UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

IN THE MATTER OF	)	**Docket No. SDWA-04-2005-1016**
Gene A. Wilson	)	
Respondent	)	

COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POST-HEARING BRIEF

COMES NOW the Complainant, the United States Environmental Protection Agency (EPA), Region 4, and hereby submits its Proposed Findings of Fact and Conclusions of Law, and Post-Hearing Brief, as directed by the Honorable Judge Schub at the conclusion of the hearing in this matter. All citations to the hearing transcript will refer to the transcript pages and volume number using the abbreviation "Tr" for transcript and "V" for volume, followed in each case by the relevant page number and volume number, in the following form: Tr. # (V.#). Citations to Exhibits shall be to the Exhibit number used at the hearing.

PROPOSED FINDINGS OF FACT

1. 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, he believed the information was true, accurate and complete. Complainant's Exhibit 1. The permit application was stamped as received by the Groundwater Protection Branch of EPA's Region 4 office in Atlanta on August 22, 1989. Complainant's Exhibit 1, at page 2.

2. The permit application provides details regarding the proposed injection well's construction. For example, Attachments J and L, 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).

3. Underground sources of drinking waters (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 foot 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).

4. The purpose of the UIC permit program is to protect USDWs, such as those described in Paragraph 3, 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).

5. 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 leaks 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 Parts I(A)(4) and II(G)(3); Tr. 54-56 (V.1).

6. A well does not have to be used for injection to pose a threat to USDWs, because, over time, leaks can develop in an inactive well and fluid can move upward under pressure from lower formations and pass through those 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 than active wells, 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 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 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 Part II(F)(3); Tr. 56-57 (V.1). Such a "non-endangerment" demonstration is made by conducting an MIT. Tr. 58 (V.1).

7. Mr. Wilson's well was permitted on January 12, 1990. Complainant's Exhibit 6. 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, Part I(D)(2).

8. 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, Part 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 Part I(A)(4)(a) of his permit before injection could commence. Complainant's Exhibit 6; Tr. 166 (V.3).

9. Part I(A)(3)(a) 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. 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, Part I(A)(4) of Permit.

8. Part 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.

9. 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.

10. 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).

11. 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).

12. 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 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 is contradicted by the testimony of Carol Chen, who was responsible for scheduling such MIT tests on behalf of EPA. Ms. Chen testified that no Technical Direction Document was created authorizing a contractor to observe

an MIT at the Gene Wilson # 1 well on April 26, 1999. 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). At the time of the alleged conversation between Ms. Chen and Ms. Carter (January 11, 1999), Ms. Chen was working on the schedule for February. Tr. 203 (V.1). Ms. Chen further testified that a log book she maintains 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). Ms. Chen further testified that other unrelated inspections were scheduled for the April 26th date, and the inspector would therefore not have been available to witness an MIT at Mr. Wilson's well on that date. Tr. 163-64 (V.1). Based on Ms. Chen's testimony, Mr. Wilson's claim that the MIT test was rescheduled for April 26, 1999, is not credible.

13. Ms. Chen testified that when an MIT test was scheduled she would call the operators to confirm that the work would be done, and if they said no she would then cancel the date so that the inspector would not show up. Tr. 190 (V.1). This in fact is what occurred with respect to the MIT test originally scheduled for January 21, 1999.

14. Mr. Wilson claims that his employees prepared to conduct an MIT test on April 26, 1999, but that EPA's witness did not show. 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 where the MIT was performed without the inspector present and the well passed the pre-test. Tr. 13. The claim that an MIT test was scheduled for April 26, 1999, is not credible for the reasons described in paragraph 12, above. 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 is undermined by inconsistencies in the testimony and contradictions in the documentary record, and is also not credible.

15. On August 2, 2000, EPA sent a letter to Mr. Wilson asking for information about his well, including a copy of the most recent mechanical integrity test. Complainant's Exhibit 16. Mr. Wilson's written response of August 18, 2000 (Complainant's Exhibit 17), states that "only the initial mechanical integrity was performed." If Mr. Wilson had truly arranged for an MIT test to be witnessed only one year and four months earlier and EPA's witness had failed to show up, it would have been logical for Mr. Wilson to mention that fact in his response. However, Mr. Wilson did not do so.

16. Ms. Carter testified for Mr. Wilson and said that on April 26, 1999, Mr. Wilson called her from the farm house near the well to tell her that the EPA inspector did not show and asked her to try and find out where EPA's inspector was. Tr. 145 (V.2). Strangely, Ms. Carter's previously submitted affidavit (Respondent's Exhibit 52) states that she received a call on April 26, 1999, from Mr. Wilson's employees, and not from Mr. Wilson. Mr. Wilson himself seemed surprised by this testimony, interrupting his examination to say "I forgot that." Tr. 145 (V.2). Ms. Carter further testified that after receiving the call from Mr. Wilson, she tried to contact David Hayes at an 859 number shown in handwriting on page 2 of Complainant's Exhibit 30. Tr. 147-48 (V.2). It is interesting to note that the 859 area code did not exist until April 1, 2000, when portions of Kentucky were switched from the 606 area code to 859. See http://www.lincmad.com/newareacodes.html or http://areacode.ce-service.biz/ac859.htm. Thus, Ms. Carter's attempt to demonstrate that she did try and call Mr. Hayes on April 26, 1999, only demonstrates that the attempt occurred at some later date, perhaps during preparation for this

hearing in an attempt to locate Mr. Hayes, where it would have been discovered that Mr. Hayes' (606) area code number from 1999 would now be part of the 859 area code.

17. Ms. Carter further testified that, on April 26, 1999, she called Ms. Chen to notify her that EPA's witness did not show, and that Ms. Chen said she did not know why he had not shown up and that she would reschedule the MIT. Tr. 145-47 (V.2); Tr. 159 (V.2). This testimony was contradicted by Ms. Chen, who indicated that her log book, which contains records of her significant work activities, does not contain any reference to a call from Ms. Carter on April 26, 1999. Tr. 140. Ms. Chen further testified that she would not have said, "Oh I don't know anything, I'll reschedule." Id. Further, if Ms. Carter had spoken with Ms Chen on April 26, 1999, her affidavit would certainly have been the place to make reference to such a conversation. Respondent's Exhibit 52. But her affidavit, which makes mention in paragraph 8 of another conversation Ms. Carter had with Ms. Chen on January 11, 1999, makes no mention in paragraph 9 of a conversation had with Ms. Chen on April 26, 1999. Id.

18. Ms. Carter testified that the preparatory work for the MIT test on April 26, 1999,was performed by bringing equipment such as a bulldozer, a service rig, and other equipment over to the Gene Wilson #1 well from another farm (Cam Creek Farm) owned by Mr. Wilson. Tr. 160-62 (V.2). However, Mr. Wilson sold Cam Creek farm in 1994, so Ms. Carter's testimony does not make sense. Tr. 212 (V.2). Perhaps she was confused and was actually recalling the 1993 MIT test for which Mr. Wilson did use equipment from Cam Creek Farm. Tr. 213 (V.2).

19. Ms. Carter testified that she knew all along that Mr. Wilson's employee's had conducted an unwitnessed MIT on April 26, 1999. Tr. 165-66 (V.2). However, she typed the letter from Mr. Wilson of August 18, 2000 saying that only the initial MIT was performed (referring to the 1993 MIT), and explained that she and Mr. Wilson did not mention the

unwitnessed MIT from 1999 in this letter because "we didn't think it counted" if EPA's witness was not present. Tr. 163-66 (V.2). Mr. Wilson sought to change her testimony by objecting to say "we didn't know Mr Clark did this until maybe a month ago when I called him about being a witness." Tr. 166-67 (V.2). Ms. Carter's testimony is confusing, conflicts with her own and Mr. Wilson's testimony and the documentary record, and is not credible. Ms. Carter's statements that she did not think the 1999 MIT counted because it was not witnessed are contradicted by her statement made to explain why she made no effort of her own to reschedule the MIT. She said, to explain her failure to reschedule the MIT, that she "didn't realize there was a requirement at that time" for the MIT to be conducted and witnessed by EPA. Tr. 160 (V.2). Mr. Wilson testified as to his own view that only the initial MIT had to be witnessed by EPA. Tr. 206. Taken as a whole, Ms. Carter's and Mr. Wilson's testimony on this point is not credible and reads like an attempt to fashion a narrative from poorly remembered and poorly documented events that places them in a better light. Ms. Carter acknowledged that she has not identified any records or reports or receipts documenting the attempt to perform an MIT in April of 1999. Tr. 157 (V.2).

20. Another witness presented by Mr. Wilson to support the claim that he prepared to conduct an MIT on April 26, 1999, but EPA's witness did not show, is James Clark. Mr. Clark's testimony was elicited through continuously leading questions, with Mr. Wilson often informing his witness of the answers or correcting "erroneous" answers. Tr. 7 - 14, 38 - 42 (V.3). Mr. Clark claimed to have a clear memory of holding the required pressure level during MIT tests for 15 minutes. Tr. 11-12, 37, 44-47 (V.3). Yet the permit required, and the MIT reports signed by Mr. Clark reflect, a requirement to maintain pressure for 30 minutes. Complainant's Exhibit 6, Section I(A)(3)(a) of Permit; Complainant's Exhibit 34, Complainant's Exhibit 9. It is

understandable that Mr. Clark would fail to recall such details after so many years; however, this undermines the credibility of his account. Mr. Clark's account is further undermined by his statement that Ed Jordan had cleared the road to the well several months before the April 26, 1999, date when the supposed MIT test was scheduled. Tr. 20 (V. 3). However, as Ms. Carter testified, the MIT was originally scheduled several months before April 26, 1999 (originally scheduled for January 21, 1999) but it had to be cancelled because the weather was too bad to access the well. Tr. 144 (V.2). Mr. Clark also claims that after the April 26, 1999, date he returned to the well to pick up the equipment and return it back to Collier Creek. Tr. 14 (V.3). Mr. Clark apparently meant the equipment was returned to Cam Creek, since the well at issue was the Collier Creek well and was inactive and not a place where such equipment was stored. Likely, when Mr. Clark referred to returning the equipment to another site he meant returning it to Cam Creek. However, as noted above, the Cam Creek farm had been sold in 1994 so, as with Ms. Carter's testimony that the equipment for the MIT in 1999 was taken from Mr. Wilson's operations at Cam Creek, Mr. Clark's description also suggests that he is remembering the MIT performed in 1993 rather than the alleged MIT in 1999.

21. Another fact that undermines the Respondent's claim that he attempted to perform an MIT test on April 26, 1999, but EPA's witness never showed up, is the fact that no effort was made by Mr. Wilson to reschedule an MIT test after the April 1999 date. Tr. 159-60 (V.2). According to Ms. Carter, she called Ms. Chen and Ms. Chen indicated she would reschedule, and Ms. Carter and Mr. Wilson then let years pass without making any effort to reschedule another MIT test. As noted above, this account is not credible, but even if true the failure to make any attempt to reschedule the MIT would reflect inattention to the permit requirement to conduct the MIT test.

22. As a whole, the evidence submitted by Mr. Wilson to support a claim that he prepared to conduct an MIT in April of 1999 but EPA's witness did not show up is confused, contradicted by documentary and testimonial evidence, and not credible.

23. 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, the most recent MIT test. Complainant's Exhibit 16. Mr. Wilson responded with a letter dated August 18, 2000, which including 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.

24. 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 in fact 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 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.

25. 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). Following the inspection Mr. Vaughn returned to the office and conducted a file review, which showed that there was no record of an MIT having been performed since the initial MIT in 1993, and there were no 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).

26. 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. Complainant's Exhibit 19. The purpose of this letter was to notify the Respondent that EPA has 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.

27. 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.

28. Mr. Wilson's August 18, 2000, letter to EPA, described above in paragraph 15, includes 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. Tr. 47-48 (V.2), Complainant's Exhibits 26 and 27. By plugging the well 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) .

29. 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. This is a conservative value for economic benefit, as the benefit could have been calculated using the avoided cost of additional MIT tests required based on the inactive status of the well (As noted above, an inactive well is subject to a requirement that non-endangerment be demonstrated every 2 years). In addition, the plugging and abandonment was delayed for years when, based on the inactive status of the well and Respondent's failure to submit the notice and non-endangerment demonstration required of inactive wells under Section II(F)(3) of the Permit, the well should have been plugged and abandoned by the beginning of the period of violation captured by the Complaint (May 16, 2001). The cost of plugging is typically about $3,000. Tr. 52 (V.2). Mr. Wilson estimated the cost of plugging this well at $4,000 to

$5,000 (Tr. 187 (V.3). Using the delayed cost of plugging as the basis for an economic benefit calculation would also lead to a higher economic benefit calculation. The 4 years of delay between the beginning of the violation period covered by the Complaint and the compliance date of June 10, 2005, would have resulted in approximately $480.00 in economic benefit based on a conservative 4% rate of earned interest on the lowest estimate of the delayed plugging expense ($3,000). Thus, the $291 requested by EPA as an economic benefit portion of the penalty is probably lower than the actual economic benefit.

30. The violations by Mr. Wilson are 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 from lower formations 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 throughout 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.

31. At the hearing, Mr. Wilson presented 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 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 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).

32. Testimony and documents submitted by Mr. Wilson at the hearing suggesting that the bullhead squeeze was performed and sealed off the perforations, if true, would result in a reduction of, but would not completely eliminate, the threat posed by the well. A reduced threat would persist because the 939.65 foot 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. However, it should be noted that Mr. Wilson's information regarding the bullhead squeeze and drilling out of the concrete was inconsistent with all of the information he submitted in his permit application and all information he submitted during the life of the permit. 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. As a regulatory agency it was reasonable for EPA to act based on the information in Mr. Wilson's permit file, all of which was submitted and certified by him. Thus, the violations should not be regarded as less serious based on information submitted by Mr. Wilson at hearing about the bullhead squeeze; if anything, this information reflects a more serious failure to provide accurate information regarding his well, making a joke out of the regulatory process. By his own testimony, Mr. Wilson knew the information that he submitted to EPA was inaccurate at the time it was submitted, but he could not 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). It is offensive that Mr. Wilson allowed a well he was never serious about using to result in a drain on EPA's regulatory and enforcement resources based on incorrect information that he submitted to EPA in his permit application and left uncorrected for 16 years.

33. Mr. Wilson tries to defend his failure to submit an accurate permit application by saying he submitted the information to the contractor that assisted him in completing the application before the bullhead squeeze had occurred. Tr. 138 (V.2). However, this cannot be true because, according to Mr. Wilson's witness regarding the bullhead squeeze, Mr. Wilson was not even thinking about an injection well at the time the bullhead squeeze was conducted. Tr. 211, 217-219 (V.1). According to Mr. Hay, Mr. Wilson was still interested in a production well

and not an injection well at this point. Id. So Mr. Wilson's claim at Tr. 138 (V.2), and Tr. 192 (V.1) that the UIC permit application information was submitted to the contractor before the bullhead squeeze was performed is contradicted by other testimony given by his own witness. In fact, Mr. Wilson signed the certification in his permit application after the bullhead squeeze was allegedly performed, but he could not be bothered to ensure that the application contained accurate information about the construction of the well.

34. The very fact that the well was re-drilled from 58 feet to 939.65 feet and an application was submitted for a UIC permit reflects an intent to re-perforate the well at some point so that injection could occur. Mr. Wilson has acknowledged that when he applied for the permit, at least, it was his intent to re-perforate the well. Tr. 192 (V.3). Mr. Wilson claims to never have re-perforated the well. Tr. 196 (V.2). However, given the conflicts between much of his testimony and that of the documentary evidence, and testimony of other witnesses, his claim that the well was never re-perforated is highly questionable. Note that the Plugging Report (Complainant's Exhibit 26) states that the well was completed on April 14, 1989. This is consistent with Complainant's proposed Exhibit 32[1], a print out from the Kentucky Oil and Gas Division Web site documenting the conversion of his well from a production well to an injection well, which also lists the completion date of the conversion as April 14, 1989. Since the re-drilling of the well to a depth of 939.65 feet was completed on April 7, as noted above, that raises a question as to what activities were occurring between April 7 and April 14. It would have been

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[1]The court did not admit this document; however, EPA contends that it can still be judicially noticed as it is available on the Oil and Gas Division's website at the following web URL location: http://kgsweb.uky.edu/DataSearching/OilGas/OGsearch.asp?areatype=plat&yearCheck=undefined&sample=undefined&core=undefined&production=undefined&djvu_rec=undefined&elog=nolimit&cominfo=undefined&dpinfo=undefined&yearCrit=undefined&yearlmt=equal&month1=&day1=&year1=&month2=&day2=&year2=&permit_yearCrit=undefined&permit_yearlmt=equal&permit_month1=&permit_day1=&permit_year1=&permit_month2=&permit_day2=&permit_year2=.

easy to re-perforate the well during that week between re-drilling and the reported completion date. Tr. 239 (V.1), Tr. 190 - 192 (V.3), Tr. 211-12 (V.3). Further, Mr. Wilson's ability to accurately recall and report the details of construction is doubtful.

35. Another fact which undermines Mr. Wilson's claim that he never re-perforated the well is that the performance of the MIT in 1993 would have been a useless exercise on an un-perforated well because a new MIT would have been required after re-perforation. Complainant's Exhibit 6, Part I, Section G(3) of Permit ("Mechanical integrity shall also be demonstrated any time the tubing is removed from the well, the packer is reset, or a loss of mechanical integrity becomes evident during operation."). Re-perforation would have involved removal and resetting of the tubing and packer. Monte Hay and James Clark acknowledged it was odd to conduct an MIT on an unperforated well. Tr 243 (V.1), Tr. 29 -30 (V.3). For this reason, the normal reaction of an owner/operator in Mr. Wilson's position, upon being asked by EPA to conduct an MIT on an unperforated well, would be to advise EPA that the well had not yet been perforated and request to delay any MIT until after perforation. Mr. Wilson did not do this, nor did he correct any of the information in his well file in which he had certified that the well had in fact been perforated at a depth of 941 to 951 feet.

36. EPA has justified the penalty it is seeking by asserting that Mr. Wilson did not demonstrate a good faith attempt to comply with his permit. Tr. 55 - 57 (V.2). Mr. Wilson's lack of good faith is evidenced by statements he made in writing to EPA, such as his statement that he had "...been meaning to plug the well since 1993 but ever 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). This makes clear that Mr. Wilson did not take his obligations seriously; conditions in the Permit did not matter — only letters from EPA reminding him what to do established obligations. However, contrary to his assertions, EPA did provide notices to Mr. Wilson of his obligation to conduct MIT testing and he still failed to 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).

37. 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.

38. On May 16, 2006, Complainant filed an Administrative Complaint against Respondent pertaining to the Gene 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 #KYI0376 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 and $1,000 based on the failure to submit monitoring

reports. In an order issued prior to hearing, this Court has already held that the permit issued to Mr. Wilson was a valid and enforceable permit.

PROPOSED CONCLUSIONS OF LAW

39. Section 300h-2(c)(2) of the Safe Drinking Water Act (SDWA or the Act), as amended by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorizes EPA to assess a civil penalty of up to $5,500 per day for each day of violation, up to a maximum administrative penalty of $137,500, for violations which occurred between January 30, 1997, and March 15, 2004. For violations occurring after March 15, 2004, Section 300h-2(c)(2) of the Act, as modified by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorizes EPA to assess a civil penalty of up to $6,300 per day for each day of violation, up to a maximum administrative penalty of $157,500.

40. Section 300h-2(c)(4)(B) of the Act 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."

41. Respondent violated Part II, Section G(3) of his permit by failing to demonstrate mechanical integrity within 5 years of his last approved demonstration. The Respondent's approved MIT demonstration of October 15, 1993 was the only demonstration of mechanical integrity made by Respondent during the life of his permit. The Respondent's claim that he performed an unwitnessed demonstration of mechanical integrity on April 26, 1999, is not credible and, in any case, was not witnessed or approved, as required by the permit.

Accordingly, Respondent was in violation of Part II, Section G(3) of the permit at least from October 16, 1998, until the well was plugged on June 10, 2005, or for the entire length of the period covered by the Complaint, that being May 16, 2001, to June 10, 2005.

42. 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. 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, that being from May 16, 2001 to June 10, 2005. Respondent's argument [Tr. 223, V.2] 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 and he never started injection, and therefore never "ceased" injection, is not a reasonable interpretation of the Permit. Such an 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 receive heightened and more regular scrutiny and are properly plugged and abandoned if the owner has no intention of using the well. Accordingly, 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 the well was ever active.

43. Even if the permit section applicable to "Inactive Wells" did not apply to Mr. Wilson, 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, that being May 16, 2001, to June 10, 2005, as described in paragraph 41, above. However, failing to meet the permit requirement for Inactive Wells every two years while the well was inactive would produce a higher level of economic benefit for the failure to plug and abandon or demonstrate mechanical integrity, and result in overlapping violations that could support a higher maximum penalty. The penalty EPA is seeking in this case for violations based on a failure to plug and abandon or demonstrate mechanical integrity, $10,291, is reasonable in any case.

44. Respondent violated Part I, Section D(2) of the permit by failing to submit annual monitoring reports during the entire life of the permit. Mr. Wilson did submit several letters providing information that would have been included in an annual monitoring report, such as letters dated June 21, 1991 (Complainants Exhibit 7), and August 18, 2000 (Complainant's Exhibit 17). However, this hardly discharges the Respondent's obligation to submit an annual report. Such reports were supposed to be submitted every year on EPA Form 7520-11. Complainant's Exhibit 6, Part I, Section D(2). As a result of Respondent's failure, EPA was not aware of the inactive status of the well for extended periods, and accordingly was unaware that Mr. Wilson should have been complying with the requirements applicable to Inactive Wells, as discussed above. This violation was also a serious one, as the reporting requirement is a cornerstone of the regulatory program which allows EPA to stay informed about the status of the well. Respondent did not demonstrate any good faith efforts to comply with this requirement.

45. Respondent argues that his obligation to submit annual monitoring reports was not triggered because he never used his well for injection. Mr. Wilson 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, for obvious reasons (the Permittee is

required to monitor injection pressure, annulus pressure, flow rate, and cumulative volume of injection — no results for such parameters would exist unless operation were occurring). The Injection Operation Monitoring obligation 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. Clearly, with the first due date tied to the effective date of the Permit, the annual report obligation is triggered even if the well has not commenced operation. EPA receives annual reports from operators of inactive wells which inform EPA of the status of the well by indicating zero values for the monitoring parameters. Tr. 62 - 67 (V.1). 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).

46. 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 proposed by EPA for this violation is reasonable.

47. As discussed above, the violations in this case are serious. Mr. Wilson's failure to demonstrate mechanical integrity at any time after October 15, 1993, until the well was plugged on June 10, 2005, was a gross breach of permit obligations and created a potential threat to USDWs. If Mr. Wilson's claims that the perforations of the well were cemented off is credited,

that would reduce but not eliminate the environmental threat posed by the well; however, it would also indicate that Mr. Wilson certified inaccurate information in his permit application and did not correct that information to EPA for the life of the permit. Accordingly, any reduction in the environmental threat resulting from the bullhead squeeze is not a basis for reducing the penalty to be assessed in this case.

48. The $291 identified by EPA as economic benefit from the violations in this case is a conservative estimate; it is likely that the actual economic benefit exceeded this amount and that EPA's request for an economic benefit portion of penalty of $291 is more than reasonable.

49. EPA did not present evidence indicating a prior history of violations. Accordingly, no adjustment of penalty is appropriate based on this factor.

50. EPA considered the economic impact of a penalty on the violator and determined that Mr. Wilson would not have difficulty in paying the proposed $11,291 penalty. Tr. 57 (V.2). Mr. Wilson declined to submit information in support of an inability to pay claim and does not dispute his ability to pay the proposed penalty. Tr. 7 - 8 (V.1), Tr. 57 (V.2).

51. With respect to the penalty factor of "such other matters as justice may require," the fact that the violations had existed for several years before the period covered by the Complaint is relevant and further supports a finding that the penalty proposed by EPA is reasonable. In addition, the need to deter other owner/operators from violating UIC requirements justifies imposition of a significant penalty as the oil and gas regulated community is a relatively small one and assessment of a de minimis penalty would send the wrong signal to the regulated community. Tr. 58 (V.2).

52. One of the purposes of penalty assessments is to deter violators from such conduct in the future. See Tull v. United States, 481 U.S. 412 at 422 (1987) (the need for deterrence should

be considered in imposing penalties); Sierra Club v. Simkins Kindustries, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988), cert. denied, 491 U.S. 904 (1989)(imposition of civil penalties "can be an important deterrence against future violations").

COMPLAINANT'S POST-HEARING BRIEF

I. INTRODUCTION

This matter is before the Presiding Officer for assessment of a penalty for the Respondent's violations of a permit issued pursuant to the Safe Drinking Water Act. The Presiding Officer issued an Order prior to hearing holding that the Respondent was subject to a valid permit. However, Motions for Accelerated Decision on other issues were denied and a hearing was held on the issues of liability and the amount of any penalty to be assessed against Respondent. The hearing took place on September 25 through 27, 2007, in Ashland, Kentucky. At the hearing, EPA proposed a penalty of $11,291 against Respondent for the alleged violations.

For the reasons outlined in Complainant's Proposed Findings of Fact and Conclusions of Law, Complainant contends Respondent is liable for violating his permit and that an application of the statutory penalty factors to the facts of this case warrants an assessment of the proposed penalty of $11,291.

In order to avoid a lengthy and repetitive discussion, the Post-Hearing Brief section of this pleading does not include a statement of facts, a description of the violations, or an application of each penalty factor to the facts, as the preceding Complainant's Proposed Findings of Fact and Conclusions of Law reflect Complainant's summary of the evidence presented at hearing and an explanation of the violations and basis for the proposed penalty, and is fully supported by record references and legal citations. The following discussion focuses on specific

issues that warrant further discussion and legal analysis. In particular, the following brief responds to a variety of "defenses" asserted by the Respondent in prior pleadings and at hearing.

Mr. Wilson utterly and completely failed to comply with the conditions of his permit from the time of its issuance in 1990 until he finally plugged the well in June of 2005. He could not be bothered to provide correct information to EPA, to become familiar with the permit and its requirements, or to comply with any of the requirements. As the foregoing Findings of Fact and Conclusions of Law demonstrate, whenever a permit requirement became applicable to Mr. Wilson, he violated it. In 15 years, he did not submit one Annual Monitoring Report. His initial MIT was performed in 1993 and he never did perform another one.

Even accepting entirely Mr. Wilson's version of events, there is no set of facts or interpretation of the permit that does not result in a finding of violation for a long period of time. For example, even assuming that Mr. Wilson was only required to demonstrate mechanical integrity every five years, he still was in violation from October 16, 1998 to June 10, 2005. Furthermore, even if one accepts Mr. Wilson's claim that he attempted an MIT on April 26, 1999, but was unable to complete an approved MIT because EPA's witness did not show, and if this were considered to mitigate a portion of the penalty, Mr. Wilson still did not perform a succeeding MIT within 5 years of that date. Thus, even if Mr. Wilson were viewed as having a performed a compliant MIT on April 26, 1999, he still would have been in violation from April 27, 2004, to June 10, 2005, for over a year of violation. Even under that scenario, which completely skews the facts in Mr. Wilson's favor, the $11,291 penalty sought by EPA would be reasonable.

Against this backdrop of disregard of his permit requirements, Mr. Wilson offers a series of "defenses." Defenses is not really an accurate word for Mr. Wilson's case, because what Mr.

Wilson really offers is a series of excuses. There is always an excuse, or someone else to blame, for Mr. Wilson's failures to comply with the permit requirements.

II. MR. WILSON'S EXCUSES

A. Excuse Number One - EPA Did Not Remind Me Enough

One of Mr. Wilson's excuses is that his failure to conduct MIT tests when required was a result of EPA's failure to remind him to conduct the MITs. Tr. 184 (V.3)(Well, it's not my fault you [EPA] didn't get it [notice] to me any earlier." Mr. Wilson viewed his obligation to comply with the permit to be dependent on EPA telling him what to do and when to do it. This theory turns the concept of environmental permits and conditions upside down. This is especially true in light of the fact that Mr. Wilson is an attorney who is fully capable of reading a permit and understanding what it means. Tr. 128 (V.3). Mr. Wilson's excuse that it was EPA's responsibility to notify him when his permit required any activity on his part should not mitigate the assessment of a penalty against him. If anything, this attitude warrants the imposition of a higher penalty.

Further, this excuse is especially lame in light of the fact that EPA did remind Mr. Wilson of his MIT obligation. Complainant's Exhibits 12, 14, and 16. Even after receiving notification of the need to demonstrate mechanical integrity, Mr. Wilson remained out of compliance for more than six years.

B. Excuse Number Two - I Never Used the Well

Mr. Wilson has repeatedly cited the fact that he never used the well as justification for his inattention to permitting requirements. Tr. 178 (V.3), Tr. 190 (V.3), Complainant's Exhibits 17, 20, 21. However, EPA witnesses described the threats that are posed to USDWs by inactive injection wells and explained why compliance with permitting requirements is equally, if not

more, important for inactive wells as for wells that are regularly injecting. Tr. 58 - 60 (V.1), Tr. 50 - 51 (V.2).

C. Excuse Number Three - The Well Did Not Threaten the Environment

Mr. Wilson has asserted that the well did not pose a threat to the environment. First, he presented evidence of the remoteness of the well from people and development. Tr. 228 (V.1). However, the proximity of populations is irrelevant to the protection of USDWs, which is the primary purpose of the UIC program. Second, as discussed above, Mr. Wilson presented evidence regarding the cementing off of perforations to show that the well did not threaten the environment. Also as noted above, this should not be a basis for mitigating the penalty in this case because it is inconsistent with every piece of information submitted to EPA during the life of the permit. Mr. Wilson certified to EPA the accuracy of information (Complainant's Exhibit 1) showing that the well was perforated at a depth of 941 to 951 feet. Mr. Wilson never corrected or revised the information submitted to EPA during the permit life, and after completion of an MIT demonstration and submission of a completion report (Complainant's Exhibits 9 and 10) the well was ready and authorized for injection. EPA understandably relied on information submitted by the applicant and treated the well as one which posed a potential threat to USDWs. Mr. Wilson should not be rewarded for making a mockery of the UIC permitting program in this way.

D. Excuse Number Four - EPA Did Not Show Up to Witness an MIT

As discussed above, Mr. Wilson's claim that an MIT was scheduled for April 26, 1999, but EPA's witness did not show up, is not credible. However, even if credited, the attempted MIT would not satisfy the permit requirement for a witnessed and approved MIT. Further, Mr. Wilson did not submit a report of the MIT demonstration as required by Part I, Section D(1) of

the permit. Moreover, even if Mr. Wilson were deemed to have completed a compliant MIT on April 26, 1999, this was already four months past due under the 5 year deadline for repeating MIT demonstrations, and well beyond the 2 year deadline for demonstrating non-endangerment for inactive wells. Then, Mr. Wilson again failed to MIT for the remainder of the permit term, and the well was not plugged until June 10, 2005, resulting in an additional extended period of noncompliance. Clearly, Mr. Wilson was not attentive to these permit requirements and the alleged, but doubtful, events of April 26, 1999, should not be a basis for mitigating his penalty, especially when the penalty proposed by EPA of $11,291 is more than reasonable.

E. Excuse Number Five - EPA Was Unfair to Me

Mr. Wilson suggests that EPA treated him unfairly and differently from other operators. Tr. 103 - 05 (V.3). In fact, EPA's issuance of the permit Mr. Wilson applied for is cited by Mr. Wilson as one example of the unfair treatment he received from EPA. Id. Tr. 199 - 200 (V.2), Tr. 103 - 05 (V.3). Issuing a permit that he requested is an odd form of unfair treatment for Mr. Wilson to allege.

Mr. Wilson also complains that the permit was not in the form he wanted because it did not allow him to accept and inject brine from other operators. Tr. 207 - 208 (V.2). Mr Wilson did request to modify his permit to authorize the injection of brine from other operators. Respondent's Exhibits 2 and 3. However, at the time he made these requests he still had not conducted his initial MIT demonstration or submitted the Completion Report required by the Permit before he was authorized to inject at all. Complainant's Exhibit 6, Part I, Section A(4), Complainant's Exhibits 9 and 10. Thus, it is not surprising that his request was not granted.

To support his claim that he was unfairly treated by EPA's issuance of a permit that did not authorize the injection of brine from other operators, Mr. Wilson suggests that even his initial

application requested authorization to inject brine from other operators. Tr. 191 (V.2). Mr. Wilson cites a reference in the application to his plans to inject brine from "surrounding leases" as evidence that he was seeking to inject brine from other operators. Complainant's Exhibit 1, Attachment K, page 5 ("produced brine will be hauled in from surrounding leases by truck and stored in holding tanks prior to injection"). However, Mr. Wilson has elsewhere acknowledged his original intent was to inject brine from his own operations at Cam Creek. Complainant's Exhibit 17 (August 18, 2000, letter to EPA from Mr. Wilson)("The anticipated use was to do our own oil wells in the community; however, they were all sold to Mr. Ed Jordan before the need arose").

Moreover, Mr. Wilson was intentionally distorting the application's use of the term "surrounding leases," as this is a term used throughout the oil and gas business to refer to oil and gas production wells. Mr. Wilson argued that the term leases must refer to other operators because he owned the Cam Creek wells. However, at hearing EPA presented numerous form documents used by EPA showing that oil and gas wells are commonly referred to as leases, whether or not the underlying property is owned also by the operator of the leases. Tr. 169 - 172. It is also clear from other parts of the application that the "surrounding leases" referred to Mr. Wilson's own production wells at Cam Creek, as the application also provides in Attachment H, at page 3-4, that data from the analysis of injection fluid was obtained "from the existing saltwater gathering system holding tank that contains a combination of water from all wells that are to be used during the injection process." Complainant's Exhibit 1. Obviously, this refers to brine produced from Mr. Wilson's own wells and held in tanks at Cam Creek, and not to other owner/operators from whom Mr. Wilson might obtain brine in the future. Mr. Wilson played dumb when this was pointed out to him. Tr. 172 (V.3). Mr. Wilson stated "I don't know if he

went to other surrounding leases and got them or not." Tr. 172 (V.3). This is utterly lacking in credbility.

Mr. Wilson claimed ignorance about the term "lease" being a term of general usage for oil and gas wells in the oil and gas industry. Tr. 174 (V.3). However, he later used the term "lease" to refer to his own Cam Creek production wells while examining one of his own witnesses. Tr. 201 (V.3)("Do you know who assisted me in operating that lease?"). This is but one example of a pattern in Mr. Wilson's testimony, which in general reflects a willingness to evade, dissemble, twist the facts, and provide non-responsive answers to cross-examination.

As another example, Mr. Wilson seems to blame delays in his plugging of the well on EPA's failure to provide information about the plugging process, and distorts the documentary record in an effort to shift the blame from himself, where it belongs, to EPA. In Complainant's Exhibit 25, Mr. Wilson's letter of March 31, 2005, he states "You will note in my correspondence to your agency in 2000 I asked for additional information which came five (5) years later from your office." Mr. Wilson is apparently referring to Complainant's Exhibit 17, his letter of August 18, 2000, which states "we plan on plugging the well as soon as Mr. Ed Jordan is available for his services" and asks EPA "to advise if additional information is required." The letter does not contain any request for additional information of EPA as Mr. Wilson later characterizes it. Moreover, EPA had no reason to provide more information to Mr. Wilson since his approved plugging plan was a part of his permit and EPA was in the position of waiting for Mr. Wilson to provide a more specific date or time frame for the plugging to occur. Complainant's Exhibit 5, Part I, Section E, and Part II, Section F(1) and (2), Tr. 74 - 77 (V. 1).

Ultimately, Mr. Wilson's claims of unfair treatment are without a factual basis. Perhaps Mr. Wilson is claiming that EPA must enforce against every well owner who has a violation of a

permit in exactly the same way; however, such a standard would be impossible to meet and EPA has broad enforcement discretion to allocate enforcement resources to specific cases.

To the extent Mr. Wilson is raising a selective prosecution he clearly has not asserted facts to support such a claim. In B & R Oil, the Environmental Appeals Board noted that "Courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." Id. 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 (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.

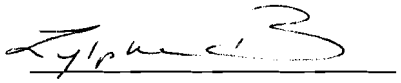
Thus, Mr. Wilson's claims of unfair and discriminatory treatment do not provide a basis for mitigating EPA's proposed penalty. What would be unfair would be to allow Mr. Wilson to blow off his permit for 15 years without requiring him to pay a penalty, when other owner/operators of injection wells are expending resources to comply with permit conditions.

III. Conclusion

After consideration of the statutory factors as outlined in the Proposed Findings of Fact and Conclusions of Law, above, Complainant's proposed penalty of $11,291 is reasonable and appropriate.

Based on the evidence presented at hearing and the administrative record in this matter, Complainant respectfully requests that the Honorable Judge Schub assess a civil penalty of $11,291 against Respondent.

Respectfully submitted,



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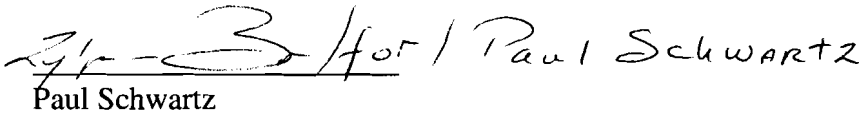

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, the original and one copy of "Complainant's Proposed Findings of Fact and Conclusions of Law and Post-Hearing Brief" was delivered by interoffice mail to the Regional Hearing Clerk and copies were sent to the following persons in the manner noted.

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