

# GENE A. WILSON

101 Madison Street, P.O. Box 702, Louisa, KY 41230  
(606) 638-9601 • Fax (606) 638-1041

January 8, 2009

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board (MC 1103B)  
Ariel Rios Building  
1200 Pennsylvania Avenue N.W.  
Washington, DC 20460-0001

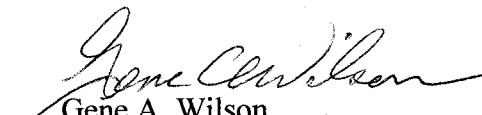
Re: Gene A. Wilson  
Docket No. SDWA 04-2005-1016  
SDWA Appeal No. 08-09

Dear Sir/Madam:

Enclosed herewith please find the original and six (6) copies of the Brief on the above referenced matter. Please return a file-marked copy to this office in the envelope provided herein.

If you have any questions, do not hesitate to contact me.

Sincerely,

  
Gene A. Wilson

GAW:pmc

Enclosures

**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 )  
\_\_\_\_\_ )

\*\*\*\*\*

**RESPONDENT'S APPELLATE BRIEF**

ENVIRONMENTAL APPEALS BOARD  
JAN 11 12 PM '09  
U.S. E.P.A.  
WASHINGTON, D.C.

## **TABLE OF CONTENTS**

INTRODUCTION	1
ISSUES PRESENTED FOR REVIEW	2
SUMMARY OF ARGUMENT	5
STANDARD OF REVIEW	8
FACTUAL AND PROCEDURAL BACKGROUND	8
ARGUMENT	13
CONCLUSION	16

## TABLE OF AUTHORITIES

### Cases

*L.K. Comstock & Co., Inc. v. Becon Const. Co., 932 F.Supp. 948, affirmed 73 F.3d 362*

### Statutes

40 C.F.R. 22.30(a)(1)

40 C.F.R. 22.28(a)

40 C.F.R. 22.14(5)(b)

40 C.F.R. 22.19(a)

40 C.F.R. 22.30

### Other Authorities

Doctrine Of Laches

## **INTRODUCTION**

Comes the Respondent, Gene A. Wilson, pursuant to 40 C.F.R. 22.30 (a) (1) appeals the Initial Decision of Presiding Officer Susan B. Schub, assessing a civil penalty of Eight Thousand Two Hundred Ninety-One Dollars (\$8,291.00); Order Denying Motion To Reopen Hearing and related Orders during the proceedings denying Respondent due process and a fair hearing.

Respondent was issued UIC permits KYI0376, KYI0344 and KYI0503 in 1990. Permits KYI0344 and KYI0503 were used extensively and were transferred with the sale of the Cam Creek farm in 1994. UIC Permit KYI0376 remained with the Collier Creek farm some four (4) miles away and is the subject of this litigation.

The permit in question was erroneously issued by authorizing the injection of fluids brought to the surface in connection with conventional oil and gas production **ONLY** from permittees operations for enhanced recovery. Respondent had no oil wells on his Collier Creek farm for enhanced recovery and continuously attempted to have the permit corrected to allow injecting oil producers brine water, to no avail. Therefore, Respondent notified EPA on August 18, 2000 he desired to plug the well. Authorization from EPA to plug the well was received five (5) years later on March 17, 2005 with the well being fully plugged on June 10, 2005. Respondent's Exhibit "22" and "30".

EPA filed its Complaint a year later alleging Respondent violated various provisions of the SDWA and its implementing regulations.

After extensive pleadings, motions, affidavits, etc. a hearing was held on September 25, 26 and 27, 2007 with the Presiding Officer Susan B. Schub determining among other things, the well was totally sealed, there was no actual or potential harm to

the environment or possible sources of drinking water; however, she decided Respondent did programmatic harm to the UIC regulatory program by failure to conduct a Mechanical Integrity Test (MIT) and file EPA Form 7520-11 on five (5) occasions marking "0" for injection.

The Initial Decision was issued on August 21, 2008 and Respondent moved to reopen hearing pursuant to 40 C.F.R. 22.28(a). The Motion was denied on November 24, 2008 with this Appeal timely filed on December 8, 2008 and EAB granting an extension of time for this Brief to be filed on or before January 15, 2009.

All citations to the hearing transcript will refer to the transcript pages and volume number using the abbreviation "Tr." for transcript and "Vol." for volume followed by page number.

### **ISSUES PRESENTED FOR REVIEW**

(A.) Whether Respondent was denied due process and fair treatment after the first and only NOV was issued against him on February 14, 2005 with EPA's attorney Zylpha Pryor refusal to negotiate a settlement except for a demand of an arbitrarily and capricious penalty of Nine Thousand Two Hundred Fifty-Three Dollars (\$9,253.00) without her even viewing Respondent's UIC permit files. (It will be shown later in this Brief that most of Respondents files had been lost by EPA.)

(B.) Whether E.P.A. denied Respondent a fair hearing at the outset by failure to disclose that practically all of Respondent's files were missing from his UIC permit file to determine a just resolution.

Note: E.P.A.'s enforcement officer Mr. Randy Vaughn could not produce Respondent's file upon request causing Respondent to make two (2) trips to Atlanta using the Freedom Of Information Act (FOIA) for researching to locate missing documents. (Some documents Respondent requested were denied; therefore, an Appeal was timely made to the EPA Office of Environmental Information in Washington, DC but was subsequently lost by that agency.)

(C.) Whether E.P.A. arbitrarily, capriciously and without just cause filed a Complaint against Respondent a year after the well was completely plugged under the pretence of setting an example.

Note: Respondent sincerely believes the sole reason was due to Ms. Pryor and Respondent having personality issues. Reference is made to Respondent's letters to Ms. Pryor dated March 14, 2005, March 31, 2005 and July 24, 2006, Respondent's Exhibit "29", "32" and "36".

(D.) Whether Respondent is denied due process and fair play when Ms. Pryor failed to comply with the Consolidated Rules Of Practice. 40 C.F.R. 22.14(5)(b) provides that a copy of the rules shall accompany each Complaint served. (This appears to be struggling for straws but is only material to show EPA's arbitrary acts toward a permit holder placed in distress by EPA's actions.)

(E.) Whether the Presiding Officer erred in denying Respondent's Motion To Require EPA To File Its Pre-Hearing Exchange First denying Respondent a form of discovery as to the charges against him.

(F.) Whether the Hearing Officer arbitrarily, erroneously and capriciously denied Motion to join Respondent's former UIC permits KYI0344 and KYI0503 to this cause of action to show Respondent always acted in good faith in dealing with EPA; that MIT notices were always given to operators when to conduct the test; and some of the missing documents of the permit in question were misfiled by EPA and located through FOIA research.

(G.) Whether the Presiding Officer erred in not taking judicial notice Enforcement Officer, Randy Vaughn placing notice of inspection September 14, 2004, in a pipe on Respondent's farm was not proper service.

Note: Mr. Vaughn could have easily given his inspection report to the tenant living on the property on his way out for delivery to Respondent later. Mr. Vaughn's notice was never found. Complainant's Exhibit "18".

(H.) Whether the Hearing Officer denied Respondent due process by destroying his affirmative defense of prejudicial treatment and selective prosecution by denying his Motion to make other UIC permit holder files of the Eastern Kentucky Region (31 permits) part of this record showing i.e. if permittee did not have a Standby Trust Agreement and Letter of Credit E.P.A. notified the operators the injection permit would be revoked; that E.P.A. always notified permit holders when to do MITs; letters of no injecting from permittees were sufficient rather than using form 7520-11; permits could be cancelled by letter when never placed in service; shut-in wells did not require annual monitoring reports; etc.

(I.) Whether the Presiding Officer erroneously accepted E.P.A.'s understanding of the language in its permit even though she admits there was confusion causing E.P.A. to issue a guidance document some ten (10) years after Respondent was issued his permit. (See Presiding Officers Order on Motion For Summary Determination dated June 14, 2007; Amended Order on Respondent's Motion For Summary Judgment and Complainant's Motion For Accelerated Decision On

Liability dated June 19, 2007; pages 26 and 27 in the Initial Decision and Complainants Exhibit "29".)

Note: It is a rule of law that a contract must generally be construed more strongly against the party drafting the document. L.K. Comstock & Co., Inc. v. Becon Const. Co., 932 F.Supp. 948, affirmed 73 F.3d 362.

(J.) Whether the Presiding Officer denied Respondents constitutional rights by not allowing the introduction of E.P.A.'s letters to other UIC permit holders showing Respondent was being treated differently holding they were inadmissible as unreliable and lacking in probative value. See Initial Decision at page 28 and Tr. Vol. III, P. 102-112.

(K.) Whether the Presiding Officer erred in denying Respondents Motion for a continuance to await the results of his Appeal to the EPA Office of Environmental Information in Washington, DC. This denial further prevented Respondent due process and a fair hearing by preventing discovery as permitted by 40 C.F.R. 22.19(5). Respondent's Exhibit "58".

(L.) Whether the Presiding Officer erroneously and arbitrarily denied Respondent's Motion enlarging days for hearing to present his case especially after the introduction less than two (2) months before the hearing, Appendix A submitted by EPA as Complainant's Exhibit "29" that completely changed reporting requirements of UIC permits. This surprise document violated 40 C.F.R. 22.19(a) on pre-exchange of documents ordered on July 11, 2006.

(M.) Whether Presiding Officer grossly erred in holding Respondent completely and flagrantly ignored all regulatory requirements for the life of the permit and refusing to obey authority in plugging the well when the issued permit clearly made no provision for a shut-in well or a well never placed in service. Tr. Vol. I, P. 121-122. The permit only required plugging "after cessation of injecting for two (2) years".

(N.) Whether Presiding Officer grossly erred in holding Respondent was required to file annual notices of no injections even though the issued permit required these reports were to be made after the well was placed in operation which never occurred. Further EPA classified the well as a "shut-in" which required no annual reports. Complainant's Exhibit "11" being the 5 Year Review Checklist in 1998 reflecting the well was classified as a shut-in.

(O.) Whether the Presiding Officer violated 40 C.F.R. Section 22.22 by not granting the introduction of a telephone bill and affidavit to rebut and refresh Ms. Carol Chin's testimony. It was unknown at the hearing Ms. Chin would not remember factual events and the document was not available until days of research through old records subsequent to the hearing.



(P.) Whether EPA waived a MIT after receiving notice from Respondent he wished to plug the well on August 18, 2000 with EPA responding March 14, 2005 with plugging instruction and the well fully plugged on June 10, 2005.

Note: Complainant's Exhibit "31" has numerous letters from EPA to operators after they gave notice they wished to plug their wells EPA would send its letter of acknowledgement and form styled "Plugging And Abandonment Plan" which it failed to send Respondent. EPA should be estopped by the Doctrine Of Laches and fair play in demanding a MIT after saying nothing when Respondent stated in his August 18, 2000 letter "Please advise if additional information is required". Respondent's Exhibits "22" and "34".

(Q.) Whether EPA erred when it singled out Respondent in not giving MIT notice while other operators were reminded regularly until August 1, 2005, when EPA sent a letter by certified mail stating that notices were no longer being given to operators when conduct MIT's.

(R.) Whether the Presiding Officer erred in determining Respondent should have filed EPA form 7520-11 marking "0" on injecting brine water the same year the well was plugged.

(S.) Whether the Presiding Officer erred in determining the economic impact of the penalty on Respondent be severe by referencing his position at a bank.

Note: Out of three (3) thick volumes of testimony, it is mentioned in the Presiding Officers Order Denying Motion To Reopen Hearing that Respondent was Chairman of the Board of a bank. It is not mentioned our little town of 2,000 people needs a financial institution to do business and Respondent's position there is free gratis.

### **SUMMARY OF ARGUMENT**

Respondent was issued UIC permits KYI0344 and KYI0503 in 1990 to dispose of brine water flowing into the creek on a farm recently purchased by Respondent for its large tobacco base on Cam Creek. UIC permit KYI0376 (subject of this litigation) was applied for at the same time as back up but was never needed or placed in service.

Respondent wasn't sure he needed the back up UIC permit on Collier Creek and it was classified as a "shut-in" by EPA. This permit, however was erroneously issued to force oil to the surface in connection with oil production activities. Respondent had no oil wells on his farm on Collier Creek and attempted for almost ten (10) years to have the

permit corrected to allow brine disposal from oil producers in the Martha area. This was never granted.

After cleaning up the brine water problems on Cam Creek Respondent sold the farm on a land contract in 1992 and after sufficient payment, deeded the property to Ed Jordan in 1994 and assigned the two (2) active UIC permits to Mr. Jordan.

With this sale Respondent had no need for an injection well that only allowed disposal of Respondents (permittees) brine water. See UIC Permit KYI0376 Part I Page 2 Section B (1) of Respondent's Exhibit "7".

After ten (10) years of sporadic requests to modify the UIC permit, Respondent notified EPA on August 18, 2000 he desired to plug the well. Plugging approval was received five (5) years later on March 14, 2005, after the first and only Notice Of Violation (NOV) was issued against Respondent on February 9, 2005. Respondent's Exhibits "22", "24" and "30".

During the life of permit KYI0376, Respondent received notice to do three (3) Mechanical Integrity Tests (MITs); one in 1991 that EPA cancelled; one in 1993 that was observed by an EPA representative and one in 1999 that Respondent rescheduled for April 26, 1999 due to weather conditions, but the EPA inspector didn't show. (Inspector was terminated by EPA.) Tr. Vol. I, P. 188.

EPA erroneously claims it gave Respondent notice to do MIT's and file annual monitoring reports but this was never established during this entire proceeding and Respondent emphatically denies any form of communication in this regard. On the face page of the UIC permit it states the permit shall be reviewed at least once every five(5) years from the effective date. EPA classified Respondent's well as a "shut-in" until

September 14, 2004 when Enforcement Officer Randy Vaughn changed the wells classification to “temporarily abandoned” with his on site inspection. (See EPA’s “5 Year Review Checklist” in 1998 clearly showing a shut-in well was exempt from annual monitoring reports.) Complainant's Exhibit “11”.

Without notice to Respondent, in 2000 EPA changed annual monitoring reports to include shut-in wells even though on form 7520-11 it would reflect “0” for injecting. All correspondences from EPA were received by registered mail, return receipt requested and you would think something so important as changing the EPA policy by Appendix A “Monitoring and Reporting Guidance For Class II-D and II-R Injection Wells Underground Injection Control Program” sent to some operators (but not Respondent) would be considered extremely important. The UIC permits were changed from “cumulative volumes shall be made over equal time intervals beginning on the date on which the well *commences operation* (emphasis added)” and “after a *cessation* (emphasis added) of injection for two years the permittee shall plug and abandon the well ....”. No provision was made anywhere in the UIC permit if you never injected. (Tr. Vol. I, P. 121-122.) Respondent did not see this new directive until July 30, 2007, when served on Respondent by EPA and the Presiding Officer who was having trouble with the ambiguity of the UIC permit.. Complainant's pleading titled Clarification Of Complainant’s Position Regarding Permit Requirements To Demonstrate Integrity And Submit Monitoring Reports with attached Appendix A to correct UIC permits.

On February 14, 2005 Respondent received the NOV and plugged the well on June 10, 2005. A year later EPA filed its Complaint.

## **STANDARD OF REVIEW**

Section 22.30 of the Consolidated Rules Of Practice Governing Appeals states a party may appeal any adverse order or ruling of the Presiding Officer.

Respondent prays that after the Environmental Appeals Board (EAB) reads all of Respondents pleadings; motions; affidavits, and testimony EAB will determine the Initial Decision was erroneous and modify the decision and set aside the Findings Of Fact And Conclusions Of Law and adopt Respondent's Proposed Findings Of Fact, Conclusions Of Law, Post Hearing Brief And Proposed Order submitted on January 2, 2008 or in the alternative overrule the Presiding Officers Order Denying Motion To Reopen Hearing and related orders denying the introduction of Respondent's other UIC permit files, EPA letters and documents found through FOIA and other adverse orders denying Respondent due process and a fair hearing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

The Complaint was filed on May 16, 2006, with Respondent filing his Counterstatement Of Facts, Answer To Administrative Complaint, Answer To Allegations Of Fact And Violations, Answer To Proposed Order and Opportunity To Request Hearing on June 9, 2006.

Subsequent to the initial pleadings, supra, Respondent filed numerous motions and affidavits attempting to determine why EPA was so upset with him. Other than the abrasive comments from EPA Attorney Zylpha Pryor Esq.; her charge of non compliance and her refusal to accept Respondent's assertion that he had never placed the well in service, Respondent was at a complete loss why EPA was mad.

The UIC permit KYI0376 states on its face page that "this permit shall be

reviewed at least once every five years from the effective date". During the first five (5) years Respondent did not receive a NOV and during the second five (5) year period Respondent did not receive a NOV so for ten (10) years EPA felt Respondent was in full compliance with his permit. On September 14, 2004, (stuck in a pipe at the well) Enforcement Officer Randy Vaughn changed the well designation from a "shut-in" to "temporarily abandoned" requiring the plugging within two (2) years. See Class II Well Inspection Form, Complainant's Exhibit "18".

In 2000 EPA changed its policy for annual monitoring reports but failed to notify Respondent of this change so on February 14, 2005 Respondent received a NOV and immediately took action plugging the well on June 10, 2005.

It's imperative EAB read all of Respondents motions, pleadings and affidavits which make appropriate references to the record pursuant to 40 C.F.R. 22.30(a)(1) for a fair and just conclusion in this case. All such documents and some of the Presiding Officers orders are made a part of this record by reference as if copied at length herein and are as follows in chronological order:

1. August 8, 2006, filed Facts and Exhibits For Stipulation and Motion For Summary Judgment. EPA responded motion was premature so Regional Hearing Officer held it in abeyance of a ruling.
2. October 13, 2006, filed Motion To Require Complainant To File First with explanation.
3. October 30, 2006, filed Supplemental Motion To Require Complainant To File First.
4. On November 2, 2006, Respondent received Order on Respondents Motion To Require Complainant To File First. EPA complained so the Hearing Officer denied the Motion stating Respondent could file Rebuttal later to any objections.
5. November 7, 2006, filed Motion To Compel Disclosure Or Continuance Of

Hearing In The Alternative with exhibits.

6. November 14, 2006, filed Pre-Hearing Information Exchange.
7. December 4, 2006, filed Rebuttal. It is noted in the pleading it is a response to an oral order from the Judicial Hearing Officer.
8. December 11, 2006, filed two (2) motions, one Motion For Summary Judgment and Motion To Strike Or To Consolidate.
9. February 20, 2007, four (4) pleadings were filed:
  - (A) Affidavit Addendum To Previously Filed Motion To Dismiss.
  - (B) Motion to make Respondent's UIC Permits KYI0344 and KYI0503 a part of the record.
  - (C) Motion to view other UIC permit holders files pursuant to FOIA.
  - (D) Respondent's Reply To Complainant's Motion For Accelerated Decision On Liability
10. March 15, 2007, filed Respondent's Response To Complainants Reply To Respondents February 20, 2007 Reply and Motions.
11. April 26, 2007, filed Motion to have thirty-one (31) UIC permits be made a part of the record. Through the FOIA Respondent confirmed as suspected he had been singled out for enforcement prejudicially and arbitrarily by EPA lawyer Zylpha Pryor. These surrounding UIC permits disclosed if an operator let a bond expire he was notified his permit may be pulled; notice was always given by EPA for operators to conduct an MIT; annual monitoring reports were excepted by letter only not using EPA forms; wells never used could be terminated by letter from a UIC permit; notices to plug was followed with plugging instructions from EPA; etc.
12. June 19, 2007, Respondent receives Regional Hearing Officer Susan B. Schub's Order on Motion For Summary Determination. That among other things the Hearing Officer determined Respondent had not met his burden of establishing without further hearing a judgment as a matter of law. In Ms. Schub's discussion she is clearly having trouble with the UIC permit requirements. The time intervals "*beginning on the date on which the well commences operation*" (emphasis added) also the words "*after a cessation of injection for two years...*" Ms. Schub states "*however, it is a material matter in dispute whether or not the requirement applied to a well never put into service*". Further she states "*it is a material issue in dispute whether or not the well*

*commenced operations”.*

13. July 03, 2007 received Order on Respondents Motions. Among other things ruled Motion of February 26, 2007 was denied.

Note: This Order took away one (1) of Respondent's affirmative defense of prejudicial treatment. (EPA's lawyer was not aware Respondent had had two (2) UIC permits issued to him also in 1990 at the time she erroneously, arbitrarily and capriciously demanded a money penalty, nor had she bothered to ask of missing documents found through FOIA by Respondent.)

Note: Permits KY10344 and KY10503 would dispel the perceived notion by EPA lawyers that Respondent always acted in bad faith in his dealing with EPA; that notices were always given for MIT's, etc. The UIC permit that is the issue here was missing numerous documents which Respondent found in his other two (2) permit files EPA had misfiled and now this arbitrarily and capricious ruling denies Respondent of fair play, due process and destruction of one of his affirmative defenses.

Further the Presiding Officer summarily denied Respondents May 1, 2007 Motion to allow other UIC permits to be filed in this proceeding to show prejudicial treatment and unfair enforcement. Another affirmative defense denied.

14. July 18, 2007 filed Motion To Make Additions To Documents In Pre-Hearing Exchange List And Affidavit; Motion To Make Addition To Respondents Pre-Hearing Exchange List Of Witnesses and Respondent's Notice of being available on September 25, 2007.

15. July 27, 2007, filed Respondent's Notice to correct certification on the pleadings.

16. July 30, 2007 Respondent received EPA's pleading styled Clarification Of Complainant's Position Regarding Permit Requirement To Demonstrate Mechanical Integrity And Submit Monitoring Reports, with an attachment titled Appendix A. It is an EPA document to correct ambiguities to all previously issued UIC permits according to Mr. William Mann's testimony at the hearing. The problem is, it's the first time Respondent and the Presiding Officer were privy to see such document that addresses the ambiguities bothering the Hearing Officer about injection wells never put into service. Mr. Mann testified at the hearing that Respondent's permit made no provision for an injection well never placed in service. He further testified had he seen the missing documents in KYI0376 (permit at issue) he would have considered Respondent was being responsible with his permits (good faith). Tr. Vol. I, P. 109 and 122.

17. July 31, 2007, filed Second Supplement To Respondent's Pre-Hearing Exchange. Among other things Respondent discovered his timely filed FOIA had been lost by the EPA Office Of Environmental Information, in Washington, DC.

18. August 2, 2007, filed Addendum To Pre-Hearing Exchange Witness List.

19. August 24, 2007, filed Respondent's Joint Replies To: (1) Complainant's Reply To Respondent's Pre-Hearing Exchange Witnesses List And Motion To Strike Witnesses; (2) Complainant's Reply to Second Supplement To Respondent's Pre-Hearing Exchange; and (3) Complainant's Motion And Reply To Respondent's "Motion To Make Addition To Documents In Pre-Hearing Exchange List" And Motion To Enlarge Days Allotted For Hearing Or In the Alternative To Dismiss And Affidavit Of Respondent.

20. September 6, 2007, received Presiding Officer's Order on Pre-Hearing Motions, Ms. Schub denied among other things additional witnesses for Respondent and to enlarge days allotted for hearing.

Note: Since EPA had added a co-counsel in the way of Paul Schwartz Esq., Respondent chose to take the testimony of Ms. Zylpha Pryor and Mr. Lynn Dangerfield as hostile witnesses. Ms. Pryor at the beginning in her Pre-Hearing Exchange Statement had Mr. Dangerfield as a listed witness but decided not to use him since Respondent wished to examine him under oath. Further Respondent wished to examine Ms. Pryor under oath to further establish prejudicial treatment and selective prosecution. This ruling denied Respondent's constitutional right of confronting his accusers and examining them by cross-examination as hostile witnesses. Respondent's affirmative defense of selective prosecution and prejudicial treatment becomes difficult to establish by this ruling.

21. January 2, 2008, filed 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.

Note: The Presiding Officer failed to make a ruling on this motion and proposed order submitted with this pleading.

22. January 23, 2008, filed Reply Brief And Sworn Affidavit with Exhibit Of Telephone Bill. With this pleading Respondent filed also his proposed Corrections To Complainants Proposed Conclusions Of Law. This pleading sadly enough was also not ruled upon by the Hearing Officer before issuing her Initial Decision.

Note: This was done to refute EPA's witness, Ms. Carol Chin's testimony at the hearing

23. February 4, 2008, filed Response To Complainant's Motion To Strike Affidavit With Exhibit Of Telephone Bill.

24. August 21, 2008, Initial Decision was received by Respondent although the Presiding Officer apparently elected not to rule upon Respondent's pleadings timely filed January 2, 2008 and January 23, 2008. It was determined Respondent and his witnesses were truthful in that the well had never been put in service by



injecting brine water and further there was no threat to the environment or possible sources of drinking water. A new charge however was placed upon the Respondent of programmatic harm to the SDWA program.

Note: Rather than addressing the UIC permit for plugging and annual reporting, Respondent devoted the hearing primarily proving the well was never put in service and there was no danger to possible sources of drinking water mistakenly thinking EPA would be more concerned about possible environmental issues.

25. September 4, 2008, filed Motion To Reopen Hearing Pursuant to 40 C.F.R. 22.28 (a) to correct testimony at hearing since the Presiding Officer did not rule on Respondents January 23, 2008 pleading.

26. September 25, 2008, filed Response To Complainant's Reply Objecting To Reopening The Hearing and on December 1, 2008 reopening the proceedings was denied.

### **ARGUMENT**

The pleadings and exhibits referred to above and incorporated by reference as if copied at length herein will establish Respondents concerns and would be cumulative if repeated in this Argument.

EPA admits in its opening statement at the hearing that normally after a well is plugged, no further enforcement action is taken however; it had selected Respondent to make an example of by sending a message to members of the oil and gas community it was enforcing UIC permits. The problem is Respondent was not a member of that select community of oil and gas producers but was considered a farmer by the surrounding property owners. Tr. Vol. I, P. 21-22.

EPA witness Mr. William Mann testified the permit issued to Respondent in 1990 made no provision for a well never placed in service requiring annual reporting or plugging (Tr. Vol. I, P. 121-122.); notices to conduct MIT were sent out by EPA every five (5) years (Tr. Vol. I, P. 56 and 144.); letters and MIT notices not in Respondent's file

in Atlanta and had there been Mr. Mann testified he would have considered Respondent responsible with injection wells (Tr. Vol. I, P. 108-109.).

EPA must have concurred with no NOV's issued during the first sixteen (16) years of the permit. EPA classified Respondent's well a shut-in not requiring annual monitoring reports. With Appendix A to the UIC permits being issued in 2000 and the new enforcement team being unfamiliar with Respondent and viewing the UIC permit with missing files it could be perceived Respondent was violating his permit. These notices EPA attorney's relied on (presumed delivered) were not given to Respondent. Tr. Vol. I, P. 122.

A MIT could have been requested at any time by EPA; however, Ms. Carol Chin, Project Officer for EPA testified she planed routine inspections each year for MIT's from her data base and she would decide which wells to see (Tr. Vol. I, P. 154.); rechecked her data base to see if a well was done by their date (Tr. Vol. I, P. 156.); stopped scheduling and giving operators notices they were due MIT's 1, 2 or 3 years ago (Tr. Vol. I, P. 133.) and always gave five (5) year notices for MIT's to operators (Tr. Vol. I, P. 169.). Further, witness Ed Jordan owner of three (3) injection wells testified EPA always gave notice to do MIT's up to two (2) years ago and then notified him EPA was no longer going to remind operators when MIT's were due (Tr. Vol. III, P. 205, 207 and 212.).

EPA's attorneys continually alleged through this action Respondent received notice to conduct an MIT and file annual monitoring reports. This is not true. If it can be shown any of these notices were served on Respondent or he did not quickly respond to any EPA directive, he will pay the assessed penalty of Eight Thousand Two Hundred Ninety-One Dollars (\$8,291.00) immediately without any further proceedings.

Respondent was amazed at EPA's poor record keeping by losing contents of his UIC permit KYI0376; losing the appeal to EPA Office Of Environmental Information, in Washington, DC; losing assignment of KYI0344 and KYI0503 and giving notice on September 1, 1995 to conduct a MIT on Cam Creek, (Respondent's Exhibit "49"); losing an entire file of a very active UIC Permit KYI0412 which Respondent found in another operators file while at EPA's office in Atlanta, etc. See additional disappointing issues with EPA in Respondent's Reply Brief And Sworn Affidavit With Exhibit Of Telephone Bill filed on January 23, 2008, which probably further inflamed EPA's personnel.

These short comings of EPA of course does not excuse Respondent, if he refused to obey the authority of EPA as accused. Respondent honestly and truly felt he was not violating his permit by not plugging, (without notice to do so) since the permit clearly made no provisions to do so for a shut-in well never placed in service. Also shut-in wells did not require annual monitoring reports. EPA classified the well as a "shut-in" not triggering any annual reporting by Respondent. See EPA's 5 Year Review Checklist, Complainant's Exhibit "11".

Respondent fully complied with the requirements of his UIC permit as written in 1990. In 2000 Appendix A modified the requirements for shut-in wells to file Form 7520-11 even though you would mark "0" for injecting. This change order was never served on Respondent. Tr. Vol. I, P. 63-64.

The well was on Respondents farm; over ½ mile to the nearest neighbor; not hurting anything or anybody and Respondent truly believed there was no hurry to complete the plugging of the well without a directive to do so from EPA. EPA waited five (5) years to acknowledge Respondents letter of his desire to plug the well which

further buttress a no hurry frame of mind.

In showing good faith to plug however, Respondents secretary Patty Carter, (a neighbor to Ed Jordan) regularly reminded him (by telephone and when seen) we were still wanting him to do the job of plugging. Tr. Vol. II, P. 170.

Post-NOV actions taken by Respondent displays his character in dealing with EPA. Respondent contacted Mr. William Mann by telephone and Mr. Mann suggested Respondent not wait on EPA but to give myself a time frame to plug which is reflected in Respondent's letter to Mr. William Mann dated March 7, 2005. Respondent's Exhibit "27".

Respondent believes the NOV served on Respondent on February 14, 2005 prompted EPA to stop giving notices for UIC permit holders to conduct their MITs although it was also used to inform EPA inspectors in the field when to observe the testing. Tr. Vol. I, P. 206 and Respondent's Exhibits "14", "16" and "49" and Complainant's Exhibit "31".

### **CONCLUSION**

A general summary of Respondents experiences with injection wells, the permitting process and EPA's enforcement policies are in order at this juncture.

Respondent knew nothing about oil production, brine water, enhanced recovery by injection wells, etc. Respondents purchase of the Cam Creek farm was the introduction to brine water flowing freely in the creek. Kentucky oil and gas inspectors were glad Respondent purchased the farm and suggested an emergency UIC permit with EPA be applied for to properly dispose of the brine. Request was made to EPA but denied. Respondent's Exhibit "61" and Tr. Vol. I, P. 100.

Through a delayed process, Respondent was issued UIC permits KYI0344 and KYI0503 for Cam Creek and KYI0376 for Collier Creek. The Collier Creek well was never completed since it was considered back-up.

Respondent always kept EPA informed of the clean up activities on Cam Creek. (Respondent's Exhibits "61", "14" and "22".) and after expenditures of several thousands of dollars; and with the brine problem corrected Respondent sold the Cam Creek farm on a land contract to Ed Jordan in 1992.

Respondent directed his attention for the first time to the UIC permit KYI0376 on Collier Creek. It was issued without a Standby Trust Agreement or Letter Of Credit and only permitted brine disposal from Respondents operations on Cam Creek some four (4) miles away. Respondent attempted to have the permit corrected. Respondent's Exhibits "2" and "3".

Respondent considered plugging of the well in 1993; however, EPA indicated it was going to modify the permit and allow injecting oil producers brine and ordered an MIT which was conducted October 15, 1993. Respondent's Exhibits "17" and "18". With sporadic reminders to EPA of Respondents desire to correct the permit it never materialized and in 1999 EPA scheduled another MIT, however the inspector did not appear to observe the test and in 2000 Respondent notified EPA the well had never been placed in service and he desired to plug the well.

EPA issued a NOV against Respondent on February 9, 2005 charging him with failure to file annual monitoring reports and failure to plug the well after cessation of injecting for two (2) years. Respondent plugged the well on June 10, 2005 and the Complaint was filed almost a year later on May 16, 2006.

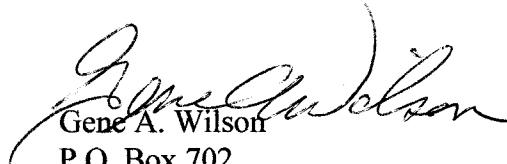
EPA classified the well as a shut-in in 1991 requiring no annual monitoring reports; however, on September 14, 2004, Enforcement Officer Randy Vaughn changed the wells classification in his field report to “temporarily abandoned” triggering new requirements from Respondent . Respondent’s Exhibit “20” and “23”.

Respondents permit file was void of supra, except the 1993 MIT, therefore Mr. Vaughn felt Respondent was a flagrant violator. The 5 Year Review Checklist of July 17, 1998, the Appendix A of 2000 changing monitoring reports for shut-in wells and the on sight inspection report of 2004 was never served on Respondent as Mr. Vaughn apparently assumed they had been.

In Complainant’s Reply To Respondent’s Pre-Hearing Exchange Witness List And Motion To Strike Witnesses, EPA attorney Zylpha Pryor asked the Presiding Officer to prohibit Respondent from introducing evidence to show selective prosecution at the hearing, and in Complainant’s Reply To Respondent’s Findings Of Fact, Conclusions Of Law And Post-Hearing Brief EPA’s lawyers state “when all else fails, a common tactic is to vilify your opponent, which Respondent sought to do with regard to counsel for Complainant during the hearing and in his brief”. Its interesting to note however in Complainant’s Proposed Findings Of Fact And Conclusions Of Law And Post Hearing Brief, EPA lawyers accuse Respondent and his witnesses of not being truthful by using words i.e. “not being credible” “claims” “purported” “is not credible” “doubtful” “highly questionable”. These charges are repeated some thirty (30) times in one brief. Are these words being used by EPA’s lawyers to vilify their opponent? This has been their tactic from day one. Even at the hearing EPA could give hear-say testimony and Respondent was stopped from leading witnesses.

Respondent has attempted to cover the life of his permit but at seventy-one (71) years of age memory may have left some parts not mentioned; however, prays a just result will come from this Appeal.

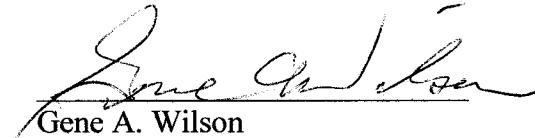
Respectfully Submitted

  
Gene A. Wilson  
P.O. Box 702  
Louisa, KY 41230  
606-638-9601  
606-638-1041 fax  
[gene@wilsonandbailey.com](mailto:gene@wilsonandbailey.com)

**CERTIFICATE OF FILING AND SERVICE**

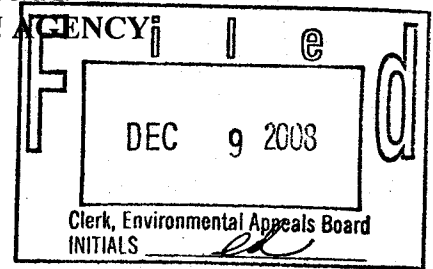
The undersigned does hereby certify that the Original of this Respondent's Appellate Brief was mailed for filing, First Class U.S. Mail, Certified/Return Receipt Requested, to the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board (MC1103B), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460-0001; and that a copy was served by U.S. First Class Mail on (1) Ms. Patricia A. Bullock, Regional Hearing Clerk, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (2) USEPA Presiding Officer Susan B. Schub, Regional Judicial Officer, U.S. EPA, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (3) Counsel Ms. Zylpha Pryor, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (4) Counsel Mr. Paul Schwartz, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; and (5) Mr. Nicholas N. Owens, National Ombudsman, U.S. Small Business Administration, 409 3<sup>rd</sup> Street, SW, MC 2120, Washington, DC 20416-0005, on this 8<sup>th</sup> day of January, 2009.

Dated: January 8<sup>th</sup>, 2009

  
Gene A. Wilson  
P.O. Box 702  
Louisa, KY 41230  
(606) 638-9601

RECEIVED DEC 11 2008

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



In re: )

Gene A. Wilson )

Docket No. SDWA 04-2005-1016 )

SDWA Appeal No. 08-09

ORDER GRANTING EXTENSION OF TIME

On December 5, 2008, Gene A. Wilson ("Mr. Wilson") filed a notice of appeal from the August 20, 2008 Initial Decision and November 24, 2008 Order Denying Motion to Reopen Hearing issued by Regional Judicial Officer Susan B. Schub (the "Presiding Officer"). The Initial Decision resolved a complaint U.S. EPA Region 4 (the "Region") filed against Mr. Wilson. The Initial Decision found Mr. Wilson liable for violating section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(c), with respect to a well known as the Gene A. Wilson #1 well (the "Well") located in Lawrence County, Kentucky, and subject to Permit # KY 10376 (the "Permit"). The Initial Decision found Mr. Wilson liable for his failure to plug and abandon the Well or show non-endangerment in violation of the Permit and 40 C.F.R. §§ 144.52(a)(5) and 144.51(a) between May 16, 2001, and June 10, 2005. The Initial Decision also found Mr. Wilson liable for failing to submit annual monitoring reports for the Well for the years 2001, 2002, 2003, 2004, and 2005 in violation of the Permit and 40 C.F.R.



§ 144.51(a). The Initial Decision assessed a civil administrative penalty of \$8,291 for these violations.

Before the Board at this time is Mr. Wilson's Motion for Extension of Time to File Appeal Brief, which requests an extension through Tuesday, January 15, 2009, for the time in which Mr. Wilson must file his brief in support of his notice of appeal. Pursuant to 40 C.F.R. § 22.30(a), a person seeking to appeal from an initial decision would ordinarily simultaneously file both the notice of appeal and appellate brief. Here, Mr. Wilson states that he needs the additional time for filing his appellate brief to review the large administrative record and lengthy Initial Decision. He also states that he needs additional time due to the Christmas and New Year Holidays. Mr. Wilson states that he consulted with the Region's counsel and he represents that the Region does not oppose or object to his request for an extension of time to file his appellate brief.

Upon consideration, the Board hereby grants Mr. Wilson's request for an extension of the time to file his appellate brief. Mr. Wilson shall file on or before Tuesday, January 15, 2009, his appellate brief required by 40 C.F.R. § 22.30(a)(1). Ordinarily, once a party has filed a notice of appeal, any other party may, within 20 days after the date on which the first notice of appeal was served, file either, or both, a notice of cross appeal and a response brief responding to arguments raised by the appellant. 40 C.F.R. § 22.30(a)(1), (2). Because we have granted Mr. Wilson an extension of time to file his appellate brief, we hereby grant the Region an extension of time to elect to file a notice of cross appeal and to file a response brief. Accordingly, the time within which the Region may file a notice of appeal pursuant to 40 C.F.R. § 22.30(a)(1) and the time within which the Region may file its response brief and related documents pursuant to 40 C.F.R.

§ 22.30(a)(2) is hereby extended to 20 days after the date on which Mr. Wilson serves his appellate brief.

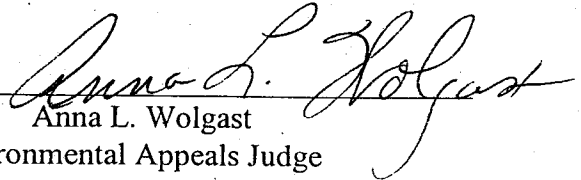
So ordered.

Dated:

*December 9, 2008*

ENVIRONMENTAL APPEALS BOARD

By:



Anna L. Wolgast

Environmental Appeals Judge

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

In re: )  
 )  
 )  
Gene A. Wilson ) SDWA 04-2005-1016  
 )  
 )  
Respondent ) E.A.B. Docket No. \_\_\_\_\_

\*\*\*\*\*

**MOTION FOR EXTENSION OF TIME TO FILE APPEAL BRIEF**

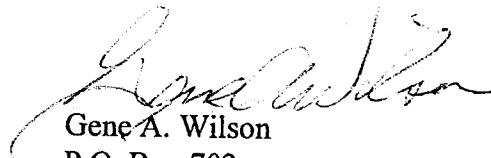
Respondent, Gene A. Wilson, respectfully moves and requests that the Environmental Appeals Board ("EAB") grant additional time to file his Appellate Brief on or before January 15, 2009, in regard to Region 4's August 21, 2008, Initial Decision and Order Denying Motion To Reopen Hearing dated November 24, 2008, in the above captioned matter.

Respondent seeks this additional time since the appeal time of thirty (30) days encompasses the holidays of Christmas and New Years Eve and the extremely large record that covers a period of some eighteen (18) years for review and restudying the lengthy initial decision for a proper appellate brief.

Before filing this Motion Respondent states he call opposing counsel Paul Schwartz Esq. Attorney for E.P.A., Region 4 asking if he objected to this motion for additional time to file a brief, Mr. Schwartz advised he would consult with his co-counsel Zylpha Pryor Esq. and return Respondent's call. Shortly thereafter Mr. Schwartz returned

Respondent's call stating they do not oppose or object to the Motion For Additional Time To File Appeal Brief.

Respectfully Submitted

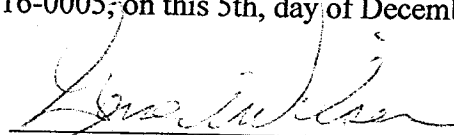


Gene A. Wilson  
P.O. Box 702  
Louisa, KY 41230

**CERTIFICATE OF FILING AND SERVICE**

The undersigned does hereby certify that the Original of this Motion For Extension Of Time To File Appeal Brief was mailed for filing, First Class U.S. Mail, Certified/Return Receipt Requested, to the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board (MC1103B), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460-0001; and that a copy was served by U.S. First Class Mail on (1) Ms. Patricia A. Bullock, Regional Hearing Clerk, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (2) USEPA Presiding Officer Susan B. Schub, Regional Judicial Officer, U.S. EPA, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (3) Counsel Ms. Zylpha Pryor, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (4) Counsel Mr. Paul Schwartz, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; and (5) Mr. Nicholas N. Owens, National Ombudsman, U.S. Small Business Administration, 409 3<sup>rd</sup> Street, SW, MC 2120, Washington, DC 20416-0005; on this 5th, day of December, 2008.

Dated: December 5, 2008



Gene A. Wilson  
P.O. Box 702  
Louisa, KY 41230  
(606) 638-9601  
(606-638-1041 fax

RECEIVED  
U.S. E.P.A.

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

2009 DEC -8 PM 1:31  
ENVIR. APPEALS BOARD

In re: )  
Gene A. Wilson ) SDWA 04-2005-1016  
Respondent ) E.A.B. Docket No. \_\_\_\_\_

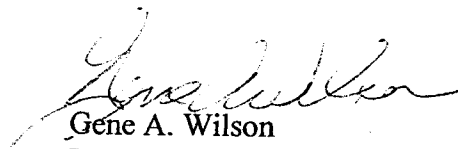
\*\*\*\*\*

**NOTICE OF APPEAL**

Respondent, Gene A. Wilson, respectfully files this Notice of Appeal seeking review with regard to Region 4's August 21, 2008, Initial Decision assessing a civil penalty of Eight Thousand Two Hundred Ninety-One Dollars (\$8,291.00) under Section 1423 (c) of the Safe Drinking Water Act; Order Denying Motion To Reopen Hearing dated November 24, 2008 and other decisions and orders by Region 4 Presiding Officer Susan B. Schub in the above captioned matter.

A Motion For Extension Of Time to filed the Appellate brief is being filed in this matter with reservation of right to file such brief within the thirty (30) day period (plus 15 days) or other such time as may be ordered by the E.A.B.

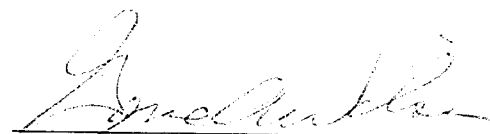
Respectfully Submitted

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

**CERTIFICATE OF FILING AND SERVICE**

The undersigned does hereby certify that the Original of this Notice of Appeal was mailed for filing, First Class U.S. Mail, Certified/Return Receipt Requested, to the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board (MC1103B), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460-0001; and that a copy was served by U.S. First Class Mail on (1) Ms. Patricia A. Bullock, Regional Hearing Clerk, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (2) USEPA Presiding Officer Susan B. Schub, Regional Judicial Officer, U.S. EPA, Region 4, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (3) Counsel Ms. Zylpha Pryor, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; (4) Counsel Mr. Paul Schwartz, Associate Regional Counsel, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, GA 30303-8960; and (5) Mr. Nicholas N. Owens, National Ombudsman, U.S. Small Business Administration, 409 3<sup>rd</sup> Street, SW, MC 2120, Washington, DC 20416-0005, on this 5th, day of December, 2008.

Dated: December 5, 2008



Gene A. Wilson  
P.O. Box 702  
Louisa, KY 41230  
(606) 638-9601  
(606-638-1041 fax