

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF)

Gene A. Wilson)

Respondent)

Docket No. SDWA-04-2005-1016

HEARING CLERK

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**RESPONSE TO RESPONDENT'S MOTION TO COMPEL DISCLOSURE OR
CONTINUANCE OF HEARING IN THE ALTERNATIVE**

COMES NOW, Counsel for Complainant and timely files this response to Respondent's 'Motion to Compel Disclosure or Continuance of Hearing in the Alternative.' The parties have already had the opportunity to argue the merits of this motion and the Honorable Regional Judicial Officer ruled to deny it during a recent conference call. However, Complainant is filing its Response to the written Motion in the interest of creating a record of its objection.

First, Respondent states in his Motion that the file is absent his attempts to have the permit modified, his notices that the well had not been completed, and various other defenses. EPA has no records or documents, other than what is being withheld, that Respondent has not had the opportunity to view. If Respondent has documents which he sent to EPA, the burden is on him to produce such documents, as EPA has no knowledge of them.

Second, Respondent requests that the Regional Judicial Officer view the documents withheld pursuant to his Freedom of Information Act (FOIA) request, or, alternatively, grant a continuance so that Respondent can appeal the decision of the FOIA office to withhold the documents. A copy of the withheld documents and transmittal letter has been attached hereto. The following bracketed numerical references pertain to the item numbers on the list of documents to be withheld. It is EPA's position that the withheld documents have no probative value in the context of this case. The Administrative Action Data Sheets and Case Conclusion Data Sheets [#1, #2] are purely internal, administrative records which have no relevance to the merits of this case. The Administrative Penalty Settlement Calculation Worksheets [#3] contain EPA's method of arriving at the penalty amount that EPA offered to settle Respondent's case. Respondent refused to settle the case for any amount, so the amount reflected on these Worksheets is no longer an issue. The amount that Complainant will seek for purposes of litigation is a different amount which was not arrived at by using any of the information

contained on these Worksheets. The staff attorney's handwritten notes [#4] are attorney work products which were prepared following the time frame of the violations and have no bearing upon the merits of the case. The three e-mails [#5, #6, #7] contain discussions among EPA staff regarding certain aspects of the case prior to the filing of the Complaint. The documents upon which the discussions were based are all part of the record which Respondent has had the opportunity to review. The two memoranda [#8, #9] were prepared by the enforcement officer as notes to the file in preparation for filing the Complaint. Finally, the staff attorney's note [#10] was prepared in anticipation of the litigation. There is nothing among these withheld documents that could be construed as probative of the merits of Respondent's case. In fact, all of these documents were generated subsequent to Respondent's being notified of the violations alleged herein and most, the first three excepted, reflect EPA's effort to prepare for the litigation.

For the foregoing reasons, Complainant prays that Respondent's Motion be denied.

Respectfully submitted,



Zylpha K. Pryor
Counsel for Complainant



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

NOV 03 2006

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

RE: Freedom of Information Act Request 4-RIN-00024-07

Dear Mr. Wilson:

This is in response to your Freedom of Information Act (FOIA) request of October 5, 2006, regarding a file review of the Underground Injection Control (UIC) files pertaining to Gene A. Wilson.

Please find enclosed responsive documents that you tagged during your file review on October 20, 2006. Prior to your review of the files, Leonard Dangerfield, FOIA Specialist, advised you that a portion of the records had been removed from the files, because of their exempt status under the FOIA.

At the conclusion of your records review, you asked if the files were complete and whether another search could be conducted. You were advised that another search for responsive documents would be conducted and you would be advised of those findings.

Based on the records identified in your request, we find that after conducting an exhaustive search of the record collections for Region 4, we have no other records responsive to your request. The fees for processing your request are waived as de minimis.

We have reviewed all the requested records with an eye toward disclosure and deemed a portion of the records inappropriate for discretionary release. We are unable to provide you with documents or portions of documents which have been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. §§ 552(b)(5) and (b)(7)(A).

Exemption 5 protects "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party in litigation with the agency. The most commonly invoked privilege incorporated with Exemption 5 is the deliberative process privilege, the general purpose of which is to "prevent injury to the quality of the agency decisions." Specifically, three policy purposes consistently have been held to constitute the basis for this privilege: (1) to encourage open, frank discussions on matters of policies between subordinates and superiors; (2) to protect

against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. It also protects "inter-agency or intra-agency" communication which have been determined to be subject to the attorney-work product privilege and the attorney-client privilege.

Exemption 7(A) protects records or information compiled for law enforcement purposes where disclosure "could reasonably be expected to interfere with enforcement proceedings."

Under the FOIA, you have the right to appeal my partial denial and no records to EPA, Office of Environmental Information, Records, Privacy, and FOIA Branch (2822T), 1200 Pennsylvania Avenue, N.W., Washington, DC 20460. The appeal must be made in writing, and it must be received at this address no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30-day limit. The appeal may include as much or as little related information as you wish, as long as it clearly identifies the determination being appealed (including the assigned FOIA request number 04-RIN-00024-07). For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

Should you have questions regarding the withheld information or appeal procedure, please contact Ms. Priscilla Johnson, Office of Environmental Accountability at (404) 562-9614. Should you have questions regarding this response, please contact Leonard Dangerfield, FOIA Specialist, at (404) 562-9316.

Sincerely,

Patty A. Bettencourt
for Russell L. Wright, Jr.
Assistant Regional Administrator
Office of Policy and Management

Enclosures

1. Index of Releaseable Documents
2. Index of Exempt Documents

INDEX OF DOCUMENTS RELEASED

4-RIN-00024-07

1. Two copies of Underground Injection Control Data Management System, MIT History Report, dated November 9, 2005
2. Class II Well Inspection Form, RE: Gene A. Wilson, dated September 14, 2004
3. SBM letter to Ms. Walker Smith, Office of Regulatory Enforcement, EPA, RE: Gene Wilson, dated July 27, 2006
4. Letter from Gene A. Wilson, to Ms. Alfreda F. Freeman, RE: Gene A. Wilson Well, dated February 21, 2005
5. EPA, Region 4 Public Notice, undated
6. EPA, Region 4 letter to Mr. Gene A. Wilson, RE: Notice to Demonstrated Mechanical Integrity of Injection Well, dated January 5, 1999
7. Underground Injection Control Data Management System, RE: Gene A. Wilson, undated
8. Record copy of EPA, Region 4 letter to Gene A. Wilson, RE: Gene A. Wilson
9. 5 Year Review Checklist, RE: Gene A. Wilson
10. Permit Operator Checklist, dated September 27, 1989
11. Part II, Page II-13 of Permit Application, H. Financial Responsibility
12. EPA, Region 4 letter to Mr. Gene A. Wilson, RE: Draft UIC Permit, dated October 20, 1989
13. UIC Permit Application Attachments A -U
14. Diagram of Injection Well

DOCUMENTS TO BE WITHHELD

4-RIN-00024-07

Documents withheld pursuant to FOIA Exemptions 5, 5U.S.C. § 552 (b)(5) and (b)7(A)

1. Two (2) versions of Administrative Action Data Sheet, RE: Gene A. Wilson, undated - **7(A), Interference with Enforcement Proceeding**
2. Case Conclusion Data Sheet, RE: Gene A. Wilson, dated March 22, 2006 - **7(A), Interference with Enforcement Proceeding**
3. Two (2) UIC Administrative Settlement Policy, Individual Violations Settlement Calculation Worksheet - **(b)(5) Predecisional/Deliberative Process, 7(A), Interference with Enforcement Proceeding**
4. Three (3) handwritten note by staff attorney - **(b)(5) Attorney Work Product**
5. Email from Alfreda Freeman, Water Enforcement Branch to Zylpha Pryor, Associate Regional Counsel and other parties, RE: Gene A. Wilson, November 9, 2005 - **(b)(5) Attorney-Client, 7(A), Interference with Enforcement Proceeding**
6. Email from Carol Chen, UIC Section to Randy Vaughn, Water Enforcement Branch, RE: Gene Wilson, November 9, 2005 - **(b)(5) Attorney-Client Privilege**
7. Email from Bill Mann, UIC Section to Randy Vaughn, Water Enforcement Branch, RE: Gene Wilson, dated March 10, 2005 - **(b)(5) Predecisional/Deliberative Process, 7(A) Interference with Enforcement Proceeding**
8. Memorandum from Randy Vaughn to File, RE: Gene A. Wilson, dated July 27, 2005 - **(b)(5) Predecisional/Deliberative Process, 7(A) Interference with Enforcement Proceeding**
9. Memorandum from Randy Vaughn to File, RE: Gene A. Wilson, dated January 13, 2006 - **(b)(5) Predecisional/Deliberative Process, 7(A) Interference with Enforcement Proceeding**
10. Typewritten note by staff attorney - **(b)(5) Attorney Work Product**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, the original and one copy of Complainant's 'Motion to Compel Disclosure or Continuance of Hearing in the Alternative' 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
U.S. EPA
61 Forsyth Street
Atlanta, GA 30303

Interoffice Mail

Gene A. Wilson
101 Madison Street
P.O. Box 702
Louisia, KY 41230

Certified Mail - Return Receipt
and via Facsimile to 606-638-1041

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

First Class Mail

November 13, 2006


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