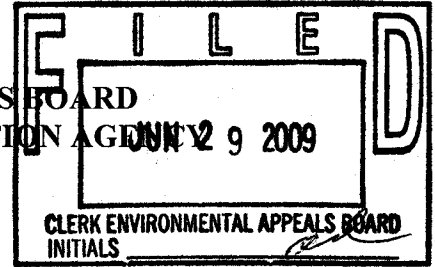


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Gene A. Wilson)

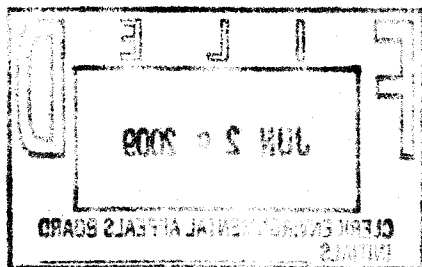
SDWA Appeal No. 08-09

Docket No. SDWA-04-2005-1016)

ORDER DIRECTING SUPPLEMENTAL BRIEFING

On January 21, 2009, Mr. Gene A. Wilson filed with the Environmental Appeals Board ("Board") an appeal of an Initial Decision issued against him on August 20, 2008, by Regional Judicial Officer ("RJO") Susan B. Schub. The appeal arises out of an administrative enforcement action initiated by Region 4 of the U.S. Environmental Protection Agency against Mr. Wilson for alleged violations of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f to 300j-26, at a well he owned near Collier Creek in Lawrence County, Kentucky.

In the proceedings below, Region 4 charged Mr. Wilson with two continuing violations of the Underground Injection Control ("UIC") program, running from May 16, 2001, through June 10, 2005. First, the Region alleged that during that four-year time span, Mr. Wilson failed to either plug and abandon the Collier Creek well or demonstrate that the well would not endanger underground sources of drinking water, in violation of a UIC permit he had obtained in January 1990 for the well, and in violation of the UIC program regulations at 40 C.F.R. §§ 144.51(a) and 144.52(a)(6). Second, the Region alleged that Mr. Wilson failed to submit annual monitoring reports for the well, in violation of the UIC permit and 40 C.F.R. § 144.51(a). The Region sought a penalty of \$11,291 for these alleged violations. After a three-day



evidentiary hearing in September 2007, the RJO found Mr. Wilson to be liable for both alleged violations and assessed a penalty of \$8,291.

In his appeal brief, Mr. Wilson argues that the RJO erred in a number of her judgments, and he urges the Board to reverse the Initial Decision. Region 4 filed a response to the appeal on January 30, 2009, arguing that the Board should affirm the Initial Decision. Mr. Wilson subsequently filed a reply to the Region's response on February 10, 2009.

After reviewing the Initial Decision, appellate briefs, and administrative record, the Board has determined that supplemental briefing would be helpful in its deliberations regarding this case. The Board therefore requests the Region's views on the following matters. The Board believes that some of these questions might implicate the applicability and functioning of the UIC program on the national level, so we direct Region 4 to consult with EPA's Office of General Counsel, EPA's Office of Enforcement and Compliance Assurance, and EPA's UIC program office and incorporate the Agency's collective interpretations in the responses to the Board's questions.

The Board seeks EPA's views on the following issues (which are not fully addressed in the briefing or record below) and requests that citations to relevant supportive legal authority be provided along with the Agency's analysis of each issue.

- (1) The RJO held that Mr. Wilson's well was neither perforated nor injected into over the entire period of time Mr. Wilson held a UIC permit for the well (i.e., January 20, 1990, through June 10, 2005). Assuming these facts to be accurate, please answer the following questions addressing the well's regulatory status:

- (a) Explain whether and, if so, under what authority, the well qualified as a "UIC injection well" or "any other facility or activity subject to regulation under the UIC program" during the period of alleged violation (i.e., May 16, 2001, through June 10, 2005).
- (b) Part I.A.4 of Mr. Wilson's UIC permit explicitly specifies that the well may not "commence injection" until, among other things, conversion of the well into a UIC injection well is completed. Part I.B.1 of the permit specifies that "injection operation" can begin on the date Part I.A.4 is completed.
 - (i) Assuming the well was never perforated, would it be factually and/or legally accurate to conclude that conversion of the well was never completed?
 - (ii) If conversion of the well was never completed, would it be correct to conclude that, under the terms of the permit, the well would never be authorized to "commence injection" and/or "commence operation"?
 - (iii) If the well was not converted into an injection well and not authorized to commence operation, what is the permit's status? Is it in effect, and why? Is it enforceable, and why?
 - (iv) If the permit is not yet effective and/or enforceable, can there be a violation under these circumstances?
- (c) What effect, if any, does Mr. Wilson's submission of EPA Form 7520-10 on January 7, 1994, apparently erroneously reporting completion of the well's

conversion into an injection well, have on the well's regulatory status if the well was never perforated or injected into despite this report?

- (d) Address the effect, if any, of Mr. Wilson's August 18, 2000 letter to EPA (in which he informed the Agency that he had never placed the well into operation, had never injected fluid into it, and planned to plug it) on the regulatory status of the well.
- (2) If Mr. Wilson had never applied for or received a UIC permit for the subject well and the well was, as the RJO held, neither perforated nor injected into, would the well ever have been "subject to regulation" under the UIC program?
- (3) The UIC regulations list a variety of wells, dug holes, and the like that are specifically included and specifically excluded from coverage under the UIC program. One such specific exclusion is "[a]ny dug hole, drilled hole, or bored shaft [that] is not used for the subsurface emplacement of fluids." 40 C.F.R. § 144.1(g)(2)(v). Does this exclusion apply to a well, such as Mr. Wilson's, that was never used for the subsurface emplacement of fluids?
- (4) If EPA were to determine that it issued a UIC permit in accordance with certain facts that turn out to be erroneous, what is the general procedure for rectifying such situations? (Part II.B.1.g of Mr. Wilson's permit authorizes the Region to modify or terminate the permit if the Region determines it issued the permit on erroneous facts. As a general matter, would the Region find it appropriate to terminate a UIC permit in a case where it learned that a well is not perforated and thus subsurface emplacement of fluids physically could not occur?)

The Region's supplemental brief must be filed with the Board on or before **Monday, August 10, 2009.**

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: June 29, 2009

By: Kathie A. Stein for Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Directing Supplemental Briefing** in the matter of *Gene A. Wilson*, SDWA Appeal No. 08-09, were sent to the following persons in the manner indicated:

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Date: JUN 29 2009


Annette Duncan
Secretary