a test for him which he cancelled. Again, EPA had no legal obligation to remind Respondent of the requirements set forth in his permit. Respondent has not offered any evidence controverting his documented noncompliance with the requirement that he timely demonstrate the mechanical integrity of his well or plug it. Attached hereto is an Affidavit by William Mann who searched EPA's file for the subject well and found no evidence that Respondent demonstrated the mechanical integrity of his well after the initial demonstration in 1993. All of the evidence submitted by Respondent is in the nature of arguable efforts to comply or misunderstanding regarding the legal obligation, and thus does not create an issue of fact regarding his liability.

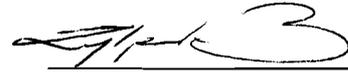
2. **RESPONDENT FAILED TO SUBMIT ANNUAL MONITORING REPORTS AS REQUIRED BY HIS UIC PERMIT.**

Part I Section D.2. of Respondent's UIC permit requires that he submit monitoring reports to EPA on an annual basis. Respondent did not submit the required monitoring reports and he makes no claim that he did. Respondent has not provided any explanation for his failure to submit annual monitoring reports. Reminders of the need to submit these annual reports, although not necessary to a demonstration of liability, were sent to Respondent in October 1998 and August 2000. [See Complainant's Exhibits 12 and 16]. Even if a well is not being used, monitoring reports are useful in informing EPA that the well is inactive. This is the only way the Agency knows that a mechanical integrity demonstration should be made every two years rather than every five or that the well should be plugged. Attached hereto is an Affidavit by William Mann, attesting to the fact that no monitoring reports are found in EPA's file for the subject well. Respondent has submitted no evidence to controvert Complainant's documentation of this allegation and there is no factual issue regarding Respondent's liability for failing to submit the required monitoring reports.

PRAYER FOR RELIEF

There being no material facts in genuine dispute, and Complainant being entitled to judgment

as a matter of law, it is hereby requested that Complainant's Motion for Accelerated Decision be granted.



Zylpha Pryor
Attorney for Complainant

Of Counsel: Paul Schwartz

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF

Docket No. SDWA-04-2005-1016

Gene A. Wilson

Respondent

AFFIDAVIT

COMES NOW the Affiant, Carol Chen, after first being duly sworn, states the following:

1. I am currently employed as an Environmental Scientist by the U.S. Environmental Protection Agency. My responsibilities include managing the Underground Injection Control (UIC) Class II field inspection program in Kentucky and Tennessee.

2. I began tracking Mechanical Integrity Testing (MIT) shortly after December 30, 1991. At that time, operators had to contact the EPA-approved field representative themselves to arrange the witnessing of their MITs. I made phone calls and sent out reminder letters to the EPA-approved inspector to assist him in his planning.

3. At some point, I became the initial point of contact for MITs, and handled the scheduling. Once the schedule was planned, the operator and inspector were free to communicate and make the necessary arrangements or rearrangements. I took on the actual management of the Class II UIC field inspection program in July 1997. Since then, I have handled all arrangements for witnessing of MIT, plugging and abandonment, and remedial cementing activities. As the point of contact for all witnessing, I issue the approval of all work for the contractor. Such approval is in the form of a technical direction document (TDD). Once the TDD is issued by EPA, the inspector and operator can arrange, or rearrange, the meeting date at will.

4. My records show that I issued TDD No. 7, dated December 21, 1998, in which I scheduled an MIT for the Gene Wilson #1 well for January 21, 1999.

5. My records also indicate that I issued a cancellation of the planned January 21, 1999, MIT of the Gene Wilson #1 via TDD No. 10, dated January 13, 1999.

6. Although I have not discovered any record showing the specific reason for the cancellation referred to in paragraph 5, generally, such cancellation is issued in response to information I receive leading me to believe that the work will not be done. The information is usually received in the form of a phone call from an operator expressing his intention not to perform the MIT. I have not found any record indicating that the mechanical integrity test was ever rescheduled, or even requested, by Gene Wilson.

7. To the best of my knowledge, and after reviewing my records, I find no mention of any communication with Gene Wilson regarding scheduling of plugging or testing activity for the Gene Wilson #1 well again until 2005. In early June 2005, I recall receiving a phone call from Mr. Wilson during which he indicated his intention to plug the Gene Wilson #1 well in very short order.

8. During the phone call referred to in paragraph 7, Mr. Wilson informed me that he had already arranged for a state inspector to witness the plugging. I told him that was fine. The well was then plugged on June 10, 2005

Carol Chen
Carol Chen

STATE OF GEORGIA
FULTON COUNTY

The undersigned Notary Public does hereby certify that the foregoing Affidavit was produced to me and acknowledged, subscribed and sworn to me by the Affiant to be her free act and deed for the purposes set forth therein.

Given under my hand and seal the 13 day of February, 2007.

My Commission Expires: ~~Notary Public, Rockdale County, Georgia~~
~~My Commission Expires Jan. 17, 2010~~

[Signature]
Notary Public

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4**

IN THE MATTER OF

Docket No. SDWA-04-2005-1016

Gene A. Wilson

Respondent

AFFIDAVIT

COMES NOW the Affiant, William Mann, after first being duly sworn, states the following:

1. I am currently employed as a permit writer by the U.S. Environmental Protection Agency and my responsibilities include reviewing underground injection control (UIC) permit applications, conducting well inspections, witnessing mechanical integrity tests, and approving plugging and abandonment plans.

2. I have handled the responsibility of writing underground injection control (UIC) permits since 1988. As part of this responsibility, I have access to and review documents, such as annual monitoring reports and mechanical integrity tests, submitted by permittees.

3. I have reviewed the permitting file for the Gene Wilson #1 well and found that no annual monitoring reports for this well have ever been submitted.

4. I have reviewed the permitting file for the Gene Wilson #1 well and found that no demonstration of mechanical integrity has been made since the initial demonstration in 1993.

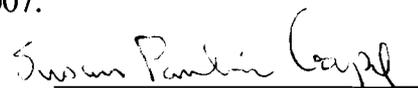

William Mann

STATE OF GEORGIA
FULTON COUNTY

The undersigned Notary Public does hereby certify that the foregoing Affidavit was produced to me and acknowledged, subscribed and sworn to me by the Affiant to be his free act and deed for the purposes set forth therein.

Given under my hand and seal the 9th day of February, 2007.

My Commission Expires: Aug 2, 2010


Notary Public

**Susan Pauline Capel
Notary Public, DeKalb County, Georgia
My Commission Expires Aug. 2, 2010**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, the original and one copy of Complainant's 'Motion for Accelerated Decision,' and accompanying Affidavits were delivered by interoffice mail to the Regional Hearing Clerk and copies were sent to the following persons in the manner noted.

Susan B. Schub, Esq.
Regional Judicial Officer
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Atlanta, GA 30303

Interoffice Mail

Gene A. Wilson
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P.O. Box 702
Louisa, KY 41230

Overnight Mail - Delivery Confirmation

Nicholas N. Owens
National Ombudsman
U.S. Small Business Administration
409 3rd Street, SW, MC 2120
Washington, DC 20416-0005

First Class Mail

February 14, 2007



Sharon Thompson, Secretary
OLS - OEA
U.S. EPA
61 Forsyth Street
Atlanta, GA 30303