UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

IN THE MATTER OF:	)	Docket No. UICAO-IX-88-01
John A. Lyddon,	)	Administrative Penalty Proceedings Under the Safe Drinking Water Act
Respondent	)	

ORDER ON RESPONDENT'S PREHEARING MOTIONS

In an Order dated November 28, 1988 the Respondent was directed to file all prehearing motions in this proceeding by December 16, 1988. On December 14, 1988 the Respondent filed a motion to join an indispensable party, a motion to transfer this proceeding to the State of Nevada Department of Conservation and Natural Resources or in the alternative to transfer the place of hearing to Reno, Nevada and a motion for a stay of proceedings.[1]

This proceeding concerns a proposed administrative enforcement order issued by the Water Management Division of EPA Region 9 (the Complainant) to John A. Lyddon (the Respondent) regarding a Class II injection well known as Eagle Springs Unit 1-35 which is located on property in Nye County, Nevada leased by Mr. Lyddon from the Bureau of Land Management. The property also contains

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1. The Respondent also requested that oral arguments be permitted on the motions. Since the parties have briefed these motions extensively and the motions generally involve questions of legal interpretation, it does not appear that there are significant benefits to be obtained from oral argument. Respondent's request for oral argument was therefore denied in a telephone conference on February 10, 1989.

three wells equipped for the production of oil and gas. The injection well is equipped for subsurface injection of waste water produced in association with oil and gas production. Declaration of John A. Lyddon at paragraph 2. Mr. Lyddon holds UIC Permit No. NVS000000002 which has an effective date of October 30, 1985. The proposed administrative enforcement order was issued to the Respondent on June 10, 1988. It charges the Respondent with certain violations of his UIC Permit, including failure to file required monitoring reports, filing false reports, failure to conduct a mechanical integrity test of the injection well, and failure to plug and abandon the injection well after the well had been out of use for two consecutive years. The Respondent requested a hearing on the proposed order and subsequently filed these prehearing motions pursuant to a scheduling order issued by the Presiding Officer.

Motion For Stay of Proceedings. The Respondent moves for a stay of these proceedings pending the adoption by EPA of "appropriate procedural regulations" for the conduct of the hearing in this matter and pending the disposition of Respondent's other motions, particularly its motion for joinder of the Secretary of the Interior as an indispensable party. Respondent's stated grounds for the motion are that (1) EPA has "failed to comply with the minimal requirements for the exercise of its rulemaking adjucative authority," (2) the case cannot be resolved without joinder of the Secretary of Interior, and (3) no risk to the environment will occur as a result of granting the motion.

The Respondent's arguments with respect to rulemaking are substantially identical to those raised in an earlier Underground Injection Control ("UIC") administrative penalty proceeding in EPA's Region 8. In re Montex Exploration Company, Docket No. UICAO-87-01 (Sept. 1, 1987) (EPA Region 8 Presiding Officer Risner). In that case the presiding officer ruled that EPA may bring UIC administrative penalty proceedings pursuant to the Safe Drinking Water Act ("SDWA") in advance of promulgating procedural regulations governing the conduct of such adjucations because the SDWA itself, which specifies at Section 1423 (c)(3) the procedures which EPA must follow in issuing administrative penalty orders, provides adequate notice and procedural rights to ensure due process protections for respondents. The presiding officer further held that the EPA could supplement the procedural requirements specified in the SDWA through the issuance of "interpretive" rules without undertaking the rule-making procedures of the Administrative Procedures Act and held that the current "Guidance on UIC Administrative Order Procedures" constituted interpretive rules and accordingly need not be promulgated in accordance with the Administrative Procedures Act.

The Respondent argues that Congress required EPA to promulgate "implementing" regulations for the enforcement provisions of the SDWA (Respondent's Reply at pp. 2-3) and that such regulations are "substantive" rather than "interpretive" and therefore must be promulgated in accordance with the APA. (Respondent's Reply at pp 4-5). The Respondent's primary basis for this argument appears to be that the "Guidance on UIC Administraive Order

Procedures" is mandatory for presiding officers and is therefore a rule "implementing" the Statute rather than an "interpretive" rule (Respondent's Reply at p.5).

Respondent's arguments are not persuasive. Although Respondent notes that the preamble to the "Guidance" states that

> EPA will use the procedures set forth in the guidance which follows to issue administrative orders under Section 1423 (c) of the Safe Drinking Water Act

this appears to be merely a statement in the future tense and does not necessarily imply that the guidance is mandatory in every respect.[2] Similarly, when Section 144.101 of the Guidance states that

> [t]his subpart describes procedures for ... all administrative orders under Section 1423 of the Safe Drinking Water Act

this language must be read in light of the fact that the guidance was drafted in the form of amendments to EPA Regulations and therefore sometimes has a mandatory tone which is inconsistent with its purpose as guidance.

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2. My Order of November 28, 1988 setting a date for the hearing in this matter provided that

> As necessary the Presiding Officer may make rules of procedure different from those contained in the Guidance.

Finally, to the extent the Respondent merely prefers the more fully elaborated procedural rules of 40 C.F.R. Part 22, he is disagreeing with the decision by Congress that hearings under Section 1423 are not subject to Sections 554 and 556 of the Administrative Procedures Act. SDWA §1423 (c)(3)(A).

Respondent's request to stay this proceeding pending joinder of the Secretary of Interior is more properly dealt with under that motion, and cannot serve as independent grounds for a general stay.

Similarly, Respondent's assertion that there is no "compelling environmental protection justification" for opposing the requested stay does not, standing alone, give grounds for granting the stay. Furthermore, Respondent's assertion appears to be incorrrect. Respondent refers at paragraph 9 of the Declaration of W. Scott Lovejoy to the possible sale of the lease, which could result in use of the injection well by a new operator. Thus the injection well could be operated, with resulting risk of environmental harm, during the period of time it will take EPA to issue procedural regulations for UIC administrative penalty hearings.

Accordingly, after considering Respondent's arguments I rule that this proceeding need not be stayed to await the adoption by EPA of procedural regulations and I decline to stay the proceeding on any of the other grounds argued by Respondent.

Motion to Join an Indispensable Party. The Respondent moves to join the Secretary of the Interior as an indispensable party. Respondent makes three general arguments for joinder: that joinder of the Bureau of Land Management[3] is "necessary to a full and fair resolution of the issues raised in this proceeding," that the present proceeding may affect the BLM's interests as lessor and as royalty holder in the lease on which the injection well is located, and that the policies of the Mineral Leasing Acts of 1920 and 1947 could be frustrated if the BLM does not participate in this proceeding.

As proof of the necessity of joining the BLM, Respondent argues that BLM witnesses will be required at hearing (Respondent's Memorandum of Points and Authorities at p.2). Obviously the fact that a BLM employee may be needed as a witness is not an adequate ground for joining the BLM as a party. Respondent also argues that the BLM is a necessary party because the value of the oil lease and of any royalties to the U.S. Government will be reduced if Mr. Lyddon is ordered to plug and abandon the injection well (Respondents Memorandum at p.2 and at pp. 3-5). This argument is discussed below at page 8. The Respondent also argues that the action by the BLM authorizing Mr. Lyddon to shut in the oil lease tolled the running of time in which Mr. Lyddon was required to conduct a mechanical integrity test on the injection well. As with Respondent's first argument, this confuses to some degree the difference between needing BLM

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3. The Bureau of Land Management is in the U.S. Department of Interior.

employees as witnesses (or needing documents from BLM files) and needing the BLM as a party. Furthermore, Respondent has cited no statute or regulation which authorizes the BLM to excuse Mr. Lyddon from compliance with regulations and permit conditions imposed on him by EPA pursuant to the Safe Drinking Water Act. In contrast, the language of the Safe Drinking Water Act clearly vests authority to issue regulations and enforce the Act in the Administrator of EPA. Safe Drinking Water Act §§ 1421(a) and 1423(a). Respondent also argues that joinder is necessary to determine whether the proposed plugging and abandonment of the injection well violates the terms of the BLM lease or conflicts with statutory authority granted to the Department of Interior to administer leases of federal lands. Although Section 1421(a)(2) of the Safe Drinking Water Act requires the Administrator of EPA to consult with appropriate federal agencies prior to proposing and promulgating regulations implementing the Act, there is no discernable requirement in the Act or in the implementing regulations that requires EPA to consider BLM's or Department of Interior's interests as lessor of federal lands when requiring the holder of a UIC permit to take steps to protect underground sources of drinking water from contamination caused by unused injection wells. Under these circumstances the mandate to protect underground sources of drinking water can override the localized economic interest of the United States in maintaining productive capability at a particular well. It is also important to note that the Permit requires plugging and abandonment of an inactive well unless the permitee has proposed a satisfactory plan to EPA

assuring that the unused well will not endanger underground sources of drinking water during the period of time it is temporarily not in use. Permit at Par.I.G.3. Thus by choosing to submit a satisfactory protective plan the Respondent may avoid all of the regulatory conflicts and financial impact it alleges would occur if the well were plugged.

Respondent's second argument is that, because the BLM is the lessor and royalty holder of the lease containing the injection well, the present proceeding may adversely affect the BLM's interests and that the principles underlying Federal Rule of Civil Procedure 19 should be applied so as to require joinder of BLM. Respondent cites Naartex Consulting Corp. v Watt, 722 F.2d 779, 788 (D.C. Cir. 1983) for the proposition that a lessor or a royalty holder are necessary parties where litigation relates to title to property or other rights under a lease. However, Naartex involves joinder of private parties in a suit against the Secretary of Interior, not joinder of an agency of the federal government in a proceeding brought by another agency of the federal government. Respondent also cites Penzoil Co. v. Department of Energy, 480 F.Supp. 1126, 1128-1129 (D.Del. 1979) for the proposition that

> [w]here an agency of the Federal Government has a clear interest in the subject matter of a proceeding, it can be joined as an indispensable party, regardless of the fact that another agency might be an adverse party in the proceeding.

However, the Penzoil case involved joinder of the United States at the request of the Department of Energy (not as a party adverse to the Department of Energy) so that DOE, which lacks authority to bring suit in its own name, could assert a counterclaim against Penzoil. The case does not stand for the proposition offered by Respondent.

Respondent's final argument is that the Mineral Leasing Acts of 1920 and 1947 reflect a Congressional purpose to "establish an orderly system by which the federal government could control the leasing of public land" (Respondent's Memorandum at p.6) and to "obtain for the public a reasonable financial return on assets that 'belong' to the public" (Respondent's Memorandum at p.7). As noted above at page 7, Respondent may avoid any potential harm to the BLM's interests by implementing a satisfactory plan to prevent contamination of underground sources of drinking water. In the alternative, there appears to be some likelihood that Respondent can plug the injection well and still extract crude oil from the lease. Since Respondent notes at page 2 of its Reply Memorandum that the injection well "has potential to be operated as a producer of crude oil," it appears that crude oil could be produced from the property without using this injection well (i.e., using it as an oil extraction well, not a brine injection well). Respondent claims to have already done so, in that crude oil is stated to have been produced from the lease during 1985 and 1986 while no brine was injected into the well. (Declaration of John A. Lyddon, Paragraph 8). Thus the requirements which may be imposed on Respondent under the First Amended

Proposed Administrative Order may not in fact reduce the economic value of the leasehold. Accordingly, the Respondent has the ability to comply with the requirements of the Safe Drinking Water Act in a manner that does not conflict with its obligations under the BLM lease and does not impinge on the financial or custodial interests of the BLM.

It should also be noted that the "Guidance on UIC Administrative Order Procedures" provides a means for voluntary participation by BLM in this proceeding, short of joinder as a party. Under Section 144.102 of the "Guidance" EPA is to give public notice of proposed adminstrative orders and invite written comments. Guidance § 144.102(b). Anyone commenting on the proposed order is to be notified of any hearing and may request an opportunity "to be heard and to present evidence" at the hearing. Guidance § 144.104(e). This procedure provides ample opportunity for the BLM to participate in the present proceeding and obviates the need to consider joinder of BLM as a party under principles analogous to Federal Rule of Civil Procedure 19(a).[4]

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4. The record in this proceeding contains a copy of the required public notice and copies of correspondence indicating that the notice was sent to the Ely Daily Times in Ely, Nevada for publication and to the Ely Public Library and the Nye County Recorder's Office in Tonapah, Nevada. EPA Exhibit 52. The notice was also sent to other persons and governmental entities including the Bureau of Land Management. EPA Exhibits 51 and 52; Declaration of Betty Wilcox (EPA Exhibit 53). Thus from the record it appears that BLM has received both constructive notice and actual notice of this proceeding. There is no indication in the record that BLM has commented on the proposed order or requested an opportunity to participate in the present proceeding. Accordingly, it appears that BLM has waived its right to be heard and present evidence at the hearing.

Motion to Transfer Proceeding to State of Nevada Department of Conservation and Natural Resources or in the Alternative to Transfer Place of Hearing to Reno, Nevada. The Respondent moves to "transfer jurisdiction of this proceeding" to the State of Nevada Department of Conservation and Natural Resources on the grounds that the State of Nevada's UIC program has been approved by EPA since the issuance of the proposed administrative order in this matter and accordingly Nevada now has primary enforcement responsibility for the UIC program.

Respondent does not cite any specific statutory provision requiring, or even authorizing, EPA to transfer pending UIC enforcement cases to a state upon approval of that state's UIC program. From the point of view of administrative efficiency such a transfer seems undesirable. Respondent argues that by continuing the present enforcement proceeding EPA is "abrogating" Section 1422 of the Safe Drinking Water Act, which provides that the state shall have primary enforcement responsibility for UIC enforcement once the State's UIC program is approved by EPA. Safe Drinking Water Act § 1422(b)(3). However, Section 1423(a) of the Act clearly authorizes EPA to undertake enforcement cases both before a state adopts an approved program and (with 30 days notice to the state) during periods when the state has primary enforcement authority. Also, the Memorandum of Agreement between Nevada and EPA on the UIC program states

> EPA has the responsibility to complete any instance of noncompliance for which EPA has initiated a formal enforcement action (e.g.

> proposed administrative order, drafted civil referral) by the effective date of this Agreement.

Memorandum of Agreement, p 10. Although Respondent urges that EPA should give Nevada "an opportunity to administer and enforce its own program with proper regard for that state's own unique environmental concerns and expertise", Respondent's Reply Memorandum at p.2, the express terms quoted above from the bilateral agreement between EPA and the State of Nevada presumably do reflect Nevada's concerns in this regard.

Respondent also argues that the present administrative proceeding was apparently brought without consultation with the State of Nevada, which violates the EPA-Nevada Memorandum of Agreement. Since the Memorandum of Agreement was not in effect at the time EPA brought this action the consultation requirement referred to by the Respondent was not applicable. See also, Safe Drinking Water Act § 1423(a)(2).

The Respondent's alternative motion to hold the hearing in this matter in Reno, Nevada turns primarily on whether certain of Respondent's proposed witnesses will be unavailable if the hearing is held in San Francisco.[5] Since I have not yet ruled on Complainant's Motion for Summary Determination (which may reduce or eliminate the need for some testimony) and have postponed the

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5. Complainant has proposed that as much of the hearing as possible be conducted in San Francisco, the remainder in Nevada.

hearing date and the date for exchange of witness lists until after the Motion is decided, I will also postpone decision on the choice of hearing location.

Accordingly, IT IS ORDERED THAT

(1) Respondent's motion for stay of proceedings is DENIED;

(2) Respondent's motion to join the Secretary of Interior is DENIED;

(3) Respondent's motion to transfer this proceeding to the State of Nevada Department of Conservation and Natural Resources is DENIED;

(4) Respondent's motion to transfer the place of hearing to Reno, Nevada is deferred for decision after Complainant's motion for summary determination has been decided.

Steven W. Anderson
Steven W. Anderson
Presiding Officer

Dated: February 21, 1989

IN THE MATTER OF JOHN A LYDDON
Respondent, Docket No. UICAO-IX-88-01

CERTIFICATE OF SERVICE

I certify that the foregoing ORDER ON RESPONDENT'S PREHEARING MOTIONS, dated February 21, 1989, was sent this day in the following manner to the addressees:

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Date: 2/22/89