UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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

ORDER DENYING MOTION TO REOPEN HEARING

An Initial Decision after hearing was issued in this matter on August 21, 2008, finding Respondent Gene A. Wilson ("Respondent" or "Mr. Wilson"), liable for violations of the Safe Drinking Water Act ("Act"), 42 U.S.C. 42 U.S.C. §300f, regulations promulgated pursuant to the Act, 40 C.F.R. §§144.51(a), 144.52(a)(6) and permit #KY 10376. Respondent was assessed a civil penalty of $8,291. On September 5, 2008, Respondent filed a Motion to Reopen Hearing ("Motion") pursuant to Rule 28 of the Consolidated Rules of Practice, 40 C.F.R. §22.28. Thereafter, on September 19, 2008, Complainant, U.S. Environmental Protection Agency ("Complainant" or "EPA"), filed a Reply to Respondent's Motion to Reopen Hearing, to which Respondent filed a Response ("Response").

Respondent seeks to have the case "reopened to continue testimony," to establish that: a) Respondent was not in the oil and gas business, in order to dispel the belief that punishing Respondent will send a message to the oil and gas producers; b) EPA was aware in 1993, that the well was plugged to 939 feet; c) prior to a new EPA policy in 2000, annual monitoring reports were not required until the well commenced operations; d) EPA failed to notify Respondent of the 2000 policy regarding annual monitoring reports; e) language contained in the Permit required plugging and abandonment only

after cessation of injection which had never begun; f) EPA notified other operators to conduct MITs and to plug wells; and g) the bullhead squeeze was still ongoing after information was given to Ashland Testing Laboratories, Inc., to apply for the permit. Respondent also wishes to place his other permit files into evidence, along with witness (unnamed) testimony, to "shed light" on the Gene Wilson #1 Permit. Lastly, Mr. Wilson wants to establish his history of good faith compliance and further buttress his arguments regarding selective prosecution through introduction of records obtained through the Freedom of Information Act ("FOIA").

Other than a reference to a particular telephone bill and a general reference to documents contained in his other permit files, Respondent neither indicates which documents he intends to introduce nor identifies any witness whose testimony he seeks to elicit in support of any of the above.

Section 22.28(a) of the Consolidated Rules, provides that a motion to reopen a hearing must "(1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing." 40 C.F.R. §22.28(a).

Relying on the criteria set forth in the regulation, and without further elaboration, Complainant opposes Respondent's Motion on the grounds that a) Respondent is not seeking to introduce new evidence and b) his arguments are a rehashing of the evidence presented at the hearing and in his briefs, and are therefore, cumulative.

In the matter of *Goodman Oil Company and Goodman Oil Company of Lewiston*, Docket No. RCRA-10-2000-0113, 2003 EPA ALJ LEXIS 23 (ALJ, Order Denying Motion to Reopen Hearing, April 10, 2003), Chief Administrative Law Judge Susan L. Biro, summarizes some of the case law in this area, stating:

> Rule 22.28(a) of the Consolidated Rules of Practice requires a showing that the 'new evidence. . . is not cumulative' and of good cause why such new evidence 'was not adduced at the hearing.' EPA's Administrative Law Judges have long held that 'motions to reopen a hearing are not lightly to be granted' and 'cannot be used as a means for correcting errors in strategy or oversights at hearing,' due to the policies of finality in litigation and of avoiding exposure of the prevailing party to the risk of having a favorable decision overturned in the absence of substantial reasons. *Ketchikan Pulp Company*, 1996 EPA ALJ LEXIS 10(ALJ, Order Denying Respondent's Motion to Reopen Hearing, Sept. 5, 1996); *N.O.C., Inc., T/A Noble Oil Co. (NOC)*, 1983 EPA ALJ LEXIS 4* 35, nn.13, 15 (ALJ, Order Denying Motion to Reopen Hearing, May 16, 1983), aff'd. 1 E.A.D 977 (CJ0 1985); see also, *F & K Plating Company*, 1986 EPA ALJ LEXIS 24 (ALJ, Order Denying Motion to Reopen Hearing, June 13, 1986), aff'd, 2 E.A.D. 443 (CJO 1987); *Boliden-Metech, Inc.*, EPA Docket No. TSCA-1-1098 (ALJ, Order Denying Motion to Reopen Hearing, Nov. 15, 1989), aff'd, 3 E.A.D. 439 (CJO, Nov. 21, 1990); *Ashland Chemical Co.*, 1987 EPA ALJ LEXIS 12 (ALJ, Order Denying Motion to Reopen Hearing, Sept. 29, 1987).

Having reviewed Respondent's Motion and considered the regulation and case law applicable to reopening a hearing, I am in agreement with Complainant. Respondent has neither offered the particular "new evidence" he seeks to introduce, shown that any evidence - almost all of which is referred to in vague and general terms - is not cumulative, nor established good cause why such evidence was not adduced at hearing.

In essence, each and every argument raised in Respondent's Motion was raised in a pre-hearing pleading, post-hearing brief, covered at hearing and/or addressed and ruled upon in a previous Order or in the Initial Decision. All arguments Respondent makes in support of reopening the hearing are not simply cumulative, but redundant, such that

addressing each one would involve reiterating much of what is contained in the three volume hearing transcript and 53-page Initial Decision.

To illustrate, Mr. Wilson seeks to have records from his other Permit files made part of the case at hand. However, Mr. Wilson unsuccessfully sought to have the files included more than once during the course of this proceeding. The Initial Decision addresses my rulings on motions filed for that purpose.[1] (Initial Decision, p.3) Similarly, Respondent's previously filed motion to add the telephone bill was already addressed. He lacked good cause for failing to submit the bill previously and lacks the requisite good cause now. (Initial Decision, p. 6) Furthermore, Respondent's attempts to introduce the telephone bill were not only previously considered, but testimony pertaining to conversations with Ms. Chen regarding scheduling of a 1999 Mechanical Integrity Test ("MIT"), consumed a considerable portion of Mr. Wilson's case. Ultimately, I found that regardless of what was discussed on the telephone with Ms. Chen, Respondent's employees assumed a test was scheduled to take place on April 26, 1999, but neither recorded an MIT nor reported test results to EPA, as required. (Initial Decision, pp. 22-23) Claims of selective prosecution and efforts to introduce documents obtained through FOIA to support such claims, had also been raised by Respondent, argued by the parties, and addressed by the undersigned at several intervals. (Initial Decision, pp. 27-28) Similarly, Mr. Wilson's contentions that EPA had some duty to facilitate a permittee's compliance with terms and conditions of a permit were thoroughly addressed as well. (Initial Decision, p. 24) The failure to raise any new evidence is also apparent with respect to other issues Mr. Wilson raises, such as depth to which the well was cased and cemented, frequency required for testing or plugging a well, and the performance of a

[1] Two such times were pursuant to motions filed on February 26, 2007, and May 1, 2007.

bullhead squeeze, all of which were covered at length during the course of the hearing. Respondent's motion fails to state any basis upon which to reopen the hearing to re-explore these same issues, nor does it identify any relevant evidence not previously introduced. In essence, Mr. Wilson seeks to reopen the hearing to buttress evidence already introduced, rather than any evidence that is not cumulative. Even applying the broader interpretation of "new evidence," to include not only evidence which did not exist at the time of hearing, but that which is "newly discovered," Mr. Wilson would not prevail. *See, Goodman Oil Company, supra, at 5.*

Respondent expresses some regret in both his Motion and Response that he had not spent his allotted time at hearing differently (Motion, p. 1) He also objects to having been denied a motion for additional time for hearing, yet had fully concurred in concluding the hearing in three days when four full days had been scheduled. As set forth above, correcting Respondent's strategic errors is not a basis for reopening the hearing. *F & K Plating Company, supra at 9.*

Respondent also points to what he considers to be two inaccuracies in the Initial Decision. First, he seeks to "correct" that the well was located on a lease in Martha, Kentucky while he owned the land outright in fee simple. Secondly, he objects to the finding that he is "doing business under the laws of Kentucky," as an implication that he is in the oil and gas business. Mr. Wilson seeks to clarify the second point in order to lessen the penalty assessed which took into consideration deterrence to other members of the regulated community.

The issue regarding use of the phrase "lease" was covered at the hearing, where it was sufficiently established the term lease is generally used for oil and gas and injection

wells, even if the underlying property is owned. Transcript ("Tr."), III[2], pp. 169-174. A number of exhibits contained the term "lease" describing property on which wells were located. For example, Attachment K to the Permit Application refers to the fact that "produced brine will be hauled in from surrounding leases" and requires that the applicant fill in the "Lease/well number" to describe Lease ownership. Tr. III p. 159, Exhibit 1, p. 5.

Respondent's objections to the finding that he is doing business under the laws of Kentucky lack merit as well. Clearly, Mr. Wilson was and continues to conduct business under the laws of Kentucky as reflected in his own testimony and that of one of his key witnesses, Ms. Patty Carter. As Ms. Carter testified, "I started off with him at a dredging operation. We sold the dredging operation and moved to the law office but he's more or less into real estate development. . . We did get into the oil and gas out there on the farm for a little while and then sold it to Ed Jordan and we opened a bank last year, so it's primarily that type things." Tr. II, p. 156. Mr. Wilson himself testified, "I was very active dealing with EPA and I thought I had a good relationship with them the first four and a half years that I learning about oil and gas business, because I was almost in contact with them every day." Vol. III, p. 100. Lastly, he states, "if you ask what I'm doing now, I'm president and chairman of the board of a bank. . .." Tr. III, p. 175. Most importantly, even if any of the arguments had merit, evidence offered regarding any errors made must be likely to change the result. *N.O.C., supra, at 28.* Certainly, in the matter at hand, even if these findings had been erroneous, that would not impact upon the result of the decision in any manner.

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[2] Transcript volumes are indicated as I, II, or III, followed by page number.

IT IS ORDERED:

1. Respondent's Motion is hereby **denied**.

2. Respondent shall pay the full amount of the $8,291 penalty assessed in the Initial Decision within 60 days of the date that the Initial Decision becomes final. Pursuant to 40 C.F.R. §22.27(c) and 22.28(b),[3] the Initial Decision shall become the Final Order of the Agency forty-five (45) days after service upon the parties of this Order Denying Motion to Reopen the Hearing, unless an appeal is taken pursuant to 40 C.F.R. §22.30 or the Environmental Appeals Board elects *sua sponte* to review the Initial Decision. An appeal must be filed within thirty (30) days after service of this Order upon the parties. 40 C.F.R. §22.30(a).

Date: November 24, 2008

Susan B. Schub
Presiding Officer

[3] The filing of a motion to reopen a hearing "automatically stay[s] the running of the time period for an initial decision becoming final under 22.27(c) and for appeal under §22.30." 40 C.F.R. §22.28(b)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Order Denying Motion to Reopen Hearing, in the Matter of Gene A. Wilson, Docket No., SDWA-04-2005-1016, on the parties listed below in the manner indicated:

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Certified Mail – (Return Receipt Requested)

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(via Intra-Office Mail)

Date: 11-25-08

Patricia A. Bullock
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