UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

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

COMPLAINANT'S REPLY TO RESPONDENT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND POST-HEARING BRIEF

COMES NOW the Complainant, the United States Environmental Protection Agency (EPA), Region 4, and hereby submits its Reply to Respondent's Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Brief.

Reply to Respondent's Findings of Fact

1. In paragraphs 1 through 6 of his Findings of Fact, Respondent seeks to establish that the Gene Wilson #1 well had been completely sealed off and could not be used as an injection well. However, when Respondent questioned his witness, Monte Hay, regarding this time period which extended from January through May 1989, Respondent posed the leading question, "Because at that stage, we were trying to make a producing oil or gas well, not an injection well?" Tr. 217 (V. I). During this time frame, Respondent was, by his own admission, trying to make the Collier Creek well a production well, not an injection well. This is corroborated by the same witness in a subsequent response to questions posed by Judge Schub. Tr. 234 (V.1). When asked by the Judge whether what he is testifying to is what the well was like in 1989 when it was originally planned as a production well, Mr. Hay states that is correct. On redirect of Monte Hay, Respondent states that at the time he and Mr. Hay were trying to make the well a producing well, they were not even thinking about injection wells. Tr. 239 (V. 1). It was only after the well

failed as a producer that the idea of making it an injection well was considered. Tr. 240 (V.1). Monte Hay admitted that after the well was sealed off, it could have been deepened again or reperforated, which would have made it useful as an injection well. Tr. 238, 240 (V.1). So even though the well was configured as a production well when Mr. Hay was working with Respondent, nothing precludes the possibility that the well was reconfigured when Respondent decided to make it an injection well. Monte Hay would not have known about subsequent activity to re-perforate the well and make it a viable injection well. See, e.g., Tr. 234 (V.1).

Further, the injection well permit application, certified to by Respondent and submitted after the well's failure as a producer, states that the well was configured as a perforated injection well. Complainant's Exhibit 1, Attachments J and L. Therefore, Respondent either made false statements on the permit application or false statements during the course of the hearing. Under either scenario, Respondent impugns his own credibility.

Finally, Respondent points out in paragraph 11 that he wrote to EPA requesting that the subject injection well application be considered an emergency for immediate approval because he wished to use it to handle spills on the Cam Creek property. This would be an odd request unless the Gene Wilson #1 well was up and ready to be used as an injection well.

2. Paragraphs 7 through 10 and 12 through 16 are either irrelevant or of little probative value to this case.

3. In paragraphs 17 through 19, Respondent seeks to make much of his efforts to modify the permit to enable him to take brine from other owner/operators. But the matter of a permit modification has no bearing on Respondent's permit obligations to demonstrate the mechanical integrity and submit annual monitoring reports for the subject well. If EPA had authorized the

modification, Respondent would have had to comply with these requirements. If EPA had denied the modification in writing, Respondent still would have had to comply with these requirements. In his testimony regarding his efforts to obtain a modification and in his reply brief, Respondent himself does not offer any reason why a permit modification is relevant to his failure to comply with the permit obligations. Tr. 206-209 (V.2).

4. The content of paragraphs 21 through 23 is either irrelevant or not probative of the issues.

5. In paragraph 24, Respondent asserts that his secretary, Patty Carter, called Ms. Carol Chen and rescheduled the MIT originally scheduled for January 21, 1999, to a new date of April 26, 1999. According to Respondent, when EPA's inspector did not show up on that date to witness the test, his secretary called Carol Chen who advised the secretary that the test would be rescheduled at a later date. However this entire account does not ring true for several reasons.

First, Patty Carter's affidavit, submitted as Respondent's Exhibit 22, makes no mention of a conversation between Ms. Carter and Ms. Chen on April 26, 1999. Had Ms. Carter engaged in a conversation during which Ms. Chen said that the MIT would be rescheduled at a later date, surely this information would have been contained in Carter's affidavit. Instead, Ms. Carter's affidavit ends rather abruptly with no mention being made of a conversation with Ms. Chen on April 26, 1999. Further, when asked whether or not she had talked with Carol Chen on April 26, 1999, Ms. Carter's first response was that she had not, but rather that she was trying to contact David Hayes on that day. Tr. 145 (V.2). It was only after Respondent cued her with a leading question that Ms. Carter remembered the answer she was supposed to give, that being that she had called and spoken with Ms. Chen. Tr. 145 (V.2).

Second, Ms. Chen maintains detailed records of mechanical integrity testings and well

pluggings so that she knows when and where the contractor should have inspectors available to witness these events on behalf of EPA. Tr. 156-161 (V.1). Ms. Chen testified that she had no record and no recollection of rescheduling the January 21, 1999 MIT for April 26, 1999. Tr. 184 (V.1) and Tr. 238-239 (V.3).

Ms. Chen produced all of the records of MITs and pluggings that she had covering the time period from December 4, 1998 through May 10, 1999, and the only mention of the subject well is the cancellation of the MIT scheduled for January 21, 1999. Thus, the entire issue regarding David Haye' failure to be present for the April 26, 1999, MIT is irrelevant because he was never directed to be there. Ms. Chen would have had a technical direction document indicating an MIT for April 26, 1999, if an inspector should have been there. Since she had no such document in her files, either no MIT was scheduled for that date or Ms. Chen failed to provide a technical direction document setting forth the April 26th date for the test.

According to Respondent, Patty Carter called Carol Chen on January 11, 1999 and rescheduled the January 21st MIT for April 26, 1999. See, e.g., Tr. 144-145 (V.2) and Complainant's Exhibit 30. But Ms. Chen testified that January 1999 would have been too far in advance of planning for April and she would not have started working on an April schedule yet. Tr. 163-164 (V1) and Tr. 184-185 (V.1). So it would not have been practical for her to schedule an April MIT in January.

Ms. Chen also referred to her logbook in which she maintained a record of telephone conversations with owner/operators. She testified that there was no mention of a phone call with Respondent or his secretary on January 11, 1999, in the logbook. Tr. 185 and 202-204 (V. 1).

6. Respondent states in paragraph 27 that he received a plugging plan on March 14, 2005.

However, the March 14, 2005, letter transmitting a copy of the approved plugging plan plainly states that the originally issued permit contains the approved plugging plan. A glance at page I-6 of the permit does reveal the plugging and abandonment plan for the well. Complainant's Exhibits 6 and 22.

7. Respondent's assertion in paragraph 26 that when he received the notice of violation in 2005, he had been in regular contact with EPA during the previous past 10 years is simply unsubstantiated by the record.

8. Respondent's general characterization of EPA's dealings with him as being harsh, overbearing, and negligent are merely self-serving, unsupported by the record, and irrelevant.

9. In paragraph 41, Respondent raises the issue of notices that EPA used to provide to owner/operators regarding due dates for mechanical integrity testing. Carol Chen testified that she would send out notices to try to get the owner/operators to test the wells at least every five years. Tr. 169 (V.1). She could not address the need for more frequent testing, i.e. every two years, for inactive wells because she did not know specifically what was going on with every well. Id. The record reveals that Respondent was, in fact, notified every 5 years of the due date for mechanical integrity testing. Since Respondent's first and only demonstration of mechanical integrity for the subject well took place on October 15, 1993, the next due date, if the well was active, would have been October 15, 1998. When EPA reviewed its records and found that no test had been conducted by this date, it notified Respondent and scheduled a test for his well for January 21, 1999. Complainant's Exhibit 14. When no MIT was performed in 1999, EPA again notified Respondent in August 2000 that he needed to provide a copy of the most recent mechanical integrity test. Complainant's Exhibit 16. Making no mention of EPA's having failed

to reschedule an MIT or of a successful MIT's having been performed, Respondent answered only that he planned to plug the well as soon as a certain plugger was available. Complainant's Exhibit 17. Having afforded Respondent ample opportunity to either test or plug the subject well, EPA pursued a standard approach, under the circumstances, of taking enforcement action, which did, finally, result in Respondent closing the well.

10. In paragraph 46, Respondent states that Monte Hay advised the Court that Complainant's demonstrative exhibit was incorrect. First, a more accurate statement is that through a series of leading questions, Mr. Hay agreed with Respondent that the demonstrative exhibit was incorrect. Second, the demonstrative was nothing more than an enlargement of the well diagram submitted and certified to by Respondent as part of his permit application. Tr. 37-41 (V.1). Finally as far as both paragraphs 46,47, and 48C-E, Mr. Hay was involved with trying to make the subject well into a production well and would not have been familiar with any subsequent efforts to complete it as an injection well or with its subsequent construction. Tr. 214-217 (V.1).

11. With regard to paragraph 48A, reference is made to item 5 above, in which it is explained that the matter of the inspector David Hayes is irrelevant because Carol Chen never directed that any inspector be available for an MIT on April 26, 1999.

12. While Respondent's closest neighbor to the subject well may have been a half mile away, as stated in paragraph 48B, there were people living in a tenant house roughly a couple of hundred yards from the well. Tr. 21-23 (V. 2). Notwithstanding that fact, the focus of the underground injection control program is the protection of USDWs, and there were several USDWs located in the area of the well. Tr. 41 (V.1)

13. In paragraph 51, Respondent misconstrues Randy Vaughn's testimony, stating that Mr.

Vaughn "...did not visit the subject well for six years after learning of the alleged violation." What Mr. Vaughn testified to was that he first visited the site five years after he became the enforcement officer for the area. Tr. 65 (V.2).

14. In paragraph 55, Respondent incorrectly states that Mr. Hamilton testified that "... the well was totally sealed and that no contamination could go into the water surface." Rather, Mr. Hamilton gave that response to a hypothetical question posed by Respondent. Tr. 117 (V. 2). Further, during the hearing, Counsel for Complainant objected to this same assertion concerning Mr. Hamilton's testimony, which objection was sustained. Tr. 120 (V.20.).

15. In paragraph 59, Respondent claims that Randy Poston states in his affidavit that the well on Collier Creek, i.e., the subject well, was never put into service. The full statement made by Mr. Poston in his affidavit is that it is his understanding based on talking with other oil and gas producers in the Martha community that the well was never put into service. Respondent's Exhibit B (V.2).

16. Respondent presents highlights of James Clark's testimony in paragraph 61. It was evident during the hearing, and the transcript also reveals, that Mr. Clark was unsure about some of the 'facts' to which he testified and unsure about some of the 'facts' he swore to in his affidavit. For example, Mr. Clark did not seem to know how he was supposed to answer the question regarding whether or not he had informed Respondent of the MIT pretest which he supposedly conducted on April 26, 1999. He seemed afraid to say that he had told Respondent about the pretest on April 26, but then said he was "pretty sure" he would have. Tr. 21 (V.3). But under the pressure of Respondent's leading, Mr. Clark was able to agree with certainty that he had <u>not</u> told Respondent about the pretest. Tr. 40 (V.3).

17. Respondent's statement, attributed to Ed Jordan, in paragraph 62 F, is a mischaracterization of what Mr. Jordan said. Mr. Jordan did not state that EPA "always" gave notice to do MIT tests until two years ago. Tr. 206 (V.3). Mr. Jordan only testified to his own experience with EPA. Carol Chen testified concerning EPA's practice of notifying owner/operators of MIT due dates. Tr. 166-170 (V.1).

Reply to Respondent's Conclusions of Law

18. Respondent's paragraph 63 inaccurately represents EPA's position. Counsel for EPA clearly stated in the opening statement that EPA could not scientifically determine whether or not Respondent ever injected into his well. Tr. 22 (V.1.). EPA did take the position that the well posed an environmental threat even if it was not being injected into because formation fluid could flow up through the well and out into USDWs through breaches in the casing. Tr. 49-50 (V.1). Whether or not the well was ever injected into cannot be verified and is irrelevant anyway.

19. Respondent relies on his not having profited from the subject well to conclude in paragraph 63 that there was no economic benefit to him. However, economic benefit is not limited to profit, but includes avoided and delayed compliance costs. Complainant's Exhibit 28.

20. There is no credible evidence to support Respondent's assertion that he regularly asked EPA to modify his permit over an eight-year period from 1992 to 2000, as he states in paragraph 64. Respondent produced two letters, one written in 1992 and the other in 1993, in which he requested a modification of his permit. Respondent's Exhibits 2 and 3.

Reply to Respondent's Post-Hearing Brief

For the reasons outlined above and in Complainant's previously filed Brief, Complainant re-asserts that 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 $11,192.

In the narrative portion of his Post-Hearing Brief, Respondent relies on EPA's failure to provide notice to conduct an MIT test as a basis for affording him relief. He even goes as far as saying that if EPA thought he should have tested his well every two years, it should have notified him. First, as stated in item 9 above, Complainant did notify Respondent when an MIT was due. But EPA never took it upon itself to keep notifying an owner or operator until the well was tested. Respondent was afforded an opportunity in 1999 and another opportunity in 2000 to demonstrate the mechanical integrity of his well, and took advantage of neither. Second, since he was not submitting annual monitoring reports, EPA had no way of knowing that he should have been testing the well every two years, and therefore checked for compliance on a five-year basis.

Overall, Respondent's Brief is riddled with statements that find no real support in the record or have no bearing on the issues. The transcript attests to the fact that during the course of the hearing, he controlled his witnesses' testimony by asking leading questions, thereby suggesting responses consistent with his story line. When all else fails, a common tactic is to vilify your opponent, which Respondent sought to do with regard to Counsel for Complainant during the hearing and in his brief. All in all, what emerges is a picture of a Respondent throwing everything at the wall in the hope that something will stick.

Having sold his wells on Cam Creek and finding himself unable to modify the permit,

Respondent saw no profit in the well on Collier Creek and so ignored it and the permit. When he received notices to test the well for mechanical integrity, he used delaying tactics to avoid doing so. In 1999, January weather was too bad for testing a well (although other owner/operators were able to test their wells in January). In 2000, his plugger, Ed Jordan, was not available to plug the well, and seemingly never became available in the ensuing five years.

Based on the evidence presented at the 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date indicated below, the original and one copy of "Complainant's Reply to Respondent'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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