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

IN THE MATTER OF:	)	
	)	
	)	**Appeal from Initial Decision**
Gene A. Wilson	)	**Under Section 1423(c) of the**
	)	**Safe Drinking Water Act,**
	)	**42 U.S.C. § 300h-2(c)**
	)	
Docket No. SDWA-04-2005-1016	)	**Appeal No. SDWA 08-09**
	)	

RESPONSE BRIEF OF COMPLAINANT

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RESPONSE BRIEF OF COMPLAINANT

COMES NOW the Complainant, the United States Environmental Protection Agency (EPA), Region 4, and hereby submits to the Environmental Appeals Board its Response Brief pursuant to 40 C.F.R. § 22.30(a)(2) in SDWA Appeal No. 08-09. This matter is an appeal from Presiding Officer Judge Susan Schub's Initial Decision dated August 21, 2008, and from other decisions she has made and orders she has issued, in the Matter of Gene A. Wilson, Docket No. SDWA-04-2005-1016, a matter arising under the Safe Drinking Water Act (SDWA). The Appellant/Respondent's Notice of Appeal was served on Appellee/Complainant on December 5, 2008, and Appellant/Respondent's Appeal Brief was served by first class mail on Appellee/Complainant on January 8, 2009. The Environmental Appeal's Board (the "Board") granted an extension of time for filing of Appellant's brief by Order dated December 9, 2008, and in that Order the Board also provided that the Region would have until 20 days after service of Appellant's Brief to file a Response Brief. Pursuant to 40 C.F.R. § 22.7(c), five days are added to Complainant/Appellee's time for response because the Appellant's Brief was filed by first class mail and not by an overnight or same-day service. Accordingly, Complainant's Response Brief is due to be filed at the Environmental Appeals Board on Monday, February 2, 2009.

As explained in the following brief, the Presiding Officer's Initial Decision with respect to liability was supported by the evidence and was based on a correct application of controlling legal principles. In addition, the penalty assessed by the Presiding Officer was adequately explained in the Initial Decision. Further, the penalty assessed in the Initial Decision was within the Presiding Officer's discretion and appropriately based on an application of the statutory

factors which must be considered in assessing a penalty under Section 1423(c)(4)(B) of the SDWA (the "Act"), 42 U.S.C. § 300h-2(c)(4)(B). Additional issues raised by Respondent relating to evidentiary and case management rulings by the Presiding Officer are without merit.

All citations to the hearing transcript in this Response Brief will refer to transcript pages using the abbreviation "Tr." followed by the relevant page number, and then followed in parentheses with the abbreviation "V" and the relevant volume number to identify the volume of the transcript that is being cited. Citation to Exhibits are made by identifying the Exhibit number used at the hearing. Citations to the Initial Decision will use the abbreviation "ID" followed by the relevant page number. Citations to the Appeal and Brief of Respondent will refer to "Respondent's Brief" followed by the relevant page number.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Respondent's Brief lists nineteen issues presented for review, which are enumerated as Issues A through S. A more general argument follows that list, but it does not clearly track the listed issues, nor is the argument section of the brief limited to the listed issues. Complainant will address the issues raised by Respondent; however, for organizational purposes, Complainant believes that the issues can be collapsed into a smaller number of primary issues that allow for a clearer presentation and analysis under controlling legal principles. The issues raised by Respondent's appeal appear to be as follows:

1. Whether the Presiding Officer correctly interpreted a provision of the Respondent's permit relating to the obligation to either properly plug and abandon a well which has been inactive for two years or demonstrate that such a well will not endanger underground sources of drinking water (USDWs).

2. Whether the Presiding Officer correctly interpreted provisions of the Respondent's permit relating to the obligation to file Annual Reports.

3. Whether the Initial Decision applied the penalty criteria set forth in the Act to the facts in the record in a sufficiently clear and detailed manner to satisfy the requirements of 40 C.F.R. Section 22.27(b).

4. Whether the Presiding Officer committed clear error or an abuse of discretion in assessing a penalty of $8,291 in the Initial Decision.

5. Whether the Presiding Officer committed clear error or an abuse of discretion in rejecting Respondent's selective prosecution defense and restricting the presentation of evidence relating to that defense.

6. Whether various other assertions of error in relation to evidentiary and case management rulings by the Presiding Officer constitute a basis for reversing the Initial Decision.

STATEMENT OF NATURE OF THE CASE

This is an appeal from an Initial Decision issued by the Presiding Officer on August 21, 2008, assessing a penalty of $8,291 in an administrative penalty matter under Section 1423(c) of the Safe Drinking Water Act (the Act), 42 U.S.C. § 300h-2(c), for violations of the SDWA, 42 U.S.C. § 300f, *et seq*., the regulations promulgated pursuant to the Act at 40 C.F.R.§§ 144.51(a) and 144.52(a)(6), and Respondent's Underground Injection Control (UIC) Permit #KY 10376. The Initial Decision was issued after an administrative hearing held September 25 through 27, 2007, in Ashland, Boyd County, Kentucky. The Appeal seems to challenge both the findings of liability and the assessed penalty amount.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Introduction

The following statement of facts is consistent with the factual findings of the Presiding Officer in her Initial Decision, which Complainant does not contest. It is not clear whether Respondent is contesting the Presiding Officer's factual findings. Indeed, it would be odd if the Respondent did challenge the factual findings because in cases where factual issues were in controversy, the Presiding Officer generally resolved those issues in favor of the Respondent. Complainant briefly recounts these factual disputes in the following statement because Complainant believes the Initial Decision validates Complainant's view that, even if Respondent's version of the facts were accepted in full, a finding of liability would still be warranted on the violations alleged in the Complaint, and a penalty assessment would still be appropriate. Even though the Initial Decision for the most part adopts Respondent's version of the facts, Respondent's Brief does mischaracterize, or excessively spin, certain facts. However, these mischaracterizations are more in the nature of erroneous legal conclusions or illogical interpretations of certain facts, and are identified in the following statement.

Statement of Facts

On May 15, 1989, the Respondent, Gene Wilson, signed an application for an Underground Injection Control (UIC) Permit to operate the Gene Wilson #1 well, a Class II injection well in Martha, Kentucky. Complainant's Exhibit 1. In signing the application, Mr. Wilson certified that he had personally examined and was familiar with the information in the application and that, based on inquiry of those immediately responsible for obtaining the

information, that he believed the information was true, accurate and complete. Complainant's Exhibit 1.

The permit application provides details regarding the proposed injection well's construction. For example, Attachments J and L of the application, at pages 4 and 5 of the application, state that the well is a formerly plugged and abandoned well that was recently reopened, and 630 feet of 7 inch casing was installed and cemented to the surface. Then, the application states, a 6.25 inch hole was drilled from this point down through the injection zone to a total depth of 1100 feet. Then 1003 feet of 4.5 inch casing was installed, which was then cemented to a point approximately 200 feet above the bottom of the 7 inch casing. The casing was then perforated at a depth from 941 feet to 951 feet. Complainant's Exhibit 1, Attachments J and K; Tr. 36-37 (V.1). Perforation means that holes were shot in the casing which would allow injection to occur in the zone of perforation. Tr. 43-44 (V.1). USDWs are present at the location of the Gene Wilson #1 well, including (1) an aquifer in the alluvium of the valley floor which is recharged by surface runoff and percolation, (2) a bedrock aquifer in the lower Breathitt Formation, at approximately the 190 feet depth in the well, and (3) the massive sandstone of the Lee formation, also known as the Salt Sand, at the 484 foot depth in the well. Complainant's Exhibit 1, Attachment E; Tr. 45-47 (V.1).

The purpose of the UIC permit program is to protect USDWs such as those described in the preceding paragraph, from contamination. 42 U.S.C. § 300h(b). An improperly operated and maintained underground injection well can lead to contamination of USDWs because leaks can develop in the well casing, and injected fluid or fluid moving under pressure from lower formations can pass through leaks and reach USDWs. Tr. 48-50 (V.1). Injection fluid and fluid

from lower formations can include saltwater (brine) and oil or gas, including constituents such as benzene and toluene, which are human carcinogens. Tr. 49-50 (V.1).

One of the cornerstones of the UIC permit program is the requirement that permitted UIC wells be subject to regular mechanical integrity tests (MITs). A mechanical integrity test shows whether the well is constructed properly and whether there are any leaks in in the well. Tr. 54-55 (V.1). To conduct an MIT, a well operator pressurizes the annular space in the well for a period of time and monitors the pressure level to confirm that significant variations in pressure do not occur that would indicate the presence of leaks. Tr. 54-55 (V.1). Mr. Wilson's permit required that he conduct an MIT test before injecting and again no later than 5 years after the last approved MIT demonstration. Complainant's Exhibit 6, UIC Permit Sections I(A)(4) and II(G)(3); Tr. 54-56 (V.1).

A well does not have to be used for injection to pose a threat to USDWs, because leaks can develop over time in an inactive well and fluid can move under pressure from lower formations and pass through leaks to reach USDWs. Tr. 49 (V.1). It is common for leaks to develop in some wells even though they are not being used. Tr. 49, (V.1). In some respects, inactive wells present an even greater risk, because active wells are monitored regularly and leaks and the resulting changes in pressure are more likely to be detected when they develop. Tr. 50, 58-60 (V.1). The arguably greater risk posed by a well that is inactive justifies the requirement in UIC permits, including Mr. Wilson's permit, that a well that is inactive for two years shall either be properly plugged and abandoned or that a demonstration shall be made that the well will not endanger USDWs. Complainant's Exhibit 6, UIC Permit Section II(F)(3); Tr. 56-57 (V.1). Such a "non-endangerment" demonstration is typically made by conducting an MIT. Tr. 58 (V.1).

Mr. Wilson's well was permitted on January 12, 1990. Complainant's Exhibit 6.[1] As noted above, the permit required completion of an MIT test before the commencement of injection. Complainant's Exhibit 6, Section I(A)(4). The permit further required submission of a notice of completion using EPA Form 7520-10 prior to commencement of injection. Id. The permit also required that annual monitoring reports be submitted each year, with the first report due by "the 28th day of the month following the first full year after the effective date of the permit." Complainant's Exhibit 6, Section I(D)(2).

On November 11, 1992, Mr. Wilson submitted to EPA a written request to modify the permit to allow him to inject brine from other operators in the general area of his well. Complainant's Exhibit 8. As written, the permit only authorized injection of brine from Mr. Wilson's own operations. Complainant's Exhibit 6, Section I(B)(1). Mr. Wilson submitted a follow-up letter to EPA on August 11, 1993, again seeking to modify his permit to authorize the injection of brine from other operators. Respondent's Exhibit 3. The record does not contain a written response to these requests; however, Mr. Wilson's permit was never modified by EPA. At the time of these requests, Mr. Wilson still had not conducted the MIT test or submitted the completion report required by Section I(A)(4) of his permit before injection could commence. Complainant's Exhibit 6; Tr. 166 (V.3).

Section I(A)(3) of Respondent's Permit requires that MIT tests be witnessed by an EPA representative. Complainant's Exhibit 6. On October 15, 1993, an MIT test was completed before an EPA witness demonstrating the mechanical integrity of Respondent's well.

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[1]This is one point on which Respondent's brief distorts. Respondent claims the permit "was erroneously issued." Respondent's Brief at 5. However, Respondent applied for a permit and received the permit he applied for, which was preceded by publication of a draft permit on which he did not comment. Exhibits 1-6.

Complainant's Exhibit 9. On January 7, 1994, Mr. Wilson submitted EPA Form 7520-10 (Completion Report), certifying completion of construction of the Gene Wilson #1 injection well. Complainant's Exhibit 10. After the successful completion of the MIT demonstration and submission of both the MIT test report and Completion Report to EPA, Mr. Wilson was authorized under his permit to commence injection. Complainant's Exhibit 6, Section I(A)(4) of Permit.

Section II(B)(1) of the Permit provides that a request to modify the permit does not stay the applicability or enforceability of any permit condition. Complainant's Exhibit 6.

On July 17, 1998, an EPA staff person completed a 5 Year Review Checklist with respect to Mr. Wilson's well, noting that the last MIT was performed on October 15, 1993, and no annual monitoring reports were in the file. Complainant's Exhibit 11.

On October 1, 1998, EPA sent a form letter to Mr. Wilson advising him that certain items were not included in his file, including annual monitoring reports for the 1994 through 1998 period, and his most recent mechanical integrity test. The letter requested that Mr. Wilson submit the missing items. Complainant's Exhibit 12. Mr. Wilson asserts that he did not receive this letter. Tr. 182-83 (V.3).

Approximately three months later, on January 5, 1999, EPA sent a letter to Mr. Wilson notifying him of his obligation to demonstrate mechanical integrity and scheduling an MIT test for January 21, 1999. Complainant's Exhibit 14. This letter was sent by certified mail, return receipt requested, and the receipt confirming that it was received by Mr. Wilson is included in Complainant's Exhibit 14. Mr. Wilson admits receiving this letter. Tr. 183 (V.3).

Mr. Wilson cancelled the MIT test scheduled for January 21, 1999. Tr. 160-62 (V.1). Mr. Wilson claims that when the scheduled MIT test was cancelled by his secretary, the MIT was rescheduled with EPA for an alternate date of April 26, 1999. This claim is based on the testimony of Mr. Wilson's secretary, Ms. Patty Carter, and some writing on a sticky note created by Ms. Carter. Tr. 144 (V.2); Complainant's Exhibit 30. The claim that the MIT test was rescheduled for April 26, 1999, however, is not corroborated by EPA's files, and was contradicted by the testimony of Carol Chen, who was responsible for scheduling such MIT tests on behalf of EPA. Tr. 163-64 (V.1); Complainant's Exhibit 31. Ms. Chen further testified that at the time of the purported phone conversation in January of 1999, between Ms. Chen and Ms. Carter cancelling the January 21, 1999, MIT and rescheduling the well for an April 26, 1999 MIT, she would not have even begun working on an April calendar for setting the MIT as asserted by Ms. Carter. Tr.184 (V.1). Ms. Chen further testified that a log book she maintained in 1999 to record significant work activities does not contain an entry documenting a conversation with Ms. Carter rescheduling the MIT. Tr. 184-85, 203 (V.1). The Presiding Officer resolved this conflict between the testimony of Ms. Chen and Ms. Carter by finding that, while Ms. Chen credibly testified that she would normally have maintained a record of the rescheduled MIT test date, Ms. Carter's testimony was also convincing. The Presiding Officer determined that the Respondent had "assumed, correctly or incorrectly" that an MIT test was rescheduled for April 26, 1999. ID at 22-23.

Mr. Wilson claims that his employees prepared to conduct an MIT test on April 26, 1999, but that no EPA representative appeared to witness the test. Tr. 145-46 (V.2); Tr. 53-54 (V.3); Tr. 12-13 (V.3). As part of the preparation for the MIT in April of 1999, Mr. Wilson claims that

a pre-test was conducted by his employees where the MIT was performed without the inspector present and the well passed the pre-test. Tr. 13. The claim that Mr. Wilson's employees went to the well on April 26, 1999, to perform the MIT, conducted a pre-test, and waited for EPA's inspector but no EPA representative appeared to witness the test, was credited by the Presiding Officer despite Complainant's view that the claims that such a pre-test was scheduled and performed were not credible. ID at 23. However, as the Presiding Officer further determined, the MIT pre-test did not amount to an MIT in compliance with the terms and conditions of the permit because it was not witnessed by an EPA representative. ID at 23. The Presiding Officer also noted that, even if the Respondent had conducted a compliant MIT test in 1999, no additional MIT tests were performed by Respondent from 2001 to 2005, the time period covered by this action. ID at 24.

On August 2, 2000, EPA wrote to Mr. Wilson asking for information about his well, including the current status of the well, annual monitoring reports and fluid analyses for the last five years, and the most recent MIT test. Complainant's Exhibit 16. Mr. Wilson responded with a letter dated August 18, 2000, which included statements that the Gene Wilson #1 well was never put into operation, that the original purpose had been to take brine from "our own wells in the community" but they had been sold before the need arose, and that "only the initial mechanical integrity was performed." Complainant's Exhibit 17. Complainant argued at hearing and in post-hearing briefs that Mr. Wilson's statement in this letter that "only the initial mechanical integrity was performed," made only fifteen months after the purported MIT testing event in April of 1999, undermined Complainant's claim that the April 1999 test had occurred or been scheduled. Complainant argued that if such a test had occurred but EPA's representative

had failed to appear, Mr. Wilson would have mentioned such a significant event in this letter. Nevertheless, as noted above, the Presiding Officer credited Respondent's contention that an MIT pre-test had been conducted without an EPA witness.

Randy Vaughn, an EPA employee with 16 years of experience as an enforcement officer for EPA, the last 9 years of which have been with EPA's UIC enforcement program, testified that the most common way that UIC enforcement cases come to his office's attention is through the review of database information to identify well operators who are not up to date on their MIT test requirement (i.e., have not reported an MIT test in the last 5 years). Tr. 18 (V.2). This is how Mr. Wilson's well came to the attention of EPA; it came up on a database search for wells for which no MIT had been reported for five years. Tr. 19 (V.2). After grouping wells identified through a database search by location, Mr. Vaughn scheduled an inspection trip to the area of Mr. Wilson's well to inspect Mr. Wilson's well and other wells in the area. Tr. 19 V.2). During that inspection trip, Mr. Vaughn did conduct an inspection of Mr. Wilson's well on September 14, 2004. Tr. 19 - 28 (V.2), Complainant's Exhibit 18.

During Mr. Vaughn's inspection, he noted that Respondent's well did not appear to have been active for some time; the area around it was overgrown and the well itself did not have flow lines connected to it and was heavily rusted and corroded. Tr. 25-26 (V.2). Mr. Vaughn completed a "Notice of Inspection" and folded it and left it at the well. Tr. 28 (V.2).[2] Following the inspection Mr. Vaughn returned to the office and conducted a file review, which showed that

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[2]Respondent's Brief challenges the adequacy of this notice. Respondent's Brief at page 3 (Issue G). However, Respondent does not explain why this is a relevant issue on appeal. Complainant asserts that the inspection notice is irrelevant to the appeal as the Notice of Inspection was not a legal pre-requisite for the claims in this matter, and the Presiding Officer was able to consider the circumstances of the Inspection Notice to the extent that it bears any relevance to a penalty assessment.

there was no record of an MIT having been performed since the initial MIT in 1993, and there were no annual monitoring reports whatsoever. Tr. 29 (V.2). Mr. Vaughn further noted during his file review that the file did not contain any evidence of proper plugging and abandonment or submission of the notice and demonstration of non-endangerment required by Section II(F)(3) of the permit for inactive wells (no injection for 2 years or longer) that are not plugged and abandoned. Tr. 31-32 (V.2).

Based on his inspection and file review, Mr. Vaughn determined that there was a basis to proceed with an enforcement action. Tr. 40 (V.2). On February 9, 2005, EPA issued a Notice of Violation and Notice of Opportunity to Show Cause letter to Mr. Wilson.[3] Complainant's Exhibit 19. The purpose of this letter was to notify the Respondent that EPA had reason to believe that a violation had occurred and give the Respondent an opportunity to respond and provide any information that EPA might not have in its file. Tr. 41 (V.2). Mr. Wilson responded to the NOV letter with a letter dated February 21, 2005, indicating that he had "intended on plugging the well but didn't know there was a hurry." Complainant's Exhibit 20. Mr. Wilson requested in that letter to have until July 1, 2005 to plug the well. Id.

Mr. Wilson sent another letter to EPA dated March 4, 2005, stating that he had "been meaning to plug the well since 1993 but never got around to it since it's a dry hole, was never used for injecting brine and does not effect (sic) the environment." Complainant's Exhibit 21. In this letter, Mr. Wilson requested "all information needed to properly seal the well." Id.

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[3]Respondent's Brief argues that EPA's issuance of an NOV in 2005 implies that EPA did not believe Respondent to be in violation during the first 10 years that the permit was in force. See Respondent's Brief at 9, 14. Complainant does not believe that the lack of an NOV during earlier periods can logically be inferred to mean that EPA found him to be in compliance. Many instances of non-compliance are not even discovered by EPA, and it is unreasonable to expect that all instances of non-compliance in the regulated universe are promptly documented by NOVs.

Mr. Wilson's August 18, 2000, letter to EPA (Complainant's Exhibit 17, described above at page 10), included a statement indicating that he "planned on plugging the well as soon as Mr. Ed Jordan is available for his services." Complainant's Exhibit 17. Notwithstanding this assertion, Mr. Wilson did not arrange for plugging the well until after EPA issued its NOV; the well was finally plugged on June 10, 2005, almost 5 years after Mr. Wilson's letter saying the well would be plugged as soon as Mr. Ed Jordan is available.[4] Tr. 47-48 (V.2), Complainant's Exhibits 26 and 27. By plugging the well on June 10, 2005, and submitting the plugging report to EPA, Mr. Wilson ended his period of non-compliance with respect to the Gene Wilson #1 Well. Tr. 47-48 (V.2).

EPA's witness, Mr. Randy Vaughn, conducted an economic benefit analysis relating to Respondent's violations of his Permit. Mr. Vaughn concluded that the economic benefit of the failure to submit monitoring reports was de minimis; however, based on values Mr. Vaughn identified for use in EPA's BEN model for calculating economic benefit ($300 compliance cost of conducting an MIT test, and a compliance date of May 16, 2001), Mr. Vaughn determined that the economic benefit of the avoided cost of completing an MIT test was $291. Tr. 52-54 (V.2), Complainant's Exhibit 21. As the Initial Decision makes clear, this was a very conservative calculation of economic benefit, as it was based on a one-time failure to conduct an MIT test.

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[4]Respondent seeks to shift blame for his long delay in plugging the well to EPA by complaining that EPA did not timely respond to his August 18, 2000 letter and provide plugging instructions to Respondent. Respondent's Brief at 5 (Issue P) and 6. However, Respondent's August 18, 2000 letter (Exhibit 17) did not request plugging instructions, which were already included in the Respondent's permit itself. EPA had no reason to provide more information to Mr. Wilson since his approved plugging plan was a part of his permit and Mr. Wilson was obligated under the permit to provide 45 days advance notice of plugging. Complainant's Exhibit 5, Part I, Section E, and Part II, Section F(1) and (2), Tr. 74-77 (V.1). Accordingly, EPA was in the position of waiting for Mr. Wilson to provide a specific date or time frame for the plugging to occur — more specific than just stating it would be plugged "when Mr. Ed Jordan is available."

Respondent actually would have been required to conduct additional MIT testing under the two year time frame applicable to inactive wells, and the economic benefit could also have been based on the higher deferred cost of actually plugging the well, which is the way in which Respondent ultimately came into compliance. ID at 37-40.

Complainant argued at hearing and in its post-hearing brief that the violations by Mr. Wilson were serious: by leaving his well inactive for so many years without conducting an MIT test, as required by the permit, Mr. Wilson created a risk that the well would develop leaks and fluid from lower levels would move up and reach USDWs. Tr. 48-50 (V.1), Tr. 49-51 (V.2). Such fluid could contain salt water and constituents of oil and gas such as the known carcinogens, toluene and benzene. Id. The threat was made greater by the fact that the well was inactive, making it less likely that any leaks developing in the well would be noticed. Id. The failure to submit monitoring reports was also serious, as it is through monitoring reports that EPA is apprised of the status and condition of the well. Tr. 50-51 (V.2). In this case, EPA was unaware that Mr. Wilson's well was inactive during the life of the permit and therefore subject to the more frequent (every two years) non-endangerment demonstration requirement, or plugging and abandonment. Tr. 51 (V.2.). While Mr. Wilson did submit occasional letters in response to EPA inquiries with some of the information that would have been included in annual monitoring reports, these occasional letters were hardly a substitute for an annual monitoring report.

At the hearing, Mr. Wilson countered Complainant's allegations of threatened environmental harm with testimony indicating that following the perforation of the well in the 941 to 951 foot depth interval, and following fracturing/stimulation of that interval in an attempt to make the well a productive oil or gas well, action was necessary to stop the pressurized flow of

brine water from that depth up to the surface. Tr. 211 - 218 (V.1). To stop the flow of brine water, Mr. Wilson's asserts that his contractors performed a "bullhead squeeze," where cement is pumped into the 4 ½ inch casing in the well to close off the perforations and the flow. Tr. 218 (V.1), Tr. 196-98 (V.2). Following the performance of the bullhead squeeze, Mr. Wilson claims another contractor re-drilled the well to a depth of 939.65 feet, stopping just short of the original perforations. Tr. 220 (V.2). The bullhead squeeze was allegedly conducted on April 4, 1989, and the re-drilling started on April 5, 1989. Tr. 241 (V.1), Respondent's Exhibit 50. The re-drilling continued on April 6 and was completed on April 7 at a depth of 939.65 feet. Respondent's Exhibit 50. According to Mr. Wilson, he never re-perforated the well. Tr. 196 (V.2).

Complainant acknowledged in its post-hearing brief that if a bullhead squeeze was performed to seal the perforations in the well, and the well was not re-perforated, that would result in a reduction of, but would not completely eliminate, the threat posed by the well. Complainant's Post-Hearing Brief at 15. A reduced threat would persist because the 939.65 feet depth of the re-drilled well could still serve as a potential conduit for pollution; but new perforations would have to be created, either through additional well construction activity or through deterioration, for brine and oil and gas contaminants to enter the well column from the lower depth. Id. Complainant argued, however, that Respondent's assertion that the well was not re-perforated should not be credited because it was inconsistent with the information provided in Respondent's permit application, which was left uncorrected during the entire life of

the permit.[5] Complainant's Post-Hearing Brief at 15-16. Ultimately, the Presiding Officer credited the Respondent's evidence and determined that the well was not re-perforated and did not pose a serious threat to the environment. ID at 34. On this basis the Presiding Officer reduced the penalty amount proposed by Complainant. ID at 32-36, 50.

On May 16, 2006, Complainant filed an Administrative Complaint against Respondent pertaining to the Gene A. Wilson #1 well, alleging violations of the Safe Drinking Water Act, 42 U.S.C. § 300f, et seq., 40 CFR § 144.51(a) and the UIC Permit #KY 10376 issued on January 12, 1990. The violations alleged were based on Respondent's failure to test for mechanical integrity after the initial test on October 15, 1993, through the date that the well was plugged on June 10, 2005; and Respondent's failure to submit annual monitoring reports during the life of the UIC Permit. The Complaint sought assessment of a penalty of up to the statutory maximum of $157,500; however, in its Prehearing Exchange and at hearing Complainant requested assessment of a total penalty of $11,291, which includes $10,291 for the violation based on the failure to perform MIT testing (or alternatively either plug and abandon the well or provide notice and

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[5]The bullhead squeeze and re-drilling allegedly occurred from April 3 through April 7 of 1989. Yet Mr. Wilson signed his permit application, certifying its accuracy, on May 15, 1989. Complainant's Exhibit 1. On this date, the application information, according to Mr. Wilson's hearing testimony, was inaccurate. Moreover, the Permit contained a condition requiring the updating of information and correction of any inaccurate information. Complainant's Exhibit 6, Part II, Section (E)(12)(f) of the Permit (Other Information). Mr. Wilson never submitted information correcting the significant inaccuracies in his permit application during the entire life of the permit. By his own testimony, Mr. Wilson knew the information that he submitted to EPA was inaccurate at the time it was submitted, but he couldn't be bothered to carefully review what was being submitted and ensure its accuracy. Tr. 128 - 29 (V.2), Tr. 133-38 (V.2). Mr. Wilson says that "if I was serious about making that injection well I would have told you all the depths and anything else I did to it." Tr. 159 (V.3). In Complainant's view, it is offensive that Mr. Wilson allowed a well he was never serious about using to result in a drain on EPA regulatory and enforcement resources based in part on incorrect information that he submitted to EPA in his permit application and left uncorrected for 16 years. As the Initial Decision notes, however, the Complainant did not assert a claim in this matter for failure to correct inaccurate information in the permit application, which only came to light during these proceedings. ID at 35.

demonstrate that the well would not endanger USDWs) and $1,000 based on the failure to submit annual monitoring reports. In an order issued prior to hearing, the Presiding Officer held that the Permit issued to Mr. Wilson was a valid and enforceable permit.

STANDARD OF REVIEW

The EAB reviews a Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (conferring authority on the Board to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); In re Billy Yee, 10 E.A.D. 1, 10 (EAB 2001). However, the EAB has stated many times that it will defer to an ALJ's factual findings where credibility of witnesses is an issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998); In re Echevarria, 5 E.A.D. 626, 638 (EAB 1994); In re Port of Oakland, 4 E.A.D. 170, 193 n.59 (EAB 1992). To the extent that there were factual disputes at the hearing, they have generally been resolved in favor of Respondent, as described in the Factual Statement included in this Brief. Accordingly, while it is not clear from Respondent's Brief whether he is disputing the factual findings in the Initial Decision, it would seem odd for Respondent to dispute findings that have generally been made in Respondent's favor.

While Complainant disagrees with some of the factual findings in the Initial Decision, Complainant is mindful of the EAB's traditional deference to the credibility determinations of a Presiding Officer, and Complainant accepts the Presiding Officer's factual determinations as adequately supported by the evidence and thoroughly explained in the Initial Decision.

ARGUMENT

1. **The Presiding Officer correctly interpreted a provision of the Respondent's permit requiring Respondent to either properly plug and abandon a well which has been inactive for two years or demonstrate that such a well will not endanger underground sources of drinking water (USDWs).**

The Respondent's permit included a requirement that a well that is inactive for two years either be properly plugged and abandoned or that a demonstration be made that the well will not endanger USDWs. Complainant's Exhibit 6, UIC Permit Section II(F)(3); Tr. 56-57 (V.1). That permit language is as follows:

> Inactive Wells. After a cessation of injection for two years the permittee shall plug and abandon the well in accordance with the plan unless he:
>
> (a) provided notice to the Director including a demonstration that the well will be used in the future; and
>
> (b) Described actions or procedures, which are deemed satisfactory to the Director, that the permittee will take to ensure that the well will not endanger USDWs during the period of temporary abandonment. These actions and procedures shall include compliance with the technical requirements applicable to active injection wells unless waived, in writing, by the Director.

EPA Region 4 has typically required the "non-endangerment" demonstration required under this provision to be made by conducting an MIT. Tr. 58 (V.1).

Respondent argues that language in this Permit Section for "Inactive Wells" does not apply to his well because of language stating that the Permit requirement applies after a "cessation" of injection for two years. Respondent asserts that since he never started injection, he therefore never "ceased" injection and was not subject to this provision. Respondent's Brief at 4 (Issue M). As the Presiding Officer determined, Respondent's interpretation of the permit is not reasonable. ID at 13-16.

Respondent's interpretation would mean that Respondent could maintain an inactive well in perpetuity without becoming subject to the permit requirement intended to ensure that inactive wells are subject to heightened and more regular scrutiny and are properly plugged and abandoned if the owner has no intention of using the well or cannot demonstrate non-endangerment. The more reasonable interpretation is that this section of the Permit applies to any well which has not been used for injection for more than 2 years, whether or not injection ever did occur.

The Presiding Officer's analysis of this issue goes beyond the permit language and chronicles the regulatory history behind this permit provision and a related regulatory provision at 40 C.F.R. § 144.52(a)(6). As the Presiding Officer notes, the preamble to the Final Rule, which also contains the "after cessation of injection" language, makes clear that the requirement was intended to apply to any well that is "out of operation for more than two years." ID at 15-16; 49 Fed. Reg. 20147-8. The use of the "cessation" terminology can probably be attributed to the assumption that most entities that obtain permits for underground injection do actually inject fluids into their wells.

Respondent violated Part II, Section F(3) of the Permit by failing, after the well had been inactive for more than 2 years, to either properly plug and abandon the well or provide required notice to EPA informing EPA of his intent to use the well in the future and describing procedures satisfactory to EPA to ensure that the well would not endanger USDWs. As noted above, the non-endangerment showing required by this section was enforced in EPA Region 4 by requiring MIT testing every 2 years instead of every 5 years, as required for active wells. The Respondent's well was inactive for the entire life of the permit, and thus was subject to and in

violation of the requirements of Part II, Section F(3) of the Permit for the entire period covered by the Complaint from May 16, 2001 to June 10, 2005.

Even if the permit section applicable to "Inactive Wells" did not apply to Respondent's well, the failure to conduct an MIT within 5 years of the last approved demonstration would have placed Mr. Wilson in a state of violation for the entire period covered by the Complaint. Moreover, as noted above, the economic benefit amount sought by Complainant and awarded in the Initial Decision was based on a one time failure to conduct an MIT test, and would not be affected by a decision to resort to the 5-year MIT requirement as the basis for a penalty instead of the "Inactive Wells" provision. The penalty assessed in the Initial Decision for failure to conduct the MIT or to plug and abandon the well and make the required demonstration that USDWs will not be endangered ($7,291) is reasonable in any case.

2. **The Presiding Officer correctly interpreted provisions of Respondent's Permit relating to the obligation to file Annual Reports.**

Respondent argues that his obligation to submit annual monitoring reports was never triggered because he never placed his well in operation. Respondent's Brief at 4 (Issue N). Respondent is confused by the "Injection Operation Monitoring" obligation, in Part I, Section C(2), of the Permit (Complainant's Exhibit 6), which is not triggered until operation commences. The monitoring requirements are not triggered until after injection for obvious reasons: the Permittee is required to monitor injection pressure, annulus pressure, flow rate, and cumulative volume of injection, and no results for such parameters would exist unless injection were occurring. The Injection Operation Monitoring obligation, however, is distinguishable from the Reporting obligation in Part I, Section D(2), which provides that reports "shall be reported each

year on EPA Form 7520-11 and must be postmarked by the 28th day of the month following the first full year after the effective date of this permit." Complainant's Exhibit 6.

In Complainant's view, the fact that the first due date for an Annual Report is tied to the effective date of the Permit, and not to the commencement of operations, makes clear that the annual report obligation is triggered even if the well has not commenced injection. EPA receives annual reports from operators of inactive wells, and such reports inform EPA of the status of the well, and would report zero values for the monitoring parameters. Tr. 62-67 (V.1). Such reports are important in the regulatory scheme because, without such reporting, EPA would have no way of determining which wells were inactive and therefore subject to the special provisions applicable to inactive wells.

EPA issued clarifying guidance on this point to ensure that operators of inactive wells were aware of this reporting obligation. Tr. 65-67, Complainant's Exhibit 29. Mr. Wilson claims not to have received this guidance; however, EPA is entitled to an inference that it was received based on the testimony of William Mann that the guidance was mass mailed to all owner/operators in Kentucky in 2000 and Mr. Wilson would have been on the database of owner/operators in Kentucky. Tr. 62-67 (V.1). The Presiding Officer, while acknowledging that some confusion was understandable because the section with the annual report requirement contains a cross-reference to the monitoring requirement, held that the Annual Report obligation applied to wells even if they had not commenced operation. ID at 25-27. In making her decision, the Presiding Officer noted that considerable weight should be accorded to the Agency's interpretation under applicable precedent. See In re Lazarus, 7 E.A.D. 318, 353 (EAB 1997). As the EAB has noted, where there may be some ambiguity in the regulatory

requirements, regulated entities assume the consequences of their conduct when they fail to inquire of EPA as to whether their activities comply with the law. In re Howmet, 13 E.A.D. ___ (EAB 2007).

Mr. Wilson's violation for failure to submit annual monitoring reports persisted for the entire time period covered by the Complaint, from May 16, 2001, until June 10, 2005. Based on the factors to be considered in assessing a penalty in Section 300h-2(c)(4), the $1,000 penalty assessed by the Presiding Officer for the failure to submit any Annual Reports during this period is reasonable.

3. **The Initial Decision applies the penalty criteria set forth in the Act to the facts in the record in a sufficiently clear and detailed manner to satisfy the requirements of 40 C.F.R. Section 22.27(b).**

Pursuant to 40 C.F.R. Section 22.27(b), the Presiding Officer is required to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." The Presiding Officer is also required to consider any civil penalty guidelines issued under the Act; however, no such guidelines have been issued that are applicable to the UIC/SDWA violations which are at issue here. The Presiding Officer is further required to "explain in detail in the Initial Decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act."

The Presiding Officer in this case has thoroughly explained her penalty assessment in a detailed opinion that applies each of the statutory penalty criteria to the facts of the case. In such circumstances, the Environmental Appeals Board ("EAB") has generally accorded considerable deference to a Presiding Officer's penalty assessment. See, e.g., In Re: Advanced Electronics, Inc., 10 E.A.D. 385, 399 (EAB 2002) ("In such circumstances, it is appropriate for the Presiding

Officer to analyze each of the statutory factors, ... and the Board generally gives deference to a presiding officer's penalty determination.").

The EAB reviews a Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (conferring authority on the Board to "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); In re Billy Yee, 10 E.A.D. 1, 10 (EAB 2001). However, the EAB has stated many times that it will defer to an ALJ's factual findings where credibility of witnesses is an issue "because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility." In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998); In re Echevarria, 5 E.A.D. 626, 638 (EAB 1994); In re Port of Oakland, 4 E.A.D. 170, 193, n.59 (EAB 1992).

The EAB also has made clear that it generally will accord deference to a Presiding Officer's penalty assessment where, as here, the Presiding Officer has thoroughly explained the manner in which the statutory penalty criteria have been applied to the facts of the case. See In re Slinger Drainage, Inc., 8 E.A.D. 644, 669 (EAB 1999) ("[w]e see no obvious errors in the Presiding Officer's penalty assessment and, therefore, we see no reason to change his penalty assessment.").

4. **The Presiding Officer did not abuse her discretion or commit clear error in assessing a penalty of $8,291 in the Initial Decision.**

As noted above, the EAB has accorded substantial deference in reviewing the penalty assessments of Presiding Officers. See In re Slinger Drainage, Inc., 8 E.A.D. 644, 669, n.32 (EAB 1999) ("Board generally will not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty."). None of the arguments of Respondent rise to the level of an abuse of

discretion or clear error. To the contrary, the Presiding Officer's thorough analysis reflects a careful application of statutory penalty criteria to the facts of the case. Accordingly, the penalty should not be adjusted on any of the grounds raised by Respondent. See In re B.J. Carney Industries, Inc., 7 E.A.D. 171, 217 (EAB 1997) ("An 'appropriate' penalty is one which reflects a consideration of each factor the governing statute requires to be considered, and which is supported by an analysis of those factors.")

Most of Respondent's arguments do not even clearly relate to the penalty calculation or an application of penalty factors. Rather, Respondent's brief mostly challenges procedural and case-management orders issued by the Presiding Officer, and reflects a conviction that he has not been fairly treated and that he does not believe EPA used its enforcement discretion in an appropriate manner. However, such concerns are not valid appeal issues and do not raise any doubts about the penalty assessment. To the extent that some portions of Respondent's brief do touch on issues relevant to the Presiding Officer's application of statutory penalty factors to the facts of this case, they are addressed below.

The statutory penalty factors which the Presiding Officer was required to consider are set forth in Section 300h-2(c)(4)(B) of the Act, which provides that "in assessing any civil penalty under this subsection, the Administrator shall take into account appropriate factors, including (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirement; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

Seriousness of the Violation

Some of Respondent's arguments are relevant to the "seriousness of the violation" factor. For example, Respondent states, at page 15 of his brief, that the "well was on Respondent's 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." In response, it should be noted that the distance to the nearest neighbor is not particularly relevant, since the Act is intended to protect USDWs which did exist under Respondent's well. Moreover, the Presiding Officer actually credited Respondent's testimony regarding the lack of perforations in the well and the lowered threat to USDWs resulting from the lack of perforations. ID at 31-36, 46. Thus, the Initial Decision already fully incorporates consideration of Respondent's views that the violations were not serious. And while the Initial Decision found the threat to the environment from the violations to be less serious, the Presiding Officer reasonably found that the violations were harmful to the UIC regulatory program. ID at 35-36.

Economic Benefit

The Respondent's Brief does not appear to contain any challenge to the economic benefit determination in the Initial Decision.

History of Such Violations

The Initial Decision notes that Complainant did not find the statutory factor of history of such violations to be present in this case and the Presiding Officer accepted EPA's assessment. ID at 41. Accordingly, Respondent has no basis to complain about the Presiding Officer's application of this factor.

Good Faith Efforts to Comply

Some arguments and statements in Respondent's Brief could be characterized as claiming that he made good faith efforts to comply. See, e.g, Respondent's Brief at 44 ("Respondent honestly and truly felt he was not violating his permit by not plugging"). However, the Presiding Officer fairly considered various contentions made by Respondent regarding good faith efforts to comply in her Initial Decision and determined that, while some practices of Respondent "would serve to dispel a characterization that Mr. Wilson completely and flagrantly ignored all regulatory requirements for the life of the Permit," they did not "make up for what was extreme recalcitrance in plugging the well." ID at 42. The Initial Decision fully and fairly discusses the evidence relevant to good faith efforts to comply and reasonably concludes that "it is appropriate that lack of good faith be reflected in the penalty assessed for violations related to Mr. Wilson's failure to timely plug the well or comply with the Permit and regulatory requirements to show non-endangerment to the USDWs." ID at 41-43.

Numerous oral and written statements made by Respondent before and during hearing support the view that he did not demonstrate a good faith attempt to comply with his permit. For example, his statement that he had been meaning to plug his well since 1993 but "never got around to it." Complainant's Exhibit 21. Similarly, his statement in 2000 that he planned to plug the well as soon as Mr. Jordan was available to assist him (Complainant's Exhibit 17) reflects bad faith in that almost five years after making this statement the well was still unplugged. Mr. Wilson seeks to blame EPA for his non-compliance by arguing that it was EPA's responsibility to inform him of his obligation to MIT or plug the well. Tr. 184 (V.3). Respondent makes similar arguments in his appellate brief, seeking to blame EPA for his noncompliance because EPA did

not keep him adequately apprised of his obligations. See, e.g., Respondents Brief at 14-15. This makes clear that Mr. Wilson did not take his obligations seriously; conditions in the Permit did not matter until he received letters from EPA reminding him what to do. In fact EPA did provide notices to Mr. Wilson of his obligation to conduct MIT testing and he still did not comply. Complainant's Exhibits 12, 14, 16. Mr. Wilson's non-compliance continued for years after receipt of these letters (Mr. Wilson denies receipt of Exhibit 12; however Exhibit 14 was sent only a few months after Exhibit 12).

Mr. Wilson implies that the fact that his well was inactive excuses his non-compliance. Tr. 178 (V.3) (" If I was to start using it, yes, I would comply with it, but I had no intentions of using it."). This further demonstrates Mr. Wilson's lack of good faith efforts to comply. Nothing in the permit tolled its applicability during periods of inactivity — indeed, as noted above, certain obligations were triggered by periods of inactivity exceeding two years. Again, these are not the statements of a person who is attentive to his compliance obligations.

The Initial Decision makes note of some of these and other instances where Respondent's behavior and statements reflected a failure to make good faith efforts to comply. ID at 41-43. Certainly, the Presiding Officer's determination could not be characterized as an abuse of discretion or clear error.

Economic Impact on the Violator

The Respondent has raised as an issue in his brief "whether the Presiding Officer erred in determining the economic impact of the penalty on Respondent be (sic) severe by referencing his position at a bank." Respondent's Brief at page 5 (Issue S). It seems likely that Respondent intended to challenge the Presiding Officer's determination that the economic impact of the

penalty would **not** be severe. In any event, as the Presiding Officer noted at pages 43-44 of her Initial Decision, Respondent acknowledged during the hearing that economic impact/inability to pay was not an issue in the case. Tr. 7-8 (V.1), Tr. 57 (V.2). The Presiding Officer's determination on this factor was supported by the evidence and was not an abuse of discretion or clear error.

Such Other Matters as Justice Requires

The Environmental Appeals Board has held in the context of a Clean Water Act case, which also requires application of a "such other matters as justice requires factor," that this factor is to be sparingly used. See In re Spang & Co., 6 E.A.D. 226, 250 (EAB 1995) ("[U]se of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just."). In this case, Respondent advances no compelling reason for application of this factor to adjust the penalty, and the Presiding Officer's application of all of the factors has already produced a reasonable and just penalty.

5. **The Presiding Officer properly rejected Respondent's selective prosecution defense and restricted the presentation of evidence relating to that defense.**

Much of Respondent's Brief is devoted to recitations of ways in which he believes EPA has treated him unfairly, and/or differently from other owner/operators of injection wells. Respondent's Brief at 2-5 (See, e.g., Issues C, E, F, G, H, J, P, Q). Respondent contends that his various allegations of unfair treatment warrant the consideration of a "selective prosecution" defense. Respondent's Brief at 3 (Issues H and J), 11.

To substantiate a claim of selective enforcement or selective prosecution, Respondent must establish "(1) [that he has] been singled out while other similarly situated violators were left

untouched, and (2) that the government selected [him] for prosecution 'invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights.'" In re: Newell Recycling Company, Inc., 8 E.A.D. 598 (EAB 1999); United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 985 (E.D. Va. 1997). As noted above, Respondent has presented no basis for asserting such a defense in this case. Respondent did not present any evidence that the enforcement action against him was motivated by any consideration akin to racial or religious bias or a desire to prevent the exercise of a constitutional right. Accordingly, the Presiding Officer properly rejected Respondent's selective prosecution defense. ID at 27-28.

As noted above, Respondent asserted selective prosecution without presenting any evidence that the government selected him for prosecution "invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." Rather, Respondent's claim was based on a contention that he was unfairly targeted because other similarly, situated persons were not singled out for enforcement in the way that he was. Essentially, Respondent is attacking EPA's use of enforcement discretion in bringing an action against him. However, "Courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." See In re B&B Oil Co., 8 E.A.D. 39 (EAB 1998).

6. Respondent's various other assertions of error in relation to evidentiary and case management rulings by the Presiding Officer do not constitute a basis for reversing the Initial Decision.

Respondent's brief contains many discrete complaints and assertions of error but does not always frame them clearly or follow up the assertions with a clear analysis of why they would

warrant disturbing the Presiding Officer's Initial Decision. This Section of Complainant's Brief seeks to identify and respond briefly to a number of these additional assertions of error in Respondent's Brief.

a. Due Process. Respondents asserts that various actions by Complainant or the Presiding Officer rise to the level of constitutional or "due process" violations. Respondent's Brief at pages 2-4 (Issues A, B, J and H). However, Respondent provides no legal analysis supporting his claims of constitutional violations and none of the claims in his brief really raise issues of constitutional significance.

b. Missing Files. Respondent complains that he was denied a fair hearing because "practically all of Respondent's files were missing form his UIC permit file." Respondent's Brief at page 2 (Issue B). Elsewhere, Respondent states that he "was amazed at EPA's poor record keeping," citing various instances where he found EPA's record-keeping lacking. Respondent's Brief at 15. Yet Respondent does not articulate how EPA's alleged recordkeeping failures deprived him of a fair hearing. EPA provided Respondent with documents it relied upon at hearing through the Pre-Hearing Exchange process, in accordance with 40 C.F.R. § 22.19. Respondent was able to present his own opposing evidence, including evidence of isolated documents he found to have been missing from EPA's files. Nothing in Respondent's Brief relating to EPA's records management provides any basis for disturbing the Presiding Officer's Initial Decision.

c. Failure to Provide Copy of Part 22. Respondent complains that he did not receive a copy of Part 22 with his Complaint as required by 40 C.F.R. § 22.14(5)(b). Respondent's Brief at 3 (Issue D). Complainant believes Respondent was provided a copy of Part 22. Further,

Respondent clearly relied upon the provisions of Part 22 in the course of the proceedings below, and was not prejudiced by any failure to provide Part 22 at the time the Complaint was served on him. In any event, this was not an issue raised by Respondent during the proceedings below and is therefore not cognizable on appeal.

d. Presiding Officer's Decision Not to Make Complainant File its Prehearing Exchange First. Respondent's Brief asserts that the Presiding Officer erred in refusing to require Complainant to file its Prehearing Exchange before Respondent. This decision rests squarely within the realm of the Presiding Officer's discretion in managing the case, and does not present a basis for disturbing the Initial Decision. "ALJs retain broad discretion to conduct administrative proceedings." In re CDT Landfill Corp., 11 E.A.D. 88 (EAB 2003); In re Ag-Air Flying Services, Inc., 2006 WL 3073096 (FIFRA Appeal 06-01, EAB 2006) ("the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion in order to conduct proceedings in a fair manner that assures that facts are elicited and issues adjudicated without delay").

e. Refusal to Allow Evidence Regarding Other Permit Files. Respondent complains that he was not permitted to submit into evidence documents he copied from the files of other UIC permits. Respondent's Brief at 3-4 (Issues F, H, J).

Much of this evidence related to Respondent's selective prosecution defense which, as noted above, was without basis. The Presiding Officer explained her decision to exclude this material at page 28 of the Initial Decision, stating "the documents Mr. Wilson sought to introduce consisted of random letters and correspondence between EPA and other Kentucky well operators, isolated and out of context from whatever correspondence might have preceded or

followed the document in hand. As such they were inadmissible as unreliable and lacking in probative value." Complainant contends that this reflects a proper exercise of discretion by the Presiding Officer. Complainant believes, and argued at hearing, that the introduction of such documents would have resulted in a lengthy detour in the hearing where Complainant would have been forced to investigate and litigate the details of permit histories not at issue in this proceeding. Further, Respondent was able during the hearing to present evidence and argument relating to his view that other operators were treated differently from him.

The admission of evidence is a matter particularly within the discretion of the administrative law judge. In re Titan Wheel Corp., 10 E.A.D. 526, 541 (EAB 2002). The Presiding Officer has properly exercised her discretion with respect to the refusal to admit documents relating to other permits.

f. Refusal to Delay Hearing Pending FOIA Appeal. Respondent argues that the Presiding Officer erred in not agreeing to delay the hearing while he awaited the results of an appeal of the withholding of certain documents in response to a Freedom of Information Act request he had submitted to EPA. Respondent's Brief at 4 (Issue K).

As noted above, "ALJs retain broad discretion to conduct administrative proceedings." In re CDT Landfill Corp., 11 E.A.D. 88 (EAB 2003); In re Ag-Air Flying Services, Inc., 2006 WL 3073096 (FIFRA Appeal 06-01, EAB 2006) ("the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion in order to conduct proceedings in a fair manner that assures that facts are elicited and issues adjudicated without delay"). It was appropriate for the Presiding Officer to refuse to delay the hearing for an unknown period of time

to await the outcome of the FOIA process — a process over which the Presiding Officer had no authority or control.[6]

Moreover, to the extent that Respondent believed he needed information within EPA's control to defend himself at hearing, his recourse under Part 22 would have been to file a Motion for Additional Discovery in accordance with 40 C.F.R. § 22.19(e). Note that to obtain discovery under that section, Respondent would have had to show in such a motion that the requested discovery (i) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 C.F.R. § 22.19(e). Respondent did not do so.

It should be noted that parties in administrative hearings do not have a constitutional right to take depositions, or indeed any discovery, absent a showing of prejudice or a showing that the refusal to permit depositions [discovery] would deny a party due process. In re: Chippewa Hazardous Waste, Remediation & Energy, Inc., 12 E.A.D. 346, 368 (EAB 2005). No such showing has been made here.

g. Refusal to Enlarge Time for Hearing. Respondent claims in his brief that the Presiding Officer erroneously and arbitrarily denied his Motion to Enlarge Days Allotted for Hearing. Respondent's Brief at 4 (Issue L). Respondent's claim is undermined, however, by the

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[6]Respondent's FOIA Appeal was resolved on January 16, 2009, and was granted in part and denied in part. The few documents that have been released as a result of the appeal would not in Complainant's view have added anything of probative value to the hearing in this matter. The FOIA Appeal Response, including released documents, is attached as Exhibit 1 to this Brief.

fact that the Presiding Officer allotted four days for hearing, and the hearing was completed in three. Given that Respondent completed presentation of his case in less than the time allotted, it is difficult to fathom how he could have been prejudiced by a decision not to allot additional days.

h. Refusal to Reopen Hearing to Allow Introduction of Telephone Bill and Affidavit. Respondent argues that the Presiding Officer violated 40 C.F.R. § 22.22 by not reopening the hearing to allow the introduction of additional evidence in the form of a telephone bill and an affidavit from one of his witnesses. Respondent's Brief at 4 (Issue O). As the Presiding Officer's "Order Denying Motion to Reopen Hearing" makes clear, however, the Respondent did not meet the standard for reopening a hearing under 40 C.F.R. § 22.28. Specifically, the evidence Respondent sought to present in a reopened hearing was cumulative and redundant of evidence presented at hearing, and there was no justification for the failure to present that evidence at hearing. The telephone records Respondent sought to introduce could have been obtained in advance of and submitted at, the hearing. The affidavit Respondent sought to introduce was from a witness who already had testified fully at hearing.[7] Additional issues for which Respondent sought to introduce new testimony all were exhaustively addressed at hearing and further testimony would have been cumulative and redundant. Respondent did not have good cause for having failed to present the additional evidence at hearing and failed to show that the additional evidence was not cumulative.

[7]The factual import of the telephone records and affidavit would have tended to support Respondent's claim that he scheduled a MIT test in April of 1999, a claim the Presiding Officer credited anyway in her Initial Decision. In such circumstances, Respondent's insistence on presenting this cumulative evidence is perplexing.

As stated earlier, an ALJ has broad discretion in determining what evidence is properly admissible and her rulings on such matters are entitled to substantial deference. In re J.V. Peters & Co., 7 E.A.D. 77, 99 (EAB 1997) ("[T]he admission of evidence is a matter particularly within the discretion of the administrative law judge because he is hearing the case firsthand and therefore, his rulings are entitled to considerable deference.") (quoting In re Sandoz, 2 E.A.D. 324, 332 (CJO 1987). The Presiding Officer has properly denied Respondent's request to reopen the hearing.

i. Changing Classification of Well from "Shut-in" to "Temporarily Abandoned." At several points in his brief, Respondent complains that Complainant had changed the classification of his well from "shut-in" to "temporarily abandoned," requiring plugging within two years. Respondent's Brief at 18 and 20. As discussed above, however, the obligation to plug or abandon a well, or provide notice to EPA and demonstrate that the well will not endanger USDWs, was triggered by inactivity (or absence of injection) of a well for more than two years. Labeling the well as "shut-in" or "temporarily abandoned" is a matter of terminology or semantics, and not of regulatory significance. Both terms refer to wells that are inactive.

CONCLUSION

For the foregoing reasons, Complainant asserts that the Presiding Officer's Initial Decision should be affirmed in all respects.

ALTERNATIVE FINDINGS OF FACT

Complainant does not propose any alternative findings of fact

ALTERNATIVE CONCLUSIONS OF LAW

Complainant does not propose any alternative Conclusions of Law.

Respectfully submitted,

1/30/09

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

IN THE MATTER OF:	)	
	)	
	)	**Appeal from Initial Decision**
Gene A. Wilson,	)	**Under Section 1423(c) of the**
	)	**Safe Drinking Water Act,**
Respondent.	)	**42 U.S.C. § 300h-2(c)**
	)	
Docket No. SDWA-04-2005-1016	)	**Appeal No. SDWA 08-09**
	)	

CERTIFICATE OF SERVICE

The undersigned HEREBY CERTIFIES that the original and five copies of the foregoing Response Brief of Complainant were hand-delivered to the Environmental Appeals Board at the following address on Friday, January 30, 2009:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (MC 1103B)
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Washington, D.C. 20005

The undersigned further certifies that a true and correct copy was sent to the following persons via First Class Mail on Friday, January 30, 2009:

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