

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter Of:) Docket No SDWA-05-2021-0001
)
Douglas Bailer,) Proceeding under Section 1423(c) of the
Kawkawlin, Michigan,) Safe Drinking Water Act,
) 42 U.S.C. § 300h-2(c)
Respondent.)
)

Consent Agreement and Final Order

Statutory Authority

1. This is an administrative action commenced and concluded under Section 1423(c)(2) of the Safe Drinking Water Act (SDWA), 42 U.S.C. §300h-2(c)(2), and Sections 22.13(b), 22.18(b)(2) and (3), and 22.45 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), as codified at 40 C.F.R. Part 22.
2. Complainant is, by lawful delegation, the Director of the Enforcement and Compliance Assurance Division (Director), U.S. Environmental Protection Agency (EPA), Region 5.
3. Respondent is Douglas Bailer, an individual residing and doing business in Michigan.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, an administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). *See* 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the terms of this CAFO, including the assessment of the civil penalty and the compliance requirements specified below.

Jurisdiction and Waiver of Right to Judicial Review and Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives any and all remedies, claims for relief, and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this CAFO including, but not limited to, its right to request a hearing under 40 C.F.R. § 22.15(c) and Section 1423(c)(3) of SDWA, 42 U.S.C. § 300h-2(c)(3); its right to seek federal judicial review of the CAFO pursuant to Chapter 7 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06; any right to contest the allegations in this CAFO; and its right to appeal this CAFO under Section 1423(c)(6) of SDWA, 42 U.S.C. § 300h-2(c)(6). Respondent also consents to the issuance of this CAFO without further adjudication.

Statutory and Regulatory Background

9. Section 1421 of SDWA, 42 U.S.C. § 300h, requires that the Administrator of EPA promulgate regulations, which shall include permitting requirements as well as inspection, monitoring, recordkeeping and reporting requirements, for state underground injection control (UIC) programs to prevent underground injection which endangers drinking water sources.

10. Section 1421(d)(1) of SDWA, 42 U.S.C. § 300h(d)(1), defines “underground injection” as the subsurface emplacement of fluids by well injection and excludes the underground injection of natural gas for purposes of storage and the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

11. Section 1421(d)(2) of SDWA, 42 U.S.C. § 300h(d)(2), provides that underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

12. Section 1422(c) of SDWA, 42 U.S.C. § 300h-1(c), provides that the Administrator for EPA shall prescribe UIC programs applicable to those states that have not obtained primary enforcement responsibility of their UIC programs (a concept called “primacy”) or do not have primacy for all types of wells.

13. Pursuant to Sections 1421 and 1422 of SDWA, 42 U.S.C. §§ 300h and 300h-1, respectively, EPA has promulgated UIC regulations at 40 C.F.R. Parts 124 and 144 through 148.

14. Pursuant to Section 1422(c) of SDWA, 42 U.S.C § 300h-1(c), and EPA’s regulations at 40 C.F.R § 147.1151, EPA administers and has primary enforcement responsibility of the UIC program in the State of Michigan to ensure that owners or operators of the injection wells within Michigan comply with the requirements of SDWA.

15. 40 C.F.R. § 144.1(g) provides that the UIC programs regulate underground injection by six classes of wells and all owners or operators of these injection wells must be authorized either by permit or rule. Class II wells inject fluids which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production and may be commingled with waste waters from gas plants which are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection; for

enhanced recovery of oil or natural gas; and for storage of hydrocarbons which are liquid at standard temperature and pressure. 40 C.F.R. § 144.6(b)(1).

16. 40 C.F.R. § 144.11 further prohibits any underground injection, except into a well authorized by rule or by permit issued under the UIC program.

17. 40 C.F.R. § 144.51(a) provides that any UIC permittee must comply with all conditions of its permit. Any permit noncompliance constitutes a violation of SDWA and is grounds for enforcement action.

18. Section 1401(6) of SDWA, 42 U.S.C. § 300f(6), and 40 C.F.R. § 144.3 define “contaminant” as any physical, chemical, biological, or radiological substance or matter in water.

19. 40 C.F.R. § 144.3 defines “fluid” as any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

20. 40 C.F.R. § 144.3 defines “injection well” as a “well” into which “fluids” are being injected.

21. 40 C.F.R. § 144.3 defines “permit” as an authorization, license, or equivalent control document issued by EPA or an approved State to implement the requirements of 40 C.F.R. Parts 144, 145, 146 and 124.

22. Section 1401(12) of SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3 define “person” as an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency).

23. 40 C.F.R. § 144.3 defines “underground injection” as a “well injection.”

24. 40 C.F.R. § 144.3 defines “well” as a bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or, a subsurface fluid distribution system.

25. 40 C.F.R. § 144.3 defines “well injection” as the subsurface emplacement of fluids through a well.

26. Section 1423(a)(2) of SDWA, 42 U.S.C. § 300h-2(a)(2), provides that any person found to be in violation of any requirement of an applicable UIC program in a state that does not have primacy may be assessed a civil penalty and/or be subject to an order requiring compliance pursuant to Section 1423(c)(2) of SDWA, 42 U.S.C. § 300h-2(c)(2).

27. Under Section 1423(c)(2) of SDWA, 42 U.S.C. § 300h-2(c)(2), and 40 C.F.R. Part 19, EPA may assess a civil penalty of not more than \$7,500 for each day of violation, up to a maximum administrative penalty of \$187,500 for SDWA violations occurring after December 6, 2013 through November 2, 2015 and \$11,665 for each day of violation, up to a maximum administrative penalty of \$291,641 for SDWA violations occurring after November 2, 2015 and/or issue an order requiring compliance.

Factual Allegations and Alleged Violations

28. Respondent is conducting business in Michigan.

29. Respondent is a “person” as that term is defined at Section 1401(12) of SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

30. At all times relevant to this CAFO, Respondent owned and was authorized to operate Class II injection wells in Tuscola County, Michigan pursuant to the following permits: Orville A. Kent #1 SWD, MI-157-2D-0013, Gladwin D. Lurvey #1 ERW, MI-157-2R-0001 and

Walter Walat #1 SWD, MI-157-2D-0008 (together, "Permits"). Each of the Permits subject the three respective Class II injection wells owned and operated by Respondent to the same terms and conditions.

31. The Permits authorize the underground injection of saltwater from production wells owned and operated by Respondent in the immediate area into the Orville A. Kent #1 SWD, Gladwin D. Lurvey #1 ERW and Walter Walat #1 SWD wells subject to the terms and conditions set forth in the respective Permits.

32. Saltwater is a "fluid" and the subsurface emplacement of saltwater through the Orville A. Kent #1 SWD, Gladwin D. Lurvey #1 ERW and Walter Walat #1 SWD wells is a "well injection." 40 C.F.R. § 144.3.

33. At all times relevant to this CAFO, Respondent owned and operated wells in the State of Michigan and was thus subject to the UIC program requirements set forth at 40 C.F.R. Parts 124, 144, 146, 147 (Subpart X) and 148.

34. Part II (B)(2)(d) of the Permits provides, in relevant part, as follows:

Injection Pressure, Annulus Pressure, Annulus Liquid Loss, Flow Rate and Cumulative Volume – Injection pressure, annulus pressure, flow rate and cumulative volume shall be recorded at least weekly and shall be reported monthly as specified in Part III(A) of this permit.... All gauges used in monitoring shall be calibrated in accordance with Part I(E)(17)(e) of this permit.

35. Part II(B)(3)(a) of the Permits provides, in relevant part, as follows:

Monthly Reports – Monitoring results obtained during each week shall be recorded on a form which has been signed and certified according to 40 C.F.R. 144.32.... This report shall include the weekly measurements of injection pressure, annulus pressure, flow rate and cumulative volume as required in Parts II(B)(2)(d) and III(A) of this permit.

36. Part III (A) of the Permits specifies that injection pressure, annulus pressure, flow rate, and cumulative volume shall be recorded weekly.

37. At all times relevant to this CAFO, Part I (E)(1) of the Permits required Respondent to comply with all conditions of the Permits.

38. Under 40 C.F.R. § 144.51(a), any permit non-compliance constitutes a violation of SDWA and is grounds for enforcement action.

39. On September 23, 2019, pursuant to Section 1445(b) of SDWA, 42 U.S.C. § 300j-4(b) and Part I (E)(6) of the Permits, an EPA credentialed inspector inspected Respondent's facilities.

40. On January 14, 2020, EPA sent Respondent a noncompliance notification based on the findings of the inspection and a review of records.

41. On January 31, 2020, EPA received a written response from Respondent to the July 14, 2020 noncompliance notification.

42. On April 22, 2020, EPA issued Information Request No. V-UIC-20-1445-007 (EPA's Information Request) to Respondent pursuant to Section 1445(a) of SDWA, 42 U.S.C. §300j-4(a), 40 C.F.R. §§144.17 and 144.51(h), and paragraph E.6 of the Permits to gather information related to the Permits and historic operations, maintenance, monitoring, and reporting activities at each of the wells.

43. On June 5, 2020 and June 24, 2020, Respondent submitted its response to EPA's Information Request, including the documents requested by the EPA.

44. Under 40 C.F.R. § 144.51(a) and Part (E)(1) of the Permits, Respondent is required to comply with all conditions of the Permits and any noncompliance constitutes a violation of SDWA and is grounds for enforcement action.

Count 1 –Failure to Accurately Monitor and Record Pressure

45. At all times relevant to this CAFO, Parts II (B)(2)(d) and III (A) of the Permits

required Respondent to monitor and record annulus pressure at least weekly using calibrated gauges.

46. In the response to EPA's Information Request issued on April 22, 2020, Respondent stated that from at least July of 2015 through January 2020 they failed to measure annulus pressure with a gauge at the three injection wells on a weekly basis using calibrated gauges.

47. From July of 2015 through January of 2020, Respondent entered "0" for weekly annulus pressure data measurements on all monthly reports submitted to EPA.

48. Respondent's failure to accurately measure annulus pressure measurements weekly with a calibrated gauge and failure to record accurate measurements is a violation of Parts II (B)(2)(d) and III (A) of the Permits.

Count 2 - Submission of Inaccurate Reports

49. At all times relevant to this CAFO, Part II (B)(3)(a) and Part III (a) of the Permits required Respondent to report accurate weekly measurements to the EPA on a monthly basis.

50. Respondent submitted reports to EPA with weekly values for annulus pressure, despite failing to take weekly measurements.

51. From July of 2015 through January of 2020, Respondent, despite failing to measure annulus pressure with a gauge, entered "0" for weekly annulus pressure data measurements on all monthly reports submitted to EPA.

52. From July of 2015 through January of 2020, Respondent failed to submit accurate monthly reports to EPA.

53. Respondent's failure to submit accurate monthly reports to EPA is a violation with Part II (B)(3)(a) and Part II (B)(2)(d) and Part III (A) of the Permits.

Civil Penalty

54. Section 1423(c)(4)(B) of SDWA, 42 U.S.C. 300h-2(c)(4)(B), requires the Administrator to take into account the seriousness of the violation, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require, when assessing a civil penalty for violations of SDWA.

55. Based upon the facts alleged in this CAFO, the factors listed in Section 1423(c)(4)(B) of SDWA, 42 U.S.C. 300h-2(c)(4)(B), EPA's UIC Program Judicial and Administrative Order Settlement Penalty Policy (September 1993) (EPA's UIC Penalty Policy), and Respondent's good faith and cooperation in resolving this matter, EPA has determined that an appropriate civil penalty to settle this action is \$48,960.00.

56. Within 30 days of the effective date of this CAFO, Respondent must pay a \$48,960.00 civil penalty by sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

The check must note Respondent's name and the docket number of this CAFO.

57. A transmittal letter, stating Respondent's name, complete address, and the case docket number must accompany the payment.

58. All reports, notifications, documentation, submissions, and other correspondence required to be submitted by this Order must be submitted to EPA electronically, to the extent possible. Electronic submissions must be sent to the following addresses:

girouard.taylor@epa.gov, R5WECA@epa.gov and getz.jamie@epa.gov. The subject line of all email correspondence must include the facility name, docket number, and subject of the deliverable. All electronically-submitted materials must be in final and searchable format, such as Portable Document Format (PDF) with Optical Character Recognition (OCR) applied. If electronic submittal is not possible, the submissions must be made by certified mail (return receipt requested) and mailed to the following addresses:

Taylor Girouard (ECW-15J)
Water Enforcement and Compliance Assurance Branch
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Jamie D. Getz (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

Regional Hearing Clerk (E-19J)
U.S. Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604

59. At the time of penalty payment, Respondent must also send copies of the notice of payment and transmittal letter to the addresses specified in Paragraph 58.

60. This civil penalty is not deductible for federal tax purposes.

61. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondent must pay the following on any amount overdue under this CAFO: interest accrued on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses, including but not limited to attorneys' fees and costs incurred by the United States for collection proceedings; a \$15 handling

charge fee each month that any portion of the penalty is more than 30 days past due; and 6% per year penalty on any principal amount 90 days past due.

62. If Respondent does not pay timely the civil penalty, EPA may request the United States Department of Justice bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States' enforcement expenses for the collection action under Section 1423(c)(7) of SDWA, 42 U.S.C. § 300h-2(c)(7). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

Compliance Requirements

63. As provided by Section 1423(c)(2) of SDWA, 42 U.S.C. § 300h-2(c)(2),

Respondent shall:

- a. Within 15 days of the effective date of this CAFO, use calibrated gauges for all monitoring required by the Permits and/or replace with new gauges as needed.
- b. Within 15 days of the effective date of this CAFO, measure and record injection pressure, annulus pressure, flow rate and cumulative volume at least weekly.
- c. Within 30 days of the effective date of this CAFO, submit to EPA copies of all monitoring information (i.e. field records, daily sheets, notes, or data of measurements) with its monthly, quarterly and annual reports to the address listed in Paragraph 58 for the 12 months following the effective date of this AOC. Reports shall be postmarked no later than the 10th day of the month following the reporting period.
- d. Within 90 days of the effective date of this CAFO, submit to EPA for review and approval, and upon approval shall implement, a standard operating procedure (SOP) for use in providing adequate direction to all staff in monitoring, recording, and reporting practices required by the Permit. The SOP must address procedures for measuring injection pressure, annulus pressure, flow rate and cumulative volume with calibrated gauges and flow meters or totalizers. The SOP must include procedures for quarterly monitoring and reporting practices required by the Permit. The SOP must include procedures for annual monitoring and reporting practices required by the Permit. The SOP must also address

how all monitoring information will be maintained, in accordance with the Permits and 40 C.F.R. § 144.52(j) including calibration and maintenance records and copies of all records from the date of sample, measurement or report.

64. All reports, notifications, documentation, and submissions required by this CAFO shall be sent to EPA in the manner described in Paragraph 58. These reports, notifications, documentation, and submissions must be signed by a duly authorized representative of Respondent and shall include the following statement consistent with 40 C.F.R. § 144.32(d):

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

65. Respondent may not withhold information based on a claim that it is confidential. However, pursuant to 40 C.F.R. Part 2, Subpart B, Respondent may assert a claim of business confidentiality regarding any portion of the information submitted in response to this CAFO, as provided in 40 C.F.R. § 2.302(a)(2). The manner of asserting such claims is specified in 40 C.F.R. § 2.203(b). The name and address of any permit applicant or permittee and information which deals with the existence, absence, or level or contaminants in drinking water is not entitled to confidential treatment. 40 C.F.R. § 144.5. Information subject to a business confidentiality claim is available to the public only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. If Respondent does not assert a claim of business confidentiality when it submits the information, EPA may make the information available to the public without further notice.

66. If Respondent finds at any time after submitting information that any portion of that information is false or incorrect, the signatory must notify EPA immediately. Knowingly

submitting false information to EPA in response to this CAFO may subject Respondent to criminal prosecution under Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b), as well as 18 U.S.C. §§ 1001 and 1341.

67. Submissions required by this CAFO shall be deemed submitted on the date they are sent electronically or on the date postmarked if sent by mail.

68. EPA may use any information submitted in accordance with this CAFO in support of an administrative, civil, or criminal action against Respondent.

69. The information required to be submitted pursuant to this CAFO is not subject to the approval requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. § 3501 *et seq.*

70. If Respondent fails to comply with the requirements set forth in Paragraph 63, above, EPA may request the United States Department of Justice bring an action to seek penalties for violating this CAFO under Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b).

General Provisions

71. The parties consent to service of this CAFO by e-mail at the following valid e-mail addresses: getz.jamie@epa.gov (for Complainant) and schumacher@glassenhead.com (for Respondent).

72. Full payment of the penalty as described in Paragraph 56, above, and full compliance with this CAFO shall only resolve Respondent's liability for federal civil penalties for the violations and facts alleged in this CAFO. Violation of this CAFO shall be deemed a violation of SDWA for purposes of Section 1423(b) of SDWA, 42 U.S.C. § 300h-2(b).

73. Full compliance with this CAFO shall not in any case affect the rights of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

74. This CAFO does not affect Respondent's responsibility to comply with SDWA and other applicable federal, state, or local laws and permits.

75. Respondent certifies that it is complying with SDWA, its implementing regulations, and the Permits.

76. This CAFO constitutes a "previous violation" as that term is used in EPA's UIC Penalty Policy and to determine Respondent's "history of such violations" under Section 1423(c)(4)(B) of SDWA, 42 U.S.C. § 300h-2(c)(4)(B).

77. The terms of this CAFO bind Respondent and its successors and assigns.

78. Each person signing this CAFO certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to the terms of this CAFO.

79. Each party agrees to bear its own costs and attorney fees in this action.

80. This CAFO constitutes the entire agreement between the parties.

81. The parties acknowledge and agree that final approval by EPA of this CAFO is subject to 40 C.F.R. § 22.45(c)(4) which sets forth requirements under which a person not a party to this proceeding may petition to set aside a consent agreement and final order on the basis that material evidence was not considered.

82. In accordance with 1423(c)(3)(D) of SDWA, 42 U.S.C. § 300h-2(c)(3)(D), and 40 C.F.R. §§ 22.18(b)(3), 22.31(b), and 22.45, this CAFO shall become effective 30 days after the date that the Final Order contained in this CAFO, having been approved and issued by the Regional Judicial Officer, is filed with the Regional Hearing Clerk.

83. This CAFO shall be deemed terminated and satisfied by Respondent upon written notice from EPA that Respondent has demonstrated to EPA that all terms of this CAFO have been satisfied.

Consent Agreement and Final Order
In the Matter of: Douglas Bailer
Docket Number. SDWA-05-2021-0001

Mr. Douglas Bailer, Respondent

10-29-20
Date

Douglas Bailer
Douglas Bailer
Owner

Consent Agreement and Final Order
In the Matter of: Douglas Bailer
Docket Number. SDWA-05-2021-0001

United States Environmental Protection Agency, Complainant

MICHAEL HARRIS Digitally signed by MICHAEL HARRIS
Date: 2020.11.17 13:26:55 -06'00'

Michael D. Harris

(signature and date)

Director

Enforcement and Compliance Assurance Division

U.S. Environmental Protection Agency, Region 5

**Consent Agreement and Final Order
In the Matter of: Douglas Bailer
Docket No. SDWA-05-2021-0001**

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective 30 days after filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18, 22.31. and, 22.31. and 22.45.45. IT IS SO ORDERED.

Ann Coyle
Regional Judicial Officer
U.S. Environmental Protection Agency
Region 5

(signature and date)