UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Gene A. Wilson	)	Docket No. SDWA-04-2005-1016
	)	
Respondent.	)	
	)	

INITIAL DECISION

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). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice") and specifically Subpart I of the Consolidated Rules of Practice. 40 C.F.R. Part 22.

On May 16, 2006, the United States Environmental Protection Agency ("EPA" or "Complainant") filed an Administrative Complaint against Gene A. Wilson ("Mr. Wilson" or "Respondent") for alleged violations pertaining to the Gene A. Wilson #1 well ("the Well"), located in Lawrence County, Kentucky.[1] The bases for the alleged violations are Respondent's failures to a) either plug the Well or test its mechanical integrity and b) submit annual monitoring reports. According to the Complaint, the period for both violations begins May 16, 2001, five years prior to the date the Complaint was filed and ends on June 10, 2005, the date on which the well was plugged. Complainant seeks a penalty of $11,291.

[1] The Complaint was filed subsequent to issuance of a Notice of Violation on February 9, 2005.

PROCEDURAL HISTORY

Respondent, appearing *pro se*, filed his response to the Complaint on June 14, 2006, entitled "Counterstatement of Facts and Answer to Administrative Complaint."[2] Thereafter, on August 8, 2006, Respondent filed a Motion for Summary Judgment. By Order dated September 29, 2006,[3] I held that Respondent's Motion for Summary Judgment was premature and that a determination would be held in abeyance pending completion of prehearing exchange of information. On December 11, 2006, upon completion of the prehearing exchange of information, Respondent moved for Summary Judgment incorporating his earlier Motion for Summary Judgment. Thereafter, on February 14, 2007, Complainant filed a Motion for Accelerated Decision on Liability to which Respondent filed a timely reply along with an addendum to his previously filed Motion for Summary Judgment. On June 19, 2007, by Amended Order on Respondent's Motion for Summary Judgment and Complainant's Motion for Accelerated Decision on Liability ("Amended Order"), I denied both motions. I found there were genuine issues of material fact in dispute and also noted particular issues to be addressed by the parties at hearing. However, I found that a) Permit # KY 10376, which is the subject of the matter at hand, was a validly issued permit covering the Gene Wilson # 1 well[4] and

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[2] Respondent indicated that he is an attorney. However, he has unequivocally and repeatedly stated that he is unfamiliar with the substantive laws and procedural rules governing this proceeding, and is not appearing as counsel of record.

[3] "Order on Respondent's Motion for Summary Judgment and Order Establishing Further Proceedings"

[4] The permit remained in effect from January 12, 1990 as there was no evidence that it had been modified, revoked and reissued, or terminated.

b) annual monitoring reports had not been submitted.[5] Notwithstanding these findings of fact, I concluded that they did not establish Respondent's liability without further proceeding.

Subsequent to issuing the aforementioned Amended Order, on June 28, 2007, I issued an Order on Respondent's Motions, addressing both previously and contemporaneously filed pending motions.

Earlier in the proceeding, on December 16, 2006, simultaneous with Respondent's filing of the first Motion for Summary Judgment, Respondent filed a Motion to Strike or Consolidate ("Motion to Strike"). I granted Respondent's Motion to Strike in part by striking two of Complainant's exhibits from the record before this tribunal. On February 26, 2007, Respondent had filed a document captioned "Motion" in which (referring to the Freedom of Information Act) he sought to inspect files on other Underground Injection Control permits and to have records of those permits made part of the case at hand.[6] That Motion was denied. By the same June 28, 2007, Order, I denied Respondent's Motion filed on May 1, 2007, in which Respondent had sought the return of a portion of money paid for records under FOIA, the addition of a witness, and that all applications for injection wells assigned certain permit numbers become part of the administrative matter at hand.

On July 3, 2007, I issued a Notice of Hearing. The Notice established a date, time and location of the Hearing and also set a schedule for filing any additional prehearing

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[5] The fact that there had never been annual monitoring reports was uncontested and further supported by affidavit of William Mann.

[6] Complainant's reply filed on March 7, 2007, objected to the records of the other permits being made part of the case, and in the alternative suggested this be a FOIA request and/or handled as a supplement to pre-hearing exchange.

motions, responses and replies. The parties complied with the schedule set forth. By Order on Prehearing Motions issued September 4, 2007, I ruled on all outstanding motions. While the Order on Prehearing Motions, incorporated by reference and made part of this record, further explains the rationale and bases for my rulings, in summary I concluded as follows: Other than three particular exhibits to be made part of the prehearing exchange, Respondent's motion to add to his prehearing exchange all other documents not exchanged up to that date, including documents withheld from his FIOA request as well as permit files furnished for viewing, was denied; Respondent's motion to add to his list of witnesses was denied; Respondent' motion to enlarge days allotted for hearing or in the alternative to Dismiss was denied; Complainant's Motion to Strike Respondent's Exhibit 55 and Affidavit was denied; and Complainant's Motion to Strike Respondent's defense of selective enforcement was denied. However it is important to note that while I did not strike this defense, I cited a number of cases establishing the heavy burden Respondent faced in establishing this defense at hearing,
and advised Respondent of the following: "While Respondent claims that documents he seeks to introduce into evidence and witnesses he intends to examine at hearing will establish that he was singled out for enforcement by EPA over other similarly situated in the regulated community, thus far he has neither alleged nor exchanged prehearing information in support of the second prong of this defense: that he was so selected for prosecution invidiously or in bad faith based upon some factor such as race, religion, or a desire to prevent the exercise of Constitutional rights. In order to prevail, Respondent

must, within the time he is allotted at hearing, meet his burden with respect to both prongs of this defense."[7]

On September 4, 2007, in addition to scheduling the final prehearing conference call, I issued an Order on Subpoenas, issuing subpoenas for two of Respondent's witnesses.[8] The final prehearing conference was held on September 11, 2007, summarized by the Report of Prehearing Conference issued that same date, clarifying and resolving hearing procedural matters. All motions, responses, and Orders filed in this matter are made part of this administrative record.

An evidentiary hearing was held from September 25 through September 27, 2007, in Ashland, Boyd County, Kentucky.

Complainant called three witnesses to the stand and Respondent produced six witnesses. In addition, the affidavit of Respondent's seventh witness, Mr. Randy Poston, was admitted into evidence as he was unavailable to appear at the hearing. 40 CFR § 22.22(d). The record of the hearing consists of a three volume stenographic transcript as well as numerous exhibits.[9] The parties submitted post hearing briefs and reply briefs in accordance with the schedule established by Order on November 11, 2007. The record of the hearing closed with the submission of all reply briefs.

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[7] This defense is discussed elsewhere in this opinion.

[8] The undersigned issued another subpoena at Respondent's request to substitute a different witness who also required a subpoena to appear at the hearing.

[9] Hearing testimony is referred to by Transcript ("Tr"), Volume number (" I, II or III") followed by page number; Complainant's and Respondent's Exhibits are referenced as "C Ex. #" and "R Ex. #" respectively.

RULING ON COMPLAINANT'S MOTION TO STRIKE

Prior to addressing the substantive issues of liability and penalty, I will dispense with one pending post-hearing motion filed by Complainant to which Respondent filed a reply.[10]

Respondent's post-hearing submission is captioned: "Respondent's Proposed Findings of Fact with Missing Exhibits 14, 30 and Pleading Filed 11-07-06 Attached Herewith, Conclusions of Law, Post Hearing Brief, Motion and Proposed Order. ("Respondent's Post-Hearing Brief"). Complainant's post-hearing brief is entitled "Complainant's Proposed Findings of Facts and Conclusions of Law and Post Hearing Brief" ("Complainant's Post-Hearing Brief"). Both parties filed timely replies to the post-hearing briefs. On January 31, 2008, Complainant filed a Motion to Strike Respondent's Affidavit with Exhibit of Telephone Bill ("Motion to Strike Affidavit"), seeking to strike an affidavit of Patty Carter as well as a telephone bill attached to Respondent's Reply Brief. Ms. Carter's affidavit addressed a matter disputed during the hearing regarding a Mechanical Integrity Test ("MIT") originally scheduled to take place in January 1999. Both the affidavit and telephone bill were submitted to rebut EPA's characterizations of Ms. Carter's testimony as lacking credibility and to further buttress Ms. Carter's testimony regarding her rescheduling of that test for a different date.[11]

Section 22.22(a) of the Consolidated Rules provides, ". . . If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony

[10] The final few paragraphs of Respondent's Post-Hearing Brief is entitled "Motion", wherein Respondent seeks to have the case dismissed. The "Motion" was not filed in accordance with 40 CFR § 22.16 governing motions, nor does it appear that Respondent intended this to be treated as such. Therefore, notwithstanding the terminology, this is considered part and parcel of Respondent's request for relief that he be found not liable, that there be no assessment of penalty and that the matter against him be dismissed.

[11] The facts surrounding this event are discussed at greater length elsewhere in this Decision.

required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so." 40 C.F.R. § 22.22(a). Respondent has failed to show good cause for failing to provide the telephone bill at the time of prehearing exchange or as a supplement thereto. As such, the telephone bill will not be admitted. With respect to Ms. Carter's affidavit, similarly, 40 CFR § 22.22(e) governs admission of affidavits where the witness is unavailable. In this case, Ms. Carter was not only available but actually testified at the Hearing. She cannot now supplement testimony in this manner. Therefore, Complainant's Motion to Strike Affidavit is **granted**.

On a related matter, during the Hearing, Complainant sought to admit into evidence as Complainant's Exhibit 32, a printout from the Kentucky Oil and Gas Division website allegedly documenting the conversion of Respondent's well from a production well to an injection well. Complainant had failed to include the document in either of its prehearing exchange packages. Therefore it was deemed inadmissible at the hearing for the same reason that Respondent cannot now submit a document it had not made part of its prehearing exchange.[12] Complainant attached the same document to its Post-Hearing Brief while noting that this was the document twice not admitted into evidence, but nevertheless proposes this third time to enter it into the record, yet again, as a public document available on the Oil and Gas Division website. The parties were given

[12] Complainant offered the document into evidence twice during the hearing. It was deemed inadmissible both times. Tr III 139, Tr II 132.

ample time and opportunity to provide all exhibits intended to be entered into evidence at the hearing. Complainant's current proffer of the same document on the same basis is simply an attempt to bypass the ruling already made at hearing. Determinations with regard to admission of documents and exhibits into evidence do not rely upon motion by either party. The document is hereby **stricken.**

DETERMINATION OF LIABILITY

The Consolidated Rules governing this proceeding address the burdens of proof and persuasion placed upon the parties and provide in pertinent part as follows:

". . . (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. . . The respondent has the burdens of presentation and persuasion of any affirmative defenses. . . (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." 40 C.F.R. § 22.24

At the outset, it is necessary to confirm the precise period of time covered in this action. As stated in paragraph 21 of the Complaint, "the period for both violations begins five (5) years back from the date of the filing of this complaint and ends on June 10, 2005, the date on which the well was plugged."[13] However, there were several inconsistent references to a statutory basis for this limitation, none of which cited any particular statute.[14] Therefore, in denying Complainant's Motion for Accelerated Decision, among other issues, I directed the parties to address the relevance of alleged

[13] Evidence that the well was plugged was submitted as C Ex. 26, the Plugging and Abandonment Report, as well as a letter from Respondent confirming the plugging was completed. C Ex. 27

[14] During the hearing references were also made to this period as a "statute of limitations" by Complainant's witness, Tr II 54. Counsel for Complainant referred to a statute of limitations for penalty purposes. Tr II 31.

acts or omissions prior to May 1, 2001, the start of the period covered by the action. Notwithstanding my request there is still no clear and precise basis or statutory citation provided, leaving this tribunal to merely speculate as to the applicable Statute of Limitations.[15] Regardless of the Complainant's rationale, notice pleading under the Consolidated Rules should provide due process to Respondent and fair notice of the claims being made against him. Based upon the Administrative Complaint initiating this proceeding, Respondent can only be found liable for violations occurring between May 16, 2001 and June 10, 2005. Therefore, while evidence supporting omissions and/or commissions outside this particular timeframe may impact upon findings of liability as well as a determination of penalty, they will not, in and of themselves, amount to violations for which Respondent will be held liable.

The issues in this case cover both liability and penalty and, based upon the Administrative Complaint as drafted, are as follows:

1. Whether Gene A. Wilson, during the period from May 16, 2001 to June 10, 2005, a) violated the SDWA, 42 U.S.C. §300f, et seq., the regulations promulgated pursuant to the Act, 40 CFR § 144.51(a), 40 CFR §144.52(a)(6), and permit # KY 10376, by failing to demonstrate the mechanical integrity of the subject well at least once every

[15] 28 U.S.C. § 2642, "Time for Commencing Proceedings", provides in pertinent part as follows: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any . . . penalty. . . pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . ." This statutory limitation provision was held applicable in an administrative proceeding under SDWA § 1414(g), 42 U.S.C. §300g-3(g). See *Kenneth Sebren, A-1 Trailer Park Water System*, Docket No. SDWA – C930025, ALJ Perlstein, October 7, 1998. As explained above in the body of this decision, the violations pleaded are those to which Complainant is confined. Furthermore, the statute of limitations was not raised as an issue in this case. Therefore, this decision addresses neither the statute of limitations to the matter at hand generally nor the application of 28 U.S.C. § 2642 to this action specifically.

two (2) years or to timely plug and abandon the subject well and/or b) violated the SDWA, 40 CFR 144.51(a) and the Permit # KY 10376, by failing to annually submit monthly injection monitoring reports.

2. If Gene A. Wilson is found liable for the aforesaid violations, is the imposition of an $11,291 penalty appropriate.

Each issue of liability will be addressed separately.

I. Plugging the well or demonstrating mechanical integrity:

Paragraphs 8 through 12 of the Complaint contain the allegations pertaining to mechanical integrity testing, plugging and abandonment:

> "8. 40 CFR 144.52(a)(6) and Part II, Section F, Paragraph 3 of Respondent's permit, require that mechanical integrity be demonstrated at least once every two (2) years for a temporarily abandoned injection well or that the well be plugged and abandoned in accordance with an EPA-approved plugging and abandonment plant.
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> 9. The subject well was tested for mechanical integrity on October 15, 1993.
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> 10. The subject well was temporarily abandoned from October 15, 1995 through the date that it was plugged on June 10, 2005.
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> 11. The subject well was not tested for mechanical integrity from the date of the initial test on October 15, 1993, through the date that it was plugged on June 10, 2005.
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> 12. Therefore, Respondent violated the SDWA, 40 CFR §§ 144.51(a), 144.52(a)(6), and permit KY10376 by failing to demonstrate the mechanical integrity of the subject well."

The above-referenced Part II Section F 3 of the Permit provides:

> "Plugging and Abandonment
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> 3. Inactive Wells. After a cessation of injection for two years the permittee shall plug and abandon the well in accordance with the plan unless he:
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> (a) Provided notice to the Director including a demonstration that the well will be used in the future; and
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> (b) Described actions or procedures, which are deemed satisfactory by the Director, that the permittee will take to ensure that the well will not endanger USDWs[16] during the period of temporary

[16] USDWs are Underground Sources of Drinking Water.

abandonment. These actions and procedures shall include compliance with the technical requirements applicable to active injection wells unless waived, in writing, by the Director." C Ex. 6

As noted, paragraph 8 of the Administrative Complaint specifically states that 40 CFR § 144.52(a)(6) and Part II Section F, Paragraph 3 of Respondent's permit, require that mechanical integrity be demonstrated at least once every two (2) years for a temporarily abandoned injection well or that the well be plugged and abandoned in accordance with an EPA-approved plugging and abandonment plan. However, nowhere within the four corners of Permit # KY 10376 does it explicitly state that an MIT must be performed on a two year interval for inactive wells.[17] Therefore, in my Amended Order on Accelerated Decision I specifically directed Complainant to explain at the hearing whether the two year interval requirement, as pleaded, is one of the terms of the permit and/or regulations. I also put Complainant on notice that if it is Complainant's position that the requirement to plug and abandon a well after two years of inactivity, by *implication,* establishes the two year interval for MITs during years of inactivity, this should be established at hearing or in post-hearing briefs.[18]

In an effort to clarify the above, on July 25, 2007, Complainant filed a document entitled, "Clarification of Complainant's Position Regarding Permit Requirements to Demonstrate Mechanical Integrity and Submit Monitoring Reports" ("Clarification").[19]

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[17] The only MIT interval included in the permit is that found at Part II G 3 requiring MITs every five (5) years.

[18] In Complainant's Motion for Accelerated Decision, Complainant sites the permit condition at Part II G. 3, requiring an MIT once each five years of the life of the well. For other areas where apparent inconsistencies appear on this issue, reference is made to the undersigned's Amended Order.

[19] The "Clarification" was served upon Respondent, and entered into the record by Complainant for purpose of its intended use as a clarification of previously filed pleadings.

Complainant's counsel explained that EPA's position is that Respondent not only violated the Permit provision at Part II Section G 3 to demonstrate mechanical integrity no later than five years from the date of the last approved demonstration, but the more frequent requirement established at Part II Section F 3 applicable to inactive wells, (specifying that after cessation of injection for two years the permittee shall plug and abandon the well unless he . . . describe actions that he will take to ensure the well does not endanger the USDWs.) Complainant wrote: "The typical, if not universal, way in which other permittees comply with this requirement in EPA Region 4 and avoid the plugging and abandonment requirement, is to demonstrate mechanical integrity every two years. This method is accepted by EPA and that is why Complainant has referred to an obligation to demonstrate mechanical integrity every two years or plug and abandon the well. . . . Thus, the facts, even as characterized by Respondent, demonstrate violations of the permit based on (1) the failure to demonstrate mechanical integrity every five years as required by Part II, Section G 3 of the Permit, and (2) the failure to plug and abandon the well after two years of inactivity or alternatively provide the requisite notice and obtain approval of actions to demonstrate the well would not endanger USDWs (such as by demonstrating mechanical integrity every two years, as is the general method used for Region 4 permitted wells), as required by Part II, Section F 3 of the permit.. ." Furthermore, Complainant's position is that the 5 year and 2 year intervals are not "alternative or inconsistent, rather two distinct permit requirements, both of which are applicable in this case and both of which were violated by Respondent." Clarification p.4[20]

[20] The February 9, 2005, Notice of Violation (NOV) issued against Mr. Wilson (C Ex 19), more accurately reflects the Permit #KY 10376 requirements with respect to MITs. In addition to notifying Respondent that

Mr. Wilson's position on this matter, is simply that he thought the Permit requirement to plug his well was triggered only after injection stopped; since he never started he did not "worry about plugging." Tr II 223.

There is no claim being made by Respondent, that he conducted an MIT at any time between May 16, 2001, and June 10, 2005, the period covered in this action.[21] Nor, is there any dispute that the well was left unplugged until June 10, 2005.[22] The issue is, simply, what was Respondent obligated to do - by law, permit and regulation - that he was remiss in doing during the period covered in the Complaint? Is Respondent liable for failing to plug the well during the 2001 – 2005 period in addition to having failed to conduct certain MITs, and if so, how many? Were his obligations to plug the well and to conduct MITs mutually exclusive? What is the interplay between the Permit provision at Part II G 3, that Respondent conduct MITs every 5 years and the term requiring a showing of mechanical integrity after two years of inactivity?

Shedding some light on the issue, the regulation that Respondent is also alleged to have violated, 40 C.F.R. § 144.52(a)(6) provides:

> "After cessation of operations of two years the owner or operator shall plug and abandon the well in accordance with the plan unless he:
> (1) 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.

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a file review indicates the Gene A. Wilson # 1 has been inactive since 1993, it continues to state that for inactive wells, "EPA, *in accordance with* Part II, Section F, Paragraph 3 of the permit, requires that mechanical integrity be demonstrated every two years for a temporarily abandoned injection well, or that the well be plugged and abandoned in accordance with an EPA-approved plugging and abandonment plan." (emphasis added) The operative words are "in accordance with" and should have been used in drafting the Complaint.

[21] The majority of evidence and testimony regarding demonstration of mechanical integrity centers around an event in April 1999 discussed further below.

[22] See footnote 13.

These actions and procedures shall include compliance with the technical requirements applicable to active injection wells unless waived by the Regional Administrator."

40 C.F.R. § 144.51(a), which Respondent is also alleged to have violated, is more of a "catch-all" provision requiring that the permittee comply with all conditions of the permit and that noncompliance constitutes a violation of the SDWA.

There is a subtle distinction between the provisions pertaining to inactive wells at 40 CFR 144.52(a)(6) and those found in Part II F 3 of the Permit. The Permit requires that after cessation of injection for two years the permittee is to plug and abandon the well unless he not only provides notice to the Director, but that notice is to include ". . . *a demonstration that the well will be used in the future*." (Emphasis added) If the evidence establishes that Mr. Wilson neither notified the Director of his intention to use the well in the future, nor in reality had any such intention, would that release him from the obligation to demonstrate non-endangerment to the USDW?

A review of the preamble to the proposals and final promulgation of 40 CFR Part 144.52, is helpful in gaining a better understanding of the regulations as well as the terms and conditions of the permit.[23] Specifically, the original version of 40 CFR 144.52(a)(6), proposed on April 1, 1983, 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." The rule applied only to "abandoned" wells, and it was specifically noted that "[F]or

[23] This issue had also been addressed in a "Decision on Respondent's Motion to Dismiss the Administrative Complaint" in *In the Matter of Petco Petroleum Corporation,* (Docket No. UIC-5-99-003).

purposes of this paragraph, temporary intermittent cessation of injection operations is not abandonment." 48 Fed. Reg. 14201 (April 1, 1983)

On September 2, 1983, EPA proposed to amend the regulations to interpret when a well is to be considered abandoned so as to trigger the requirement for plugging.[24] It was at that time that EPA proposed 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 be used at some time in the future. It was specifically noted that, "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." 49 Fed Reg. 40105.

However, in the Final Rule promulgated on May 11, 1984, the preamble reflects consideration of comments that the requirement that the operator show the well will be used in the future was overly restrictive for certain Class II wells. The preamble noted:

> '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.
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> *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

[24] 48 Fed. Reg. 40098

> Administrator any time a well is out of operation for more than two years. Second, as the time of 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 (emphasis added).

Permit # KY 10376 went into effect on January 12, 1990, several years after the aforementioned regulation went into effect. While there is no explanation as to why EPA maintained the more restrictive requirement that the permittee demonstrate that the well will be used in the future, it is clear that both the regulations and the Permit imposed requirements upon Respondent intended to protect underground sources of drinking water. Regardless of any intention to use the well in the future, after two years of inactivity, in order to leave the well unplugged, he was required to take safeguards to protect the USDW *and* to demonstrate to the Director, how that would be achieved.

With an understanding of subsection (a) of Part II Section F (3)(a), and its relation to the regulation at 40 CFR § 144.52(a)(6)(i), the matters to be determined are a) whether the Gene Wilson # 1 was inactive for a period of two years; and 2) if so, did Mr. Wilson take the necessary actions to satisfy EPA that the well would not endanger USDWs. These are the issues for consideration in determining Respondent's liability.

B. Was the Gene Wilson # 1 inactive for a period of two years:

Specifically asked to explain what an inactive well is, as referred to in the permit, Complainant's witness, William Mann responded, "One that is not being used for injection purposes." Tr I 57. Consistent with this, the regulations define "well injection" as "the subsurface emplacement of fluids through a well." 40 C.F.R. §144.3.

It has been Mr. Wilson's position, which he tried to convey to EPA, that he never used the Gene Wilson #1 for injection. EPA, on the other hand would not accept Mr.

Wilson's claims, without additional proof. As discussed further below, evidence presented at the hearing not only confirmed that Mr. Wilson had not, since inception, injected into the well, but that the well, as configured, could not serve that purpose.

At the time of purchase, the Gene Wilson #1 well already existed as an old plugged well. Respondent's initial intension was to use the well to put gas into a rented tenant house located on the property.[25] However, after encountering problems in using the well as a producer (brine water was seeping out of the well), Mr. Wilson had the well casing filled with cement to the surface. R Exs. 11, 12 and 46. Soon thereafter, Mr. Wilson employed Lauffer Well Service, Inc., to drill out the previously filled cement in the casing, but stopped at a depth of 939 feet, just short of the well's original perforations. R Ex. 50. Respondent's witness Mr. Monty Hay, a registered geologist [26] testified to the fact that there had been a "bullhead squeeze" (the pumping of the cement into the well to close off the perforations and flow) beginning on April 4, 1989. The re-drilling started on April 5, 1989, and continued on April 6 – April 7, 1989. Tr I 241, R Ex. 50. Most significantly he confirmed that there would not be any way to inject fluid into the well. In response to Mr.Wilson's question whether he ever injected anything into the well, Mr. Hay replied, "To my knowledge, how could you? There was a bullhead squeeze done on it. The drilling stopped at 939. How could there be. So, in my opinion, no, there would not be anyway to inject fluid into the well." Tr I 229. While he also acknowledged Complainant's suggestion that it is possible that the well was perforated after the bullhead squeeze took place, this has to be put in context with his testimony that

[25] After calling several witnesses to the stand, Mr. Wilson testified on his own behalf and reviewed some of the history of the Gene Wilson #1. He testified in chronological order and in narrative form.

[26] Complainant stipulated that Mr. Hay was an expert. Tr I 210

it appeared to him highly unlikely it would have been performed without his knowledge and without knowledge of other producers in the community in search of any additional injection wells for disposal of their brine.

In addition to the above testimony relating to the more technical aspects of the well's configuration, testimony on Mr. Wilson's intended use of the well supports his claims. At about the time he was trying to rework the original well for production Mr. Wilson purchased the "Cam Creek property," located a few miles away, intending to use that land for farming. R Ex. 41. Only after purchasing the property did Mr. Wilson discover oil wells from which brine water was freely flowing into the creek. Of the approximately 18 wells Mr. Wilson chose two to use for injecting brine from the overflowing wells on the property, for which he applied for and obtained injection permits. Not knowing how many injection wells he would need, in addition to the two on Cam Creek he also applied for the injection permit well on Collier Creek (the "Gene Wilson #1). Mr. Wilson hired Ashland Testing and Engineering to apply for the permit on his behalf.

Mr. Wilson, diverted by work being done to clean up Cam Creek, simply ignored any and all processes taking place on the Gene Wilson # 1 until receiving notice to conduct an MIT Mr. Wilson responded on June 21, 1991, indicating that there was not yet activity on the Collier Creek farm. Tr. I 107, Tr II 200, R Ex. 14. However, according to Mr. Wilson's testimony, it was then that he realized his Permit limited injection to fluids brought to the surface in connection with oil and gas production from his operations in the Martha Field, (See Permit Section B1) and that the two injection wells on Cam Creek, Wilson's other property, were sufficient to handle the fluids from

injection wells on that property. Therefore, beginning on November 11, 1992, Mr. Wilson sought modification of his permit. R Ex. 2. A second request attaching the first was sent on August 11, 1993. R Ex. 3. Specifically, he wanted to be permitted to inject fluids from other operators' brine into the Gene Wilson #1. There is no evidence submitted by either party that EPA responded to this request for modification.

Respondent then sold his farm on Cam Creek in 1994, and with it any and all wells on that property from which Respondent could have disposed of brine into the Gene Wilson #1 on Collier Creek.

Complainant appropriately points to a good deal of other contrary evidence entered into the record regarding well perforation, the most significant of which is Mr. Wilson's permit application, the contents of which he had to attest to at time of submission. The application, and other documents submitted subsequent to the aforementioned bullhead squeeze, indicated a different well depth and perforations at 941 to 951 feet, below the point Mr. Wilson and Mr. Hay testified was the depth to which the casing was filled. As Complainant asserts, if Mr. Wilson's current version is accepted as correct, the application was not only incorrect when submitted but was never corrected at any point thereafter. With regard to the fact that Mr. Wilson's application submitted on May 15, 1989 contains incorrect information, Mr. Wilson, displaying a certain disregard for the integrity of the administrative process at the time, admitted that the information was already outdated but that he "just spoon fed that to them [the contractor] so that they could hurry up and get this application filed."[27] Tr II 192. The information contained in

[27] Mr. Wilson introduced evidence that he attempted to obtain emergency permits to inject the brine, which were denied. R Ex. 61.

the Permit Application, indicating the well was perforated with 11 holes from 941-951, reflected work originally done to the well to make it a producer. Tr II 196.

Although beginning in August 1999, Mr. Wilson conveyed to EPA that he never injected into this well (R Ex. 22), it appears that prior to commencement of the present enforcement action, there had never been any indication, that notwithstanding application for and issuance of a permit for injection activity, the well was never perforated at the necessary depth for such activity to occur.

Notwithstanding Complainant's arguments and exhibits submitted, I am fully persuaded by Mr. Hay's testimony. I found him to be a fully credible and reliable witness at the hearing. I also found that while Mr. Wilson distanced himself from submissions made by contractors on his behalf, on the matter of the configuration of this well, he was both adamant, and very credible.

Based upon the above, the Gene Wilson #1 was not only an inactive well from May 16, 2001 until June 10, 2005, the period of time covered in this Complaint, but from inception as well. As permitte of an inactive well (even one that could not be used for injection), Respondent was required to either plug his well or establish to EPA's satisfaction that the well would not endanger the USDW.

B. Did Mr. Wilson show to the satisfaction of EPA that his well would not endanger USDWs:

As discussed, EPA Region 4 typically required that mechanical integrity tests be conducted to show that there was no endangerment to the USDWs. See Complainant's Clarification, Complainant's Post-Hearing Brief, Tr I 59.

Subsequent to the above-referenced modification request Respondent performed a mechanical integrity test on the Gene Wilson # 1 on October 15, 1993. This was witnessed by EPA's representative, State employee, David Oldham, and a report signed by him was submitted to EPA. C Ex. 9.

Other than a document with a handwritten date of October 1, 1998, indicating a file review had been done and notifying Mr. Wilson that records were missing from 1994 to 1998 (C Ex. 12),[28] the record contains no other information, documentation, or evidence, pertaining to the Gene Wilson #1 well for the six year period from 1993 to 1999.

In January 1999, Complainant sent a notice to Respondent to perform an MIT. C Ex 14. This 1999 MIT – its initial scheduled date, its rescheduled date, whether it was or was not ever performed – has been a major point of controversy in this proceeding. Performance of an official MIT in 1999, prior to the period covered by this action, would be relevant to the extent it could be used to calculate the date another test would have been due. For that purpose a review of the evidence in the record on this matter is in order.

A great deal of testimony was introduced by Respondent supporting his contention that a) the MIT originally scheduled for January 1999 was cancelled; b) the test was rescheduled to take place on April 26, 1999; c) the EPA's authorized representative, David Hayes, failed to show up for the test and d) Mr. Wilson's crew expended time, effort and money preparing for the test, and in anticipation of running the supervised test ran one themselves, which indicated that the well had mechanical

[28] Mr. Wilson testified that he never received the document and referred to the fact that there was nothing indicating it was sent return receipt requested.

integrity. This testimony was presented by Ms. Patty Carter, Mr. Wilson's current Executive Assistance who also held that position in 1999, and Mr. James Clark, a former employee of Mr. Wilson's who worked for Mr. Wilson and was on site during the time of this event. Mr. Clark's direct testimony on this issue is found at Tr III 13-14; Ms. Carter's direct testimony on this event is found at Tr II 144-148.

EPA too spent a great deal of attention countering Respondent's claim, zealously arguing through its own witness Carol Chen (as well as in cross examination of Ms. Carter and Messrs. Clark and Wilson) that the January test was indeed postponed by Mr. Wilson but never rescheduled because a) Ms. Chen's technical direction documents ("TDD"s) did not indicate the test was to be performed in April;[29] b) she would not have scheduled it on that date as the inspectors were unavailable to oversee any such test of the Gene Wilson #1 on that date; and c) it is illogical that Mr. Wilson would not have previously mentioned his having conducted the test. Tr I 158-165.

While I accept, as credible and plausible, Ms. Chen's testimony that she would normally have had a record of the rescheduled test had she been the one authorizing it, I am nevertheless persuaded by the testimony of both Mr. Clark and Ms. Carter concerning the events that took place that day in anticipation of what they at least assumed, correctly or incorrectly, was a scheduled test. Tr II 144. Ms. Carter, employed by Mr. Wilson for 23 years, candidly, credibly and quite convincingly, testified to her recollection of having a conversation with Ms. Chen, explaining the problem with weather in January and that Ms. Chen rescheduled the test for the latter part of April. Ms. Carter testified with

[29] C Ex. 31; The TDD reflected an initial MIT scheduled on the Gene Wilson #1 for January 21, 1999, which was cancelled on January 13, 1999. More specifically, she testified that had an MIT been rescheduled for a later date, her TDD would not have reflected "cancelled" but would have been included on the TDD for April MITs. Tr I 156-157.

certainty that she put the purple Post-it note on the notice to demonstrate MIT, and that she wrote the date and noted, "changed per Carol Chen to Monday, April the 26th of '99." C Ex. 30.

However, most importantly, and ultimately most relevant, is that there was neither a record made of the MIT nor a report of the test submitted to EPA. Ms. Carter's own testimony on cross examination was that they did not do so, since at that time, they "didn't know that it would even count since an EPA inspector was not there to witness it." Tr II 157. Therefore, having considered all evidence submitted on this issue, I find that:

a) Respondent had on his schedule, that the January 1999 test had been rescheduled to take place April 26, 1999;

b) Respondent's employees, using equipment owned by Respondent, prepared to conduct an MIT to be witnessed by David Hayes;

c) In preparing to run the witnessed test, Respondent's employees did a "practice" type run through test of the mechanical integrity of the well;

d) An EPA representative was not present to witness the test;

e) The testing of mechanical integrity run in c) above was neither reported nor referred to by Respondent or his representatives as an MIT because it was not considered to have been an official test as it was not supervised.

I also find that this "practice" run through test did not amount to an MIT in compliance with the terms and conditions of the permit. As Respondent, through his witness, Ms. Carter initially and correctly presumed, it did not "count". Tr. I 56. Permit Part I, Section A 3 requires that pressure tests be witnessed by an EPA representative.

C Ex. 6. This finding will be further discussed under the penalty discussion set forth elsewhere in this Decision. [30]

Furthermore, even if it had been established that Respondent conducted a compliant MIT in 1999, as Complainant asserts and Respondent does not refute, no additional MITs were performed between 2001 and 2005, the time period covered by this action.

Mr. Wilson's defense to not having conducted other MITs rests on his claims that EPA failed to notify him to do so. He established that it had been EPA's practice to give notice (albeit not 100 % of the time) and that EPA had indeed stopped doing so for the past one to three years. Tr I 166. However, the notice would normally pertain to MITs that had to be conducted on five year intervals. Respondent's witness, Mr. Ed Jordan, another well operator, confirmed that he had, historically, received notice from EPA for the five (5) year MITs, until approximately two years before, at which time he received a letter from EPA notifying well operators that they would have to initiate the MIT appointments by contacting EPA.[31] Tr III 206.

There has been no evidence introduced that EPA was required to facilitate compliance in this manner, and having recognized that they could not do so consistently, they suspended the practice. With 3,000 underground injection wells in Kentucky, it would be unreasonably burdensome to shift a permittee's duty to comply onto the

[30] This will be addressed under consideration of any good faith effort of Respondent to comply with the requirements of his permit.

[31] Mr. Jordan is the operator who took over the Cam Creek lease.

permitting agency.[32] I find that this is not an adequate defense for failure to plug a well or to demonstrate non-endangerment.

II. Whether Respondent's failure to submit annual monitoring reports was a violation of the SDWA, 40 CFR § 144.51(a) and Permit # KY10376:

Section D of Respondent's Permit # Ky10376, is entitled "Reporting Requirements" and Subsection 2, "Reporting of Monitoring Results," provides, in pertinent part that, "Monitoring results, as specified in Part I, Section C, shall be reported each year on EPA Form 7520-11 and must be postmarked by the 28th day of the month following the first full year after the effective date of this permit."

However, the cross-referenced provision of the permit covering monitoring requirements, Part I, Section C. at paragraph 2, provides, "Observation and recording of injection pressure, annulus pressure, flow rate and cumulative volume shall be made over equal time intervals *beginning on the date on which the well commences operation.. .*" (Emphasis added).

By Amended Order issued on June 19, 2007, I found that no annual reports were submitted from the date of permit issuance but, focusing on this language, held in abeyance a determination on Respondent's liability for his failure to submit the reports.

Complainant called Mr. Mann as its first witness. Mr. Mann was introduced as an expert witness in his capacity as an expert in geology and the construction, operation, testing, maintenance and regulation of underground injection wells. Tr I 33.[33]

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[32] Tr I 20

[33] Mr. Wilson stipulated to his being an expert.

Mr. Mann testified that in addition to other duties, he writes, reviews and modifies permits. In this capacity, Mr. Mann testified that the Permit requirement for submission of annual monitoring reports applies even if the well is not being operated, as it is the effective date of the permit that triggers the requirement for submission. He further explained how essential the annual monitoring reports are to providing the status of the well to the Agency. Complainant introduced an exhibit Mr. Mann had prepared entitled, "Monitoring and Reporting Guidance For Class II-D and II-R injection Wells Underground Injection Control Program." According to Mr. Mann's testimony, this document was prepared sometime in January 2000 and was sent to owners and operators of injection wells in Kentucky, to specifically remind them that they were required to submit monitoring reports even if their wells were inactive or shut-in. C Ex. 29.[34] Mr. Mann further confirmed that EPA receives such annual reports on Form 7520-11, from operators of inactive wells informing EPA of the status of inactive wells by inserting "zero" for the monitoring results. Tr 1 62-67.

Complainant's counsel, in its Post-Hearing Brief, argues that Respondent is confused by the Injection Operation Monitoring obligation, in Part I, Section C (2) of the Permit which is not triggered until operation commences. Counsel then agrees that it is obvious that what are being reported under that section are items that would only be reportable if operations were occurring. They continue to explain that the Injection Operation Monitoring obligation (the once per annum in contention here), is distinguishable because that section, Part I, Section D(2), requires reporting tied to the effective date of the Permit, so that the annual obligation is triggered even if the well has not commenced operation. This argument is somewhat circuitous and overlooks the fact

[34] I admitted this into evidence but noted that there was no proof of receipt by Mr. Wilson. Tr. 1 64.

that Section D (2) cross-references Section C(2). Some confusion is understandable as is EPA's decision to issue clarifying guidance to ensure that operators of inactive wells understood this reporting obligation.

Nevertheless, I am persuaded that Complainant has sufficiently established its interpretation of this Permit requirement by virtue of Mr. Mann's testimony as well as its guidance documents submitted into evidence as Complainant's Exhibit 29. There is sufficient precedent for giving considerable weight, if not full deference, to the Agency's interpretation of its own regulations especially if it has been consistent in that interpretation. This is the case whether the form of the interpretation is an administrative practice or an official opinion letter. *See In re. Lazarus,* 7 E.A.D. 318, 353 (EAB 1997). Considerable weight should be given an Agency's interpretation of its own permit conditions.

In addition to Respondent's defenses to claims against him that I've already addressed, Respondent raised the argument that he was unfairly selected for prosecution among others in the regulated community. Although not specifically articulated as such, this was in essence a defense of selective enforcement. Respondent was advised of the burdens of proof necessary to prevail on a defense of selective enforcement. A number of motions and pleadings filed throughout the proceeding, focused upon his efforts to discover and/or produce documents on other UIC well operators in order to establish that EPA treated others in the regulated community differently. However, as he was well advised, the burden is not met by establishing that he was singled out for enforcement, but that Complainant selected him for enforcement action "invidiously or in bad faith,

i.e., based upon such impermissible considerations such as race, religion or the desire to prevent the exercise of constitutional rights." *In re Newell Recycling Company, Inc.*, 8 E.A.D. 598, 635 (EAB 1999) (quoting *United States v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 985 (E.D. Va. 1997) (quoting *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990).

During the hearing Mr. Wilson attempted to pursue this claim, seeking to introduce a number of documents pertaining to other well operators. Tr III 103-112. However, the documents Mr. Wilson sought to introduce consisted of random letters and correspondence between EPA and other Kentucky well operators, isolated and out of context from whatever correspondence might have preceded or followed the document in hand. As such they were inadmissible as unreliable and lacking in probative value. Additionally, the documents addressed EPA's approach to other operators, in essence its exercise of prosecutorial discretion, something to which the courts traditionally accord a great deal of discretion. *In re B & B Oil Co.*, 8 E.A.D 39, 51 (EAB 1998). Furthermore and most importantly, no evidence was introduced to show that Mr. Wilson was selected for enforcement based upon his race, religion or EPA's desire to prevent the exercise of his constitutional rights.[35] Therefore, I find that Mr. Wilson failed to meet the burden of the selective enforcement defense.

In conclusion, I find Respondent liable for failure to plug and abandon the Gene Wilson # 1 or to show non-endangerment to the USDW in violation of the SDWA, Permit # KY 10376, 40 C.F.R. § §144.52(a)(5) and 144.51(a), between May 16, 2001,

[35] While attempting to make a case for prosecutorial discretion, Mr. Wilson, admitted there was no problem with regard to sex, race or religion. As to constitutional rights, Respondent vaguely alluded to constitutional rights being affected when the government inconsistently deals with members of the regulated community. Tr III 105.

and June 10, 2005. I further find Respondent liable for failure to submit annual monitoring reports for the years 2001, 2002, 2003, 2004 and 2005, in violation of the SDWA, 40 CFR § 144.51(a) and Permit # KY 10376.[36]

DETERMINATION OF AN APPROPRIATE PENALTY

The Complaint filed on May 16, 2001, alleged that Respondent may be liable for civil penalties of not more than $5,500 for each day of violation for violations that occurred on or after January 30, 1997, and for civil penalties of not more than $6,500 for each day of violation for violations that occurred on or after March 15, 2004.[37] However, since the time of filing its Prehearing Exchange on November 14, 2006, Complainant seeks a penalty of $11,291.

Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B) provides that:

> "in assessing any penalty. . . , the Administrator shall take into account. . . (i) the seriousness of the violation; (ii) the economic impact (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."

40 C.F.R.. § 22.27(b) of the Consolidate Rules of Practice provides:

> "If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.. . . If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

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[36] As previously discussed, in accordance with 40 CFR § 144.51(a), any permit noncompliance constitutes a violation of the Safe Drinking Water Act.

[37] The Complaint adhered to the Consolidated Rules provision allowing notice pleading. 40 CFR §22.14,

To reiterate, Complainant has the burdens of presentation and persuasion that the relief sought is appropriate. 40 CFR §22.24(a). To make a prima facie case, Complainant must come forward with evidence to show it considered each factor and that its penalty is appropriate taking all factors into account. Then, in order to rebut Complainant's case, a Respondent can either show that EPA either failed to consider all statutory factors or "through the introduction of additional evidence that despite consideration of all of the factors the recommended penalty calculation is not supported and thus is not 'appropriate'." *New Waterbury, Ltd.*, 5 E.A.D. 529, 538-39 (EAB 1994).

There is no EPA issued statute specific penalty policy for the SDWA.[38] In the absence of a penalty policy, I will rely on the aforementioned statutory factors for determining penalty set out in Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2 (c)(4)(B). There is also precedent for following the framework of EPA's general civil penalty policies know as "GM-21" (Policy on Civil Penalties) and "GM-22" (A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Policy on Civil Penalties), 41 Env't Rep. (BNA) 2991, dated February 16, 1984. *Mr. C.W. Smith, Mr. Grady Smith & Smith's Lake Corporation*, 2004 EPA ALJ LEXIS 128 (ALJ 2004); *In re City of Marshall*, 10 E.A.D. 173, 189 (EAB 2001). I have referred to GM-22 to the extent it provides additional guidance on applying the statutory penalty factors.

Of the total $11,291 sought in this case, $10,291 is sought for Respondent's failure to plug and abandon the Gene Wilson #1 well or to have demonstrated non-endangerment to

[38] The only statute specific policy pertaining to penalty assessment is the "UIC Program Judicial and Administrative Order Settlement Penalty Policy, September 1993. However, this is to be used for settlement purposes and as such is not being used here. See *In the Matter of Mr. C.E. McClurkin d/b/a J-C Oil Company*, 2000 EPA RJO Lexis 86 (February 10, 2000); *In re Britton Construction Co.*, 8 E.A.D. 261, 280 (EAB 1999).

the USDWs; $1,000 is proposed for Respondent's failure to submit annual monitoring reports. I will analyze each of the statutory factors as they apply to both violations.

1. Seriousness of the Violation:

At the hearing, EPA called to the stand the enforcement officer on this case, Mr. Wade Randolph ("Randy") Vaughn to testify to the appropriate penalty to be assessed against Mr. Wilson.

Mr. Vaughn testified that Respondent's failure to plug the Gene Wilson #1 or to have demonstrated its mechanical integrity was considered "a quite serious violation." Tr II 49-51. In essence, Mr. Vaughn explained the importance of an MIT as the method of determining the health of a well internally below the surface, which could not otherwise be determined by visual inspection. He provided the following testimony on this point: "The mechanical integrity of the well is important because, otherwise, the well can act as a conduit for contamination from below in the formation coming up through the well or from the surface going down into the well and it creates a potential for underground sources of drinking water to be contaminated." Furthermore, Mr. Vaughn elaborated that the type of fluids that *could* come from below the surface included fluids containing crude oil constituents, which also contain benzene and toluene, known carcinogens, as well as baseline brine, heavily salted water. Those from the surface itself *could* be anything from herbicides to pesticides, fertilizers, nitrate contamination from any animal farming, all depending upon that which is taking place around the well. Lastly, Mr. Vaughn indicated that, even in the absence of use of the well for injection, EPA's view of the seriousness of this violation remains the same, since there is no way to tell that the well is not serving as a conduit for contamination to

underground sources of drinking water without the mechanical injection testing. Tr II 49-51.

At no time during the course of the hearing, or at any place in this proceeding has Complainant alleged, or even suggested, that there was actual harm to the environment. However, the primary purpose of the underground injection control program is preventing underground injection which endangers drinking water sources. 42 U.S. C. § 300h(b)(1). A demonstration of actual harm is not necessary. Therefore, when assessing the seriousness of a violation the Agency should take into consideration not only actual harm, but potential harm as well. Case law supports such an approach for assessing penalties against those who violate laws for the protection of the environment. *In re Carroll Oil Company*, 10 E.A.D. 635, 657 (EAB 2002), citing *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-03 (EAB 1996), *aff'd, Everwood Treatment Co. v. EPA*, No. 96-11590RV-M (S.D. Ala., Jan. 21, 1998); and *In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000). However, consideration of the potential for harm must be in context and necessitates taking into account whether, and to what extent the activity was likely to result in an exposure. GM-22.

As discussed above in determining liability, I found that the Gene Wilson #1, while permitted as an injection well, was not perforated for injection. As established by the evidence, Mr. Wilson had the well casing filled with cement to the surface, thereby plugging the well. When he employed Lauffer Well Service, Inc., to drill out the previously filled cement in the casing, drilling stopped at a depth of 939 feet, just short of the original perforations. R Ex. 50. Not only did Mr. Monty Hay credibly testify to this activity, but he also confirmed that there would not be any way to inject into the well.

Most pertinent to the issue of potential harm to the environment, Mr. Hay testified that for penetration to take place into any USDW, there would have to be a leak through two layers of steel casing and two layers of cement. Tr I 216 and 229. Mr. Hay further expanded on his view of the subject well testifying as follows: ". . . [D]ue to the construction methods of it, it had dual liners with four and a half and seven inch, and both were cemented, so it would be my opinion that - - and it was new construction, I remember the four and a half casing was new . . but in my experience, it would be years before there could be an issue with that. With no fluid being injected into it, there's not a corrosive material." Tr I 229. In addition, Mr. Clarence Douglas ("Doug") Hamilton was also called by Respondent to testify. Mr. Hamilton, a supervisor for the Kentucky Division of Oil and Gas Conservation, when presented with the scenario that the well was not perforated, testified to the improbability of it harming the environment. While he did not provide any direct testimony regarding well perforations he did confirm that, as described by Mr. Wilson, such a well would have been "totally sealed." Tr II 117.

Complainant's assessment that there could have been serious harm to the environment was based on the inaccurate information contained in EPA's files (albeit understandably relied upon as the information had been provided by Respondent). Complainant concedes that, if true, evidence of the bullhead squeeze would result in a reduction, but not complete elimination, of threat posed by the well, since 939 foot depth of the re-drilled well could serve as a potential conduit for pollution. However, new perforations would have to be created for there to be such conduits, "through additional well construction activity or through deterioration, for brine and oil and gas contaminants to enter the well column from the lower depth." Complainant's Post Hearing Brief, p. 15.

While seriousness of a violation can rest on the potential for harm, such potential, nonetheless must have a sufficient factual basis. ". . . The facts of each case must be reviewed to ensure that the reality of the violation is reflected." *M.A. Bruder & Sons, Inc., d/b/a M.A.B. Paints, Inc.*, 10 E.A.D. 598, 611 (EAB 2002).[39] Had it been established that the Gene Wilson #1 was configured along the lines of an injection well, perforated at a level suitable for injection, then failure to plug or MIT this well would have been a serious violation, even absent any particular showing of harm to the drinking water. While Complainant made a prima facie case for, and appropriately considered, the SDWA statutory factor of seriousness of the violation in recommending an assessed penalty, testimony introduced by Respondent at the Hearing has sufficiently rebutted EPA's calculation of the seriousness of the violation and has shown that the facts do not support EPA's assessment of the potential for harm to the environment from this particular well.

Based upon all evidence in the record, including that presented at hearing, I found that there were no such perforations. Absent perforations there was insufficient threat of harm to the environment to support Complainant's assessment of harm as "quite serious."

Complainant was understandably outraged that the information contained in Mr. Wilson's permit application was inaccurate when submitted in 1989 and thereafter left uncorrected. Complainant asserts that his doing so amounted to "making a joke out of the regulatory process." Complainant Post-Hearing Brief, p.16. However, the

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[39] This Environmental Appeals Board Decision addresses EPA's treatment of violations for penalty purposes as if Respondent in that case was a traditional Treatment, Storage and Disposal facility that had illegally stored hazardous waste without a permit for nearly two years, rather than as a generator who failed to comply in only one limited respect with the requirements necessary to qualify for the generator exemption. Application of the RCRA penalty policy failed to reflect the true seriousness of the violation. *M.A. Bruder & Sons*, at 611-612.

Complaint filed in this action does not allege violations for submitting inaccurate or false information in a permit application for which any penalty should be assessed.[40]

Notwithstanding my finding with regard to lack of potential threat to the environment the seriousness of a violation should not only take into account actual and potential harm to the environment, but programmatic harm as well. *See Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 396-400 (EAB 2004) (finding that failure to obtain a Clean Water Act ("CWA") § 404 permit could cause harm to the CWA regulatory scheme, citing numerous federal judicial and administrative cases on programmatic harm as well); and GM-22 listing "importance of the regulatory scheme" as one of the factors to consider in quantifying gravity of a violation.

While Respondent's failure to plug the Gene Wilson #1 or demonstrate that it was not a danger to the environment may not have amounted to a serious violation with regard to actual or potential harm to the USDW, it was harmful to the UIC regulatory program, regardless of the impact on humans or the environment. Mr. Wilson was obligated to comply with all terms and conditions of his permit. Although Mr. Wilson submitted requests for modification of his permit on November 11, 1992 (see C Ex. 8/ R Ex. 2) and on August 11, 1993, (R Ex. 3), he was still obligated to comply with the terms and conditions of the permit as they existed. Permit # KY10376 Part II, B (1) provides in pertinent part: ". . . The filing of a request for a permit *modification*, revocation and reissuance, or termination, or the notification of planned changes, or

[40] To the contrary, Complainant's position, for the most part, is that the documentary evidence, including the Permit application, reflects the true configuration of the well, and it is the testimony that lacks credibility.

anticipated noncompliance on the part of the permittee does not stay the applicability or enforceability of any permit condition." (emphasis added).

Complainant also considered the length of time the violation occurred. Typically harm or risk of harm is greater the longer a violation takes place. Respondent's failure to comply with the terms of his Permit by timely plugging the well or conducting mechanical integrity tests for the five years covered by this action, further supports assessment of a penalty for programmatic harm.[41]

While I find that Respondent's failure to comply with the Permit and regulatory requirements to either timely plug the Gene Wilson #1, or to demonstrate non-endangerment was harmful to the UIC program, under these particular set of facts, the programmatic harm was not as serious as the threat of harm to the environment had the well been perforated. EPA's assessment of seriousness of harm assumes the well was perforated at a depth that could endanger USDWs. Such perforations were absent. Therefore, a reduction in penalty is appropriate to reflect the more moderate level of programmatic harm.

Of the $11,291 penalty proposed by Respondent, $1,000 is sought for Respondent's failure to submit Annual Monitoring Reports during the period covered, 2001 – 2005.

EPA representative, Randy Vaughn testified that this was also considered a serious violation on the basis that the annual report would have provided the status of the well and notice that the well was inactive. Usually such reports are particularly important

[41] See discussion below under "other matters as justice may require" on the issue of length of time the violations occurred.

because they provide information about the contents and pressure of what is being injected into a well, all factors that can affect underground sources of drinking water. Tr II 51.

In reality, the reports for the Gene Wilson #1, had they been submitted, would have had zeros (0s) entered for any fluid values provided. In addition, it should be recognized that Mr. Wilson notified EPA of the inactive status of his well by letter dated August 18, 2000. However, Mr. Wilson never submitted the requisite EPA Form 7520-11. Given the number of injection wells regulated by EPA, it is essential that the appropriate government forms are used by Permitees. EPA lacked the information necessary to determine that the Gene Wilson #1 was inactive and required plugging or mechanical testing on a more frequent basis. This violation caused harm to the UIC program and to the integrity of the regulatory process.

Aside from Mr. Vaughn's general statement that this was also a serious violation, EPA proposed $1,000 – one tenth of that proposed for Mr. Wilson's other violations that it considered "quite serious." I believe this figure more accurately reflects that this is a far less serious violation. Taking into consideration that the Respondent failed to submit five annual reports, I am persuaded that EPA's $1,000 penalty assessment is appropriate.

2. Economic Impact Resulting from the Violations:

The assessed penalty should recover the amount by which Respondent benefited economically from violating his Permit, the regulations and the SDWA, over other compliant members of the regulated community. With regard to violations pertaining to plugging and mechanical integrity testing, the penalty should be commensurate with Respondent's liability: failure to plug his well beginning from the date covered by this

action, May 16, 2001, (since the well was inactive for at least two years prior to that date) or to have demonstrated to EPA that the well would not endanger the USDWs. As discussed above, if a well was not plugged after two years of becoming inactive, the Permittee would typically be required to conduct MITs every two years.
In Mr. Wilson's case this would have been twice between 2001 and 2005. However, in assessing economic benefit, Mr. Vaughn testified that using a compliance date of May 16, 2001, he measured the avoided cost of completing one MIT and found the benefit to be $291. Tr II 52-53; C Ex. 28.

EPA alternates between taking the position that Mr. Wilson was required to conduct MITs every five years to every two years. This is reflected most notably in paragraphs 41-43 of its proposed Conclusions of Law:

> "Paragraph 41: Respondent violated Part II, Section G(3) of his permit by failing to demonstrate mechanical integrity within 5 years of his last approved demonstration. . ."
> Paragraph 42: "Respondent violated Part II, Section F(3) of the permit by failing, after the well had been inactive for more than 2 years, to either properly plug and abandon the well or provide required notice to EPA informing EPA of his intent to use the well in the future and describing procedures satisfactory to EPA to ensure that the well would not endanger USDWs. The non-endangerment showing required by this Section was enforced in EPA Region 4 by requiring MIT testing every 2 years instead of every 5 years, as required for active wells. The Respondent's well was inactive for the entire life of the permit, and thus was subject to and in violation of the requirements of Part II, Section F (3) of the permit, for the entire period covered by the Complaint, . . . "
> Paragraph 43: "Even if the permit section applicable to "inactive wells" did not apply to Mr. Wilson, the failure to conduct an MIT within 5 years of the last approved demonstration would have placed Mr. Wilson in a state of violation for the entire period covered by the Complaint . . . as described in paragraph 41, above. However, failing to meet the permit requirement for Inactive Wells every two years while the well was inactive would produce a higher level of economic benefit for the failure to plug and abandon or demonstrate mechanical integrity, and result in overlapping violations that could support a higher maximum penalty. The penalty EPA is seeking in this case for violations based on a failure to plug

and abandon or demonstrate mechanical integrity, $10,291, is reasonable in any case." Complainant's Post-Hearing Brief

Earlier in the same Post-Hearing Brief, at paragraph 29, Proposed Findings of Fact, Complainant acknowledges that Mr. Vaughn's calculation of $291 was conservative, since the benefit could have been calculated using the higher avoided cost of performing additional MITs based on the inactive status of the well. Complainant also acknowledges that it could have calculated the delayed cost of plugging the well from the date of commending this action, May 16, 2001, since the well was inactive at least two years before that time. Complainant then suggest that this would have been $480, based on a conservative 4% rate of earned interest on the lowest estimate of the delayed plugging expense. This figure is derived from EPA's estimate of $3,000 to plug a well and Mr. Wilson's testimony of having spent $4,000 to $5,000 to eventually plug the well in 2005.[42] However, the first time the $480 is even suggested is by counsel in post hearing submission, without any evidentiary support introduced at the hearing or elsewhere in the record. It appears this figure is mentioned to emphasize that EPA's $291 calculation is even lower than the actual economic benefit might have been. As Counsel explained at the hearing, without knowing when, if at all, over the life of the Permit Mr. Wilson had injected, EPA used the conservative estimate based on the five year requirement. Post-Hearing Brief, p. 14; Tr II 96.

However, having had the benefit of an evidentiary hearing and preponderance of evidence to support Respondent's claim that he never injected into the well during the entire life of the permit, or most relevantly, during the five year period covered by this

[42] Evidence was entered into the record that plugging the well would have been a minimum of $3,000. Tr II 52. Since Mr. Wilson eventually spent $4,000 to $5,000 to plug the well, EPA would have had to factor in those expenses to calculate delayed cost. Tr III 187.

action, the Permit requirement set forth at Part II Section F (3) for inactive wells is more applicable to the assessment of penalties in this case.

Since it was EPA's practice to require plugging or MITs on two year intervals for inactive wells, such as the Gene Wilson #1, a more accurate proposed penalty for the economic benefit factor would have been to either, a) substantiate through evidence the $480 economic benefit derived from delaying the plugging and abandonment and/or b) calculate the economic benefit avoided by Respondent's failure to conduct two MITs between 2001 and 2005. However, ultimately it would have been at the discretion of the EPA Administrator/Director to determine what would have been a satisfactory showing of non-endangerment while the well remained unplugged. Therefore, a) in the absence of calculations employing either of the above preferred methods; b) in deference to the Agency's view of what would have been an acceptable showing of non-endangerment, and c) recognizing the importance of assessing economic benefit, I accept the $291 proposed by Complainant. *See B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 207 (EAB 1997) citing GM-22.

EPA also considered the economic benefit of Respondent's failure to submit annual monitoring reports. While Mr. Vaughn confirmed that EPA considers recovery of economic benefit important so that a person not profit from non-compliance, EPA found the economic benefit for this violation to be *di minimus*. Tr II 54. I accept EPA's assessment.

3. History of Such Violations:

In response to being specifically asked, "Could you describe how EPA has applied the factor history of such violations to the facts of this case" Mr. Vaughn responded that he took into consideration the longevity of the non-compliance. Tr II 54 - 55. However, in response to the next question on direct, ". . . did the EPA identify any other violations that Mr. Wilson may have been responsible for outside of the context of this case," Mr. Vaughn responded in the negative. Mr. Vaughn's assessment applied to all violations in the Complaint.

Based upon all evidence submitted, and as summarized by Complainant in its post-hearing submission, Complainant did not find the statutory factor of a history of violation to be present in this case. I accept EPA's assessment with respect to this factor.

4. Good faith effort to comply with the applicable requirements:

Complainant considered whether Respondent showed good faith effort to comply with requirements to plug the well or conduct MITs, and found a lack of good faith. Tr II 55. With regard to Respondent's failure to plug the well, three rather damaging exhibits were entered into evidence at the hearing and serve to support EPA's position that Respondent lacked good faith effort to come into compliance: 1) A letter from Mr. Wilson, dated August 18, 2000 – almost five years before the well was plugged - responding to an EPA inquiry about the status of his well, that states, "We plan on plugging the well as soon as Mr. Ed Jordan is available for his services." C Ex. 17; 2) A letter dated February 21, 2005 sent in response to the Notice of Violation, referring to his previous conversation with counsel for Complainant in which Mr. Wilson writes, "I told her I intended on plugging the well but didn't know there was a hurry," C Ex. 20; and

3) Mr. Wilson's letter dated March 4, 2005 to Ms.Chen in which Mr. Wilson write, "I have been meaning to plug the well since 1993 but never got around to it since it's a dry hole, was never used for injecting brine and does not effect [sic] the environment." C Ex. 21. Also telling is Mr. Wilson's own testimony that he asked Ed Jordan to plug the well in 1999 or 2000, but Mr. Jordan was busy and as Mr. Wilson states, he "didn't push him that hard". Tr I 28-29. Respondent certainly showed none of the "diligence, concern or initiative" constituting good faith effort to comply with the plugging requirements. See, *Carroll Oil*, at 660.

Mr. Wilson has a different perspective on showing of good faith, taking the position that EPA mischaracterizes him as a flagrant violator while ignoring all his effort to be responsible in his dealings with the agency, evidenced by oral communication and correspondence with EPA representatives. Tr II 149.

He and his assistant, Ms. Carter, described his activity as a well owner responsive to any communications received by the Agency, and as having incurred large expense in cleaning up property on his Cam Creek farm to the improvement of the environment. They also point to his having attempted to modify his permit so he could lawfully use the well for the purposes he intended. Mr. Doug Hamilton also confirmed that he never had any issues with Mr. Wilson regarding regulatory requirements and that Mr. Wilson was forthcoming with any information Mr. Hamilton needed. Tr II 120. While I agree that these practices, as described, serve to dispel any characterization there might have been that Mr. Wilson completely and flagrantly ignored all regulatory requirements for the life of the Permit, such past communication and contacts do not make up for what was extreme recalcitrance in plugging the well.

Additionally, as I indicated above, although Mr. Wilson's effort to conduct an MIT in April 1999 did not impact upon liability, it is appropriate to consider whether his efforts constituted good faith to comply with Permit and regulatory testing requirements, for purposes of assessing penalty. While I believe the activity described, use of employees and funds to conduct an MIT he thought was scheduled, sheds more positive than negative light on Mr. Wilson's compliance efforts at that time and for that particular occurrence, those efforts amounted to that which he was required to do as a Permittee, no more, no less.

Complainant proposed that Mr. Wilson be penalized for his lack of good faith efforts to comply with the plugging and mechanical integrity testing violations. They did not specifically address lack of good faith for the violations pertaining to the failure to submit annual monitoring reports. I agree that it is appropriate that lack of good faith be reflected in the penalty assessed for violations related to Mr. Wilson's failure to timely plug the well or comply with the Permit and regulatory requirements to show non-endangerment to the USDWs.

5. Economic impact of the penalty on the violator:

Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. *Chemspace Corporation*, 9 E.A.D. 119, 133 (EAB 2000). EPA appropriately entered evidence into the record that Respondent's ability to pay was considered. Mr. Vaughn testified that EPA took into consideration that correspondence in the file demonstrated that Mr. Wilson did own property. Tr II 57. Mr. Wilson did not submit any information supporting a claim of inability to pay, and specifically confirmed

this was not an issue in this case. Tr III 122. There is no basis upon which to reduce the penalty due to the economic impact on the violator.

7. Such other matters as justice would require:

Complainant asks this tribunal to consider under the category, "such other matters as justice may require," a) the length of time Respondent violated the law, regulations and Permit prior to commencement of the period covered by this action; and b) the importance of deterring other owner/operators from violating UIC requirements, both of which Complainant claims justify a significant penalty. Complainant Post-Hearing Brief, paragraph 24.

The length of time a violation continues is one of the criteria to consider in assessing the statutory factor of seriousness of harm. "In most circumstances, the longer a violation continues uncorrected, the greater is the risk." GM-22, p. 15.

As mentioned throughout these proceedings, the Administrative Complaint specifically establishes that the period of time captured in this action runs from May 16, 2001 to June 15, 2005: "The period for both violations begins five (5) years back from the date of the filing of this complaint and ends on June 10, 2005, the date on which the well was plugged." Respondent's liability is based upon his failure to plug his well or demonstrate non-endangerment to the USDWs for the entire five years. Similarly, I have considered Respondent's failure to submit annual reports for each of the five years within this timeframe and found him liable for failure to provide five (5) reports. For both violations, I factored the length of time into my assessment of harm and found Complainant's proposed penalty reasonable and appropriate for a penalty committed over that length of time. To increase the penalty in this case based on violations for which

Respondent is not held liable, and which fall outside the scope of the Complaint, is unwarranted.

Complainant also asserts that the need to deter other owner/operators from violating UIC requirements justifies imposition of a significant penalty. Complainant contends that the oil and gas regulated community is relatively small and assessment of a *di minimus* penalty would send the wrong message to that community. Complainant's Post-Hearing Brief, p. 24. Mr. Vaughn testified on this point, stating that, "EPA wants to keep the message out there that the regulations are there for a reason, and we expect those in the position to comply with those regulations. Tr II 58. According to counsel for Complainant, concern about the regulated community played a part in the Agency pursuing this enforcement action, as she stated, "EPA could have closed the book on this case after Respondent plugged the well, but in Kentucky oil patch, the Agency's enforcement activities are no secret and neither is noncompliance by one of its more prominent individuals." Tr I 22.

It has been Agency policy, since 1984, to recover a violator's economic benefit of noncompliance in order to deter violations. This continues to be a core principle of the Agency's enforcement. See *B.J. Carney Industries, Inc.* at 207. This is a factor appropriately considered when assessing seriousness of harm and economic benefit to a violator. *See Tull v. United States*, 481 U.S. 412 (1977). Deterrence, both persuading the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuading others from violating the law (general deterrence) are the primary goals of penalty assessment. GM-21, p. 3.

I am in agreement that the penalty assessed in this case should not only be greater than *di minimus*, but significant enough to accomplish the deterrence Complainant seeks.

As I discussed at length above, the lack of perforations in the Gene Wilson # 1 calls for a reduction in penalty from that which EPA proposed, based upon its assumption that the well was perforated. Therefore, in consideration of the statutory penalty factors, the evidence at hearing and the administrative record in this matter, Respondent is assessed a penalty of $8,291.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Section 22.27(a) of the Consolidated Rules, 40 C.F.R. § 22.27, provides that when reaching an initial decision, the presiding officer shall set forth the findings of fact and conclusions of law. The undersigned Presiding Officer's Findings of Fact and Conclusions of Law are as follows:

1. Respondent, Gene Wilson, is an individual doing business under the laws of Kentucky with a principal place of business at 101 Madison Street, P.O. Box 702, Louisa, Kentucky 41230. Respondent is a "person" as that term is defined in Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12) and 40 C.F.R. §144.3.

2. Respondent owned and/or operated the Gene Wilson #1 well (hereinafter, subject well) located on a lease in Martha Kentucky.

3. On May 15, 1989, Respondent applied for an Underground Injection Control (UIC) permit to operate the subject well as a Class II injection well.

4. Respondent had cementing and casing work done on the subject well for the purpose of using the well for oil production. This work closed existing perforations at a depth necessary to use the well for injection. The well was not reperforated.

5 Information in Respondent's Permit application did not accurately reflect the well's configuration.

6. A class II injection well permit, Permit # KY10376, (hereinafter "the Permit") was issued in accordance with 40 C.F.R. § 146.21, and became effective on January 12, 1990.

7. Respondent twice sought modification of the Permit to allow him to inject brine from other well owner/operators. However, the Permit was not modified and remained in full force and effect.

8. Respondent had not commenced injection into the Gene Wilson #1 and due to a change in his circumstances after applying for a permit, no longer intended to use the well for any injection purposes. The subject well remained inactive.

9. The SDWA, 42 U.S.C. §300f, et seq., and 40 CFR §144.51(a) required that Respondent comply with all conditions of the permit. Noncompliance constitutes a violation of the SDWA and the implementing regulations.

10. 40 C.F.R. §144.52(a)(6) and Part II, Section F, Paragraph 3 of Respondent's Permit Ky # 10376, required that after cessation of injection for two years Respondent was to have plugged and abandoned the well or to have shown to the satisfaction of the Director that the well would not endanger underground sources of drinking water (USDWs).

11. The typical demonstration of non-endangerment to the satisfaction of EPA Region 4 was performing mechanical integrity tests (MITs) on two-year intervals during the period of inactivity.

12. Part I(A)(3)(a) of the Permit requires that MIT tests be witnessed by an EPA representative.

13. The only MIT performed on the subject well as required by the Permit was the aforementioned MIT on October 15, 1993.

14. Respondent received a letter dated January 5, 1999, from EPA notifying him to demonstrate mechanical integrity.

15. Mr. Wilson cancelled the MIT. Based upon Respondent's understanding that the test was rescheduled to take place on April 26, 1999, Respondent prepared to conduct the MIT that date. In preparation for the MIT Respondent ran a practice "run" of mechanical integrity. This was neither witnessed by a representative of EPA nor reported.

16. The April 26, 1999, practice test was not in compliance with the Permit #KY10376.

17. On August 2, 2000, EPA wrote to Mr. Wilson asking for information about his well. Respondent replied that the Gene Wilson #1 well was never put into operation and that he intended to plug the well.

18. An inspection of the subject well by an EPA representative was conducted on September 14, 2004.

19. On February 9, 2005, EPA issued a Notice of Violation and Opportunity to Show Cause letter to Mr. Wilson.

20. On June 10, 2005, Respondent plugged the subject well.

21. The subject well was inactive at least two years prior to May 16, 2001, the date on which this action commences, and continued to remain inactive until it was plugged on June 10, 2005. During that time, Respondent failed to plug and abandon the well or to demonstrate non-endangerment to the USDWs in violation of the SDWA, 40 C.F.R.

§§ 144.51(a), 144.52(a)(6), and permit #KY10376.

22. Part I, Section D, Paragraph 2 of Respondent's permit requires annual submittal of monthly injection monitoring reports.

23. Respondent admitted to never having submitted the aforementioned monitoring reports based upon his assumption they were required only upon commencing injection.

24. Part I Section D Paragraph 2 applied to inactive wells, including the subject well, even if injection had never commenced.

25. For the five years covered by this action Respondent violated the SDWA, 40 C.F.R. § 144.51(a) and Permit #KY10376 by failing to submit the 2001, 2002, 2003, 2004 and 2005, annual monitoring reports as required by the permit.

26. Section 300h-2(c)(4)(B) of the SDWA, 42 U.S.C. § 1423(c)(4)(B), lists the following factors to be considered in assessing a civil penalty: (i) the seriousness of the violation; (ii) the economic impact (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 (v) such other matters as justice may require."

27. Complainant proposed a penalty of $11,291 for the violations for which Respondent has been found liable.

28. Of the total penalty Complainant proposed that $10,291 be assessed for Respondent's failure to plug and abandon the subject well or to demonstrate that the well would not endanger USDWs.

29. Underground injection wells perforated to dispose of brine from oil and gas production, can leak and contaminate USDWs. Mechanical integrity tests are the method to determine if such wells, active or inactive, are leaking underground.

30. Complainant assessed Respondent's failure to perform MITs as a "quite serious" violation based upon potential harm to the environment from the subject well relying upon inaccurate information that the well was perforated.

31. Evidence that the well was not perforated rebutted Complainant's assessment of the seriousness of harm.

32. Compliance with Permit terms and conditions is vital to the integrity of the regulatory process and violations of such terms and conditions results in programmatic harm.

33. Respondent failed to comply with the terms and conditions of the subject Permit for the full five year period covered by this action.

34. The programmatic harm resulting from Respondent's failure to comply with terms and conditions of the permit requirement to plug his well or demonstrate non-endangerment warrant a penalty based upon a moderate level of seriousness under the SDWA.

35. Lowering assessment of the "seriousness of harm" factor results in a decrease in the penalty assessed for this violation from that proposed by Complainant.

36. Evidence introduced by Complainant supports the assessment of $291 for the economic impact resulting from the violation based upon costs avoided by Respondent's failure to conduct one mechanical integrity test during the period covered by this action.

37. Beginning in 2000, in response to notices from EPA, Respondent indicated that he was going to plug the subject well. There was no evidence explaining or excusing the five year delay in plugging the well. Such recalcitrance in timely plugging the well was evidence of a lack of good faith that should be reflected in the penalty assessed.

38. The penalty assessed for Respondent's failure to plug the subject well or demonstrate non-endangerment is $7,291.

39. Annual monitoring reports are important because they provide information about fluids injected into a well, and on this basis Complainant assessed this as a serious violation.

40. Although Respondent's reports would have contained zeros for fluid values, and by letter Respondent informed EPA of the inactive status of the subject well, reports submitted on EPA Form 7520-11 would have informed EPA that the well was inactive. Failure to submit five annual reports resulted in programmatic harm for which Complainant's proposed penalty of $1,000 is appropriate.

41. Complainant's assessment that the economic impact of Respondent's failure to submit the annual monitoring reports was *di minimus* is accepted.

42. There is no evidence supporting an increase or decrease of this portion of the penalty for good faith efforts to comply.

43. The evidence indicates that there was no history of non-compliance to support assessment of a penalty for this factor as it applies to the violations.

44. There is no evidence introduced supporting a reduction in penalty due to the economic impact on Respondent.

45. The total penalty assessed should be sufficiently high to deter non-compliance among other members of the Kentucky oil and gas community.

46. The factor, "such other matters as justice requires", does not warrant penalizing Respondent for violations he is alleged to have committed prior to commencement of the period explicitly covered by this action.

47. Upon consideration of the penalty factors set forth in the SDWA, the evidence at hearing and the administrative record in this matter, Respondent is assessed a penalty of $8,291.

ORDER

1. A civil penalty of **$8,291** is assessed against Respondent Gene Wilson.

2. Payment of the full amount of this civil penalty must be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c) as provided below. Payment shall be made by submitting a certified or cashier's check payable to the "Treasurer, United States of America," to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

Respondent must include the case name and docket number on the check and in the letter transmitting the check. Respondents must simultaneously send copies of the check and transmittal letter to the Regional Hearing Clerk and agency counsel at these addresses:

Regional Hearing Clerk
U.S. EPA, Region 4
P.O. Box 100142
Atlanta, Georgia 30384

3. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision will become the final order of the agency forty-five (45) days after service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Date: Aug. 20, 2008

Susan B. Schub

Susan B. Schub
Presiding Officer

CERTIFICATE OF SERVICE

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

Mr. Gene A. Wilson
101 Madison Street
P.O. Box 702
Louisa, Kentucky 41230

Certified Mail – (Return Receipt Requested)

Zylpha Pryor, Esq. and
Paul Schwartz, Esq.
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

(via Intra-Office Mail)

Date: 8-21-08

Patricia A. Bullock
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