

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

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SDWA Appeal No. 13-01

In the Matter of:

Maralex Disposal, LLC
Ignacio, Colorado

Docket No. SDWA-8-2011-0079 (Region 8)

Appeal from the Initial Decision
Of the Presiding Officer, Administrative Law Judge
Elyana R. Sutin issued on July 8, 2013

APPELLANT'S APPEAL BRIEF

Respectfully submitted,

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August 15, 2013

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9. INTRODUCTION

Appellant, Maralex Disposal, LLC (“Appellant”), by and through its undersigned counsel, William E. Zimsky, seeks review of the Initial Decision of Presiding Officer Elyana R. Sutin issued on July 8, 2013, assessing a civil penalty of \$88,900 for violations of Section 1423 of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(1) and 40 C.F.R. § 144.51(q)(1). For the reasons set forth below, the Presiding Officer erred in her conclusion that the injection well at issue, the Ferguson # 1 Well, lacked mechanical integrity. Even if the Board affirms the Presiding Judge’s decision that the Ferguson # 1 Well lacked mechanical integrity, the Presiding Judge erred in assessing a penalty that is excessive under the undisputed facts of this case.

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW

- A.** Whether, as a matter of law, the Presiding Judge erred in holding that the Ferguson # 1 Well lacked mechanical integrity between May 5, 2010 and May 24, 2011.
- B.** Whether, on the basis of undisputed facts the Presiding Judge’s imposition of a \$88,900 penalty was excessive.

3. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves Maralex’s operation of an underground injection well, the Dara Ferguson No. 1 Well (“the Ferguson # 1 Well”) and whether Maralex

violated the Safe Drinking Water Act (“SDWA”) in connection with the operation of that well. This enforcement action centers on the issue of whether the Ferguson # 1 Well lost mechanical integrity at any time between May 5, 2010 and May 24, 2011 and, if so, what the appropriate fine should be for any such violation.

B. COURSE OF PROCEEDINGS

On September 27, 2011, the EPA filed a Proposed Penalty Complaint and Notice of Opportunity for Hearing (“Complaint”) alleging three violations of the SDWA by Maralex: Count I: failure to take weekly annulus pressure measurements as required by Part II(D)(1) of the permit (Complaint at ¶¶ 15-16); Count II: “violating 40 C.F.R. § 144.51(q)(1) and the permit at Part II(C)(6) and therefore the [SDWA] failing to maintain mechanical integrity for the Ferguson # 1 Well between at least May 5, 2010 and May 24, 2011” (*id.* at ¶¶ 17-20); and Count III: inaccurately reporting the minimum and maximum annulus pressures in its 2010 annual report filed in violation of 40 C.F.R. § 144.28(h). *Id.* at ¶¶ 21-22.

The EPA sought a civil penalty of \$111,650 for these violations: \$8,050 for failure to take weekly annulus pressure measurements; \$99,700 for failing to maintain the mechanical integrity of the well; and \$3,900 for inaccurate reporting. *Id.* at ¶ 23.

Maralex filed an Answer to the Complaint on October 28, 2011. In its Answer, Maralex denied that the Ferguson # 1 Well lost mechanical integrity under Count II of the Complaint. Answer at ¶ 17-20.

Maralex acknowledged that it failed to observe the annulus pressure under Count I of the Complaint. *Id.* at ¶¶ 15-16. In addition, Maralex admitted that it had inaccurately reported the minimum and maximum annulus pressures in its annual report filed for 2010, as alleged in Count III of the Complaint. *Id.* at ¶ 21. However, Maralex asserted that there is no requirement to make any report of these pressures and further that there was no incentive to mislead the EPA which was aware that during 2010 the annulus pressures were more than zero and that the incorrect listing of the pressures was a clerical error that was based on incomplete information. *Id.* at ¶ 22.

Finally, Maralex contended the proposed civil penalties are disproportional to any violations that may have occurred. *Id.* at ¶ 23.

Pursuant to the Presiding Judge's July 19, 2012 Pretrial Order, the parties filed Stipulations of Facts, Exhibits and Testimony on August 20, 2012.

A one-day evidentiary hearing was held in Durango, Colorado on October 12, 2012. A Supplemental Stipulation of Exhibits was filed on October 15, 2012.

The parties filed their proposed findings of fact and conclusions of law on December 17, 2012.

C. DISPOSITION BELOW

On July 8, 2013, the Presiding Judge issued her Initial Decision finding that Maralex was liable under Count II for failing to maintain the mechanical integrity of the Ferguson # 1 Well based on Maralex's inability to maintain the annulus pressure at zero as required by the Permit. Initial Decision at 10.

With respect to Count I, failure to make weekly observations, the Presiding Judge found that this violation was a Level I violation and assessed a \$10,000 penalty. *Id.* at 20. The Presiding Judge held that the failure to maintain integrity under Count II was a Level II violation and assessed a \$40,000 penalty. *Id.* at 18. The Presiding Judge increased these two penalties by 20% based on the duration of the violations, *id.* at 20-21, and increased it 50% for what she considered was a lack of effort to comply with the SDWA. *Id.* at 22-23. Thus, the Presiding Judge imposed a total penalty of \$85,000 for Counts I and II. The Presiding Judge assessed a \$3,900 penalty under Count III, inaccurate reporting. *Id.* at 14.

4. STATEMENT OF THE FACTS

A. Maralex Disposal, LLC

1. Maralex is a Colorado limited liability company doing business in the State of Colorado. Stipulation of Facts, Exhibits and Testimony ("Stipulation") at ¶ 1.

2. Maralex is a “person” as defined in the SDWA, and is therefore subject to the requirements of the statute and its implementing regulation. *Id.* at ¶

2.

3. The structure and management of Maralex vis-à-vis Maralex Resources, Inc., is as follows: Maralex is an LLC and has a single manager, Alexis Michael O’Hare. There are no officers of this LLC. In addition, Maralex has no employees. If an employee of Maralex Resources, Inc. performs services for Maralex, Maralex Resources, Inc. invoices Maralex for that work (and materials, as appropriate), and then Maralex pays that invoice to Maralex Resources, Inc. *Id.* at ¶ 22. Maralex does not pay any employees of Maralex Resources, Inc. for working on Maralex. *Id.* at ¶ 23; Hearing Transcript at Page 196, Lines 11 – 20 (hereinafter referenced as “Tr. at 191:11-20”).

4. Maralex is a relatively small company. Stipulated Exhibit No. 26 and No. 37. Maralex lost \$88,000 in 2008. Stipulated Exhibit No. 26; Tr. at 197:3-11. Maralex made \$363,000 in 2009. Stipulated Exhibit No. 26; Tr. at 199:3-9. Maralex made \$63,000 in 2010. Stipulated Exhibit No. 26; Tr. at 199:14-20. Maralex made less than \$20,000 in 2011. Stipulated Exhibit No. 37; Tr. at 200: 8-18. Thus, over the course of the last four years, Maralex averaged less than \$90,000 per year in income.

5. Maralex has owned and/or operated the Ferguson #1 well at all times relevant to the Complaint. Stipulation at ¶ 3. The Ferguson # 1 Well has not paid out, *i.e.*, the costs of construction and operation of the well exceeds the revenue produced from the well. Tr. at 163:25 – 164:2.

B. THE MECHANICAL INTEGRITY OF THE Ferguson # 1 Well

i. THE PERMIT FOR THE FERGUSON # 1 WELL

6. The Ferguson #1 Well is located in what the Colorado Oil and Gas Conservation Commission has designated as a natural gas field known as the Ignacio Blanco Field in Township 33 North, Range 9 West, Section 32, in La Plata County, Colorado, within the exterior boundary of the Southern Ute Indian Reservation. Stipulation at ¶ 4.

7. Maralex is authorized to operate the Ferguson #1 well by EPA Permit #C021011-06908 pursuant to compliance with the conditions included therein. *Id.* at ¶ 6. (The Permit for the Ferguson # 1 Well is Stipulated Exhibit No. 2.) The Ferguson #1 well is a “Class II Injection Well” as defined by 40 C.F.R. §§ 144.80 and 146.5. *Id.* at ¶ 4. As owners/operators of the Ferguson # 1 Well, Maralex is subject to the applicable requirements of 40 C.F.R. §§ 124, 144 and 146. *Id.* at ¶ 5. The Ferguson # 1 Well is a commercially operated Class II disposal well that injects waste fluids that are brought to the surface in connection with oil and gas production. Tr. at 27: 1-3. It is a “commercial” well because it

injects other people's wastewater and charges them for the disposal of such wastewater. *Id.* at 27:3-6.

8. The objective of an Underground Injection Control (UIC) permit is to ensure that water injection into a disposal well does not harm underground sources of drinking water or endanger them. *Id.* at p. 24:4- 8.

9. The Ferguson # 1 Well disposes of 60,000 to 65,000 barrels of wastewater every month. *Id.* at 29:3-9. This well is considered a large injection well placing it in the top ten percent of injection wells in Region 8 by volume. *Id.* at 29:11-17.

10. Although the Ferguson # 1 Well was approved for frac flow back water, Maralex has never accepted frac flow back water for disposal. *Id.* at 162:9-17. All of the water disposed of in the Ferguson # 1 Well is coal seam produced water that is filtered by Maralex. The filters are changed 2 or 3 times per week resulting in the injected water that averages around 6,000 total dissolved solids (TDS) resulting in extremely clean water being injected. The EPA considers less than 10,000 TDS as usable. *Id.* at 162:17 – 163:25.

11. There are seven public drinking water wells within a five-mile radius of the Ferguson # 1 Well, the closest public drinking water well being about one and one-half miles away. *Id.* at 29:24 – 30:8.

12. While the Permit for the Ferguson # 1 Well requires the well to

maintain zero pressure in the annulus, the Permit acknowledges that there may be situations where the operator is unable to maintain zero pounds of annulus pressure because of heating of liquid in the annulus causes pressure to build up in the annulus. *Id.* at 39:4-16.

13. Alexis Michael O'Hare began monitoring the annular pressure in late 2009. *Id.* at 201: ln. 2-12. Sometimes the pressures he saw were zero to 200 pounds and sometimes they were as high as 1,600 pounds, although he did not see the higher pressures until 2010. *Id.* at p. 201:15 – 21. Mr. O'Hare bled off the pressure to zero and the pressure would not return for some period. Once the pressure was bled off there was no longer any flow of liquids into the annulus. *Id.* at 201:22 – 202:4; 208:25 – 209:9.

ii. CONSTRUCTION OF THE FERGUSON # 1 WELL

14. Stipulated Exhibit 31 contains a diagram of the proposed construction schematic for the Ferguson # 1 Well. The casing for the well consists of three concentric strings of outer steel piping. The innermost steel pipe is called the tubing. The innermost pipe of tubing is sealed at its bottom by a packer or packer assembly and at the top by the well head. The area between the inside of the outer casing and the outside of the inner tubing is referred to as the annulus. Stipulated Exhibit 31 and Tr. at 31:20 – 33:22.

15. Dennis Reimers is the engineer manager for Maralex Resources, Inc. and an engineer himself. Tr. at 130:20-23; Stipulated Ex. No. 27 (Resume of Dennis Reimers). Mr. Reimers testified that when Maralex was drilling the well, he kept the EPA informed about the progress of the construction and invited Patricia Pfeiffer, the EPA official overseeing the permitting for the well, to observe the construction process, which she did for a week. Tr. at 138:21 – 139:12.

9. Despite the increased cost, Maralex elected to use a stronger casing pipe than proposed in its Permit that cost more money and dramatically improved the integrity of the casing. *Id.* at p. 140:6 – 141:1. Mr. Reimers over-designed the Ferguson # 1 Well. *Id.* at 142:2-14. Maralex provided the EPA with all information regarding the cementing process. The EPA approved Maralex's casing finding that the cementing was sufficient to protect the well. *Id.* at 143:7-19.

iii. EPA INSPECTIONS OF THE FERGUSON # 1 WELL

17. Ken Phillips and Clark Davenport of the EPA inspected the Ferguson # 1 Well in 2008. *Id.* at 54:4-12. That inspection showed annulus pressure at 790 pounds and the inspectors recommended to Mr. Reimers that he bleed off the annulus pressure. *Id.* at 54:20 – 55:8; 147:13-20. After bleeding off the pressure, there was no flow coming back from the annular. *Id.* at 148: 6-9.

18. Nathan Wisner worked for the EPA in Region 8 reviewing and overseeing underground injection well permits and regulatory compliance. *Id.* at p.

13:21- 4:9. As part of his duties, Mr. Wiser conducted a routine inspection of the Ferguson # 1 Well on May 5, 2010, to ascertain whether the well was operating in compliance with the Permit. *Id.* at 40:7-14. *See also* Stipulated Exhibit No. 8.

19. During his May 5, 2010 inspection, Mr. Wiser observed annulus pressure to be 1,725 pounds. *Tr.* at 41: 3-11. Mr. Wiser discussed with Mr. Reimers the possible causes of this elevated annulus pressure and both agreed that could be attributed to heated liquid in the annulus. *Id.* at 41:12-22. Because they were unable to bleed off liquid from the annulus on the day of the inspection Mr. Wiser asked Mr. Reimers to call him the next day to report on the annulus pressure. *Id.* at 41:23 - 42:6. The following day, May 6, 2010, Mr. Reimers advised Mr. Wiser that after he bled about a barrel of liquid off of the annulus that the annulus pressure was reduced to zero in less than 60 seconds and there was absolutely no flow after the pressure dissipated off the annular area between the 3 1/2 inch tubing and the 7 inch casing. *Id.* at 145:14-21; 46:10-25; 148:10-25; 41:23 – 42:25.

20. Mr. Wiser testified that the annulus pressure observed at the May 5, 2010 inspection did not necessarily mean that the Ferguson # 1 Well had lost mechanical integrity. *Tr.* at 64:7-10.

21. Mr. Reimers believed that the annulus pressure observed at the May 5, 2010 inspection was temperature related – when the annular pressure valve is shut

in, the temperature increases and, based on the laws of physics, the pressure increases. *Id.* at 146:8 -147:6.

22. Mr. Wisner re-inspected the Ferguson # 1 Well on May 26, 2010, to ascertain whether the well was operating in compliance with the Permit. *Id.* at 43:10-19. *See also* Stipulated Exhibit No. 9. During that inspection, Mr. Wisner observed annulus pressure to be 1,840 pounds. Tr. at 41:3-11. Mr. Reimers bled off about 60 gallons of liquid which reduced the pressure and after which there was no flow. *Id.* at 150:18 – 151: 3. Mr. Wisner and Mr. Reimers discussed the possible cause of this elevated annulus pressure and agreed that it was possibly caused by heated liquid. *Id.* at 43:20-24.

23. Mr. Wisner did not follow the protocols in the EPA's Ground Water Section Guidance No. 35 ("Guidance No. 35") during this inspection, but instead the EPA sent Maralex the letter dated June 7, 2010, drafted by Mr. Wisner, alleging that the well might be experiencing a loss of mechanical integrity, but also allowing for the possibility that the increased pressure might be induced from thermal heating. *Id.* at 43:20-24; 64:11 – 65:2; Stipulated Exhibit No. 10. (Guidance No. 35 is found at Stipulated Exhibit No. 34.) By letter dated July 6, 2010, Maralex responded to the EPA's letter of June 7, 2010. Stipulated Exhibit No. 11. Mr. Reimers, who wrote the July 6, 2010 letter, testified that the build up of the annulus pressure between the May 5 and May 26 inspections was the first

time that Maralex observed the pressure building back up so quickly and was the first indication that Maralex had that there may be something more to the annulus pressure than thermal effects. Tr. at 151:ln. 3-8; Stipulated Exhibit No. 11.

Maralex's July 6, 2010 letter did not state or concede that the Ferguson # 1 Well had lost mechanical integrity, but merely set forth a proposed testing procedure for how Maralex was going to test the mechanical integrity of the well. Tr. at 152: 2-23; Stipulated Exhibit No. 11.

24. Between July 7, 2010 and April 13, 2011, the EPA did not receive any additional information from Maralex regarding the Ferguson #1 Well. Stipulation at ¶ 23. Maralex was waiting to hear from the EPA before it undertook the proposed testing set forth in the July 6, 2010 letter. Tr. at 154:1-12. In Mr. Reimers' experience, it was standard protocol to wait for a response from the EPA on a testing proposal before commencing. *Id.* at 154:13-25.

25. In late September or early October 2010, Mr. Reimers realized he never heard back from the EPA regarding the July 6, 2010 proposal and called Nathan Wiser. *Id.* at 155:1-7. In response to Mr. Reimers' inquiry, Mr. Wiser told Mr. Reimers "Let me see. Something apparently fell through the cracks." *Id.* at 155:8-12. Mr. Wiser called Mr. Reimers back roughly two days later and verbally told him to proceed. *Id.* at 155:13-15. Maralex, however, did not proceed with the testing proposed in the July 6, 2010 letter because the manager, Mr. O'Hare,

wanted written verification before proceeding because in the past the EPA had always issued written approvals of proposed testing protocols. *Id.* at 204:8-25.

26. Between late 2010 and early 2011, Ms. Sarah Roberts replaced Mr. Wisner and assumed his injection well inspection duties in Region 8, which included the Ferguson # 1 Well. Tr. at 67: 2-7; 82:23 – 83:6. Ms. Roberts is an environmental scientist who works in the UIC program for the Office of Enforcement, Compliance, and Environmental Justice. *Id.* at 78:1-10.

27. Ms. Roberts conducted a site inspection of the Ferguson # 1 Well on April 13, 2011. *Id.* at 89:-11; Stipulation at ¶ 4. During that inspection, Ms. Roberts observed annulus pressure of 1,670 pounds. *Id.* at 89:12-16. Ms. Roberts prepared a report of her inspection (Stipulated Exhibit No. 13). *Id.* at 91:1-7.

28. Ms. Christi Reid is a petroleum engineer for Maralex who took over responsibility from Mr. Reimers for the Ferguson No. 1 Well in August 2010. Tr. at 168:16 – 169:18.

29. Ms. Reid was present at Ms. Roberts' April 13, 2011 site visit. *Id.* at 170:14-24. While Ms. Roberts measured the annulus pressure on the Ferguson # 1 Well, Ms. Roberts did not bleed the pressure off of the annulus during that site inspection. *Id.* at 171:3 – 11.

30. Following the April 13, 2011 site visit, the EPA issued a Notice of Violation dated April 19, 2011. *Id.* at 91:14-92:7; 171:11-20; Stipulated Exhibit

No. 15. Immediately after receiving the Notice of Violation on April 26, 2011, Maralex shut in the Ferguson # 1 Well pursuant to the EPA's directive as set forth in the Notice of Violation. Tr. at 92:12-93; ln. 2; 171:21 – 172:4.

31. During the reworking of the well, Maralex found a pinhole leak cause by two loose connections of tubing. After Maralex tightened those connections, the tubing no longer leaked. Tr. at 172:12 – 174:12; Exhibit 17 (record of the rework performed on the well).

32. Maralex performed a rework of the well from May 11, 2011 to May 24, 2011 and the Ferguson # 1 Well passed a mechanical integrity test on May 24, 2011. *Id.* at 94:15 – 95:21; Tr. at 173:17 – 174:8; Well Rework Record and Mechanical Integrity Test (Stipulated Exhibit No. 17).

33. After receiving the results of the Mechanical Integrity Test, the EPA sent Maralex a letter granting permission to resume injection. Tr. at 96:2-7; Tr. at 174:9-12.

34. The Ferguson #1 Well was operating between May 5, 2010 and May 24, 2011 and the annulus pressure was above zero during EPA inspections. Stipulation at ¶ 16.

35. No mechanical integrity testing was performed during the period from May 5, 2010 to May 24, 2011. *Id.* at ¶ 17.

36. The EPA observed, and Maralex confirmed, the existence of annulus pressure on the Ferguson # 1 Well in May of 2010 through May of 2011. Maralex contends that the annulus pressure on the Ferguson #1 Well during this time was intermittent and not consistent. *Id.* at ¶ 18.

iv. **EXPERT OPINIONS REGARDING THE MECHANICAL INTEGRITY OF THE FERGUSON # 1 WELL**

a. **NATHAN WISER:**

37. In addition to testifying as a fact witness regarding his inspections of the Ferguson # 1 Well, Mr. Wisner testified on behalf of the EPA as an expert in the EPA's UIC program, including the program's purpose, implementation and regulation, including permit compliance. However, Mr. Wisner was not qualified as an expert on the operation of an injection well or the construction of an injection well. Tr. at 20:14-22.

38. Mr. Wisner has two degrees in geology, but is not a petroleum engineer. *Id.* at 12:20-23; 19:22-25. Mr. Wisner has never supervised the drilling of an injection well nor has he ever been responsible for supervising the operation of an injection well. *Id.* at 20:1-9.

39. Mr. Wisner acknowledged that a build up of annulus pressure does not necessarily mean that an injection well has lost mechanical integrity. *Id.* at 57:13-17.

40. On direct examination, Mr. Wiser opined that the Ferguson # 1 Well had a leak somewhere in the well and testified that in its July 6, 2010 letter (Stipulated Exhibit No. 11), Maralex recognized that the annulus pressure was not caused by thermal heating. Based on these considerations, Mr. Wiser opined that Maralex was directed to follow the steps as though the well had lost mechanical integrity due to a leak pursuant to Guidance No. 35. Tr. at 47:3-22.

41. On cross-examination, however, Mr. Wiser acknowledged that during his supervision of the Ferguson No. 1 Well, he never found that the Ferguson # 1 Well lacked mechanical integrity. *Id.* at 70:3-10; 71:19-21. As he testified, if Mr. Wiser had determined that the Ferguson # 1 Well lacked mechanical integrity he would have told Maralex to immediately shut in the Ferguson # 1 Well. *Id.* at 70:11-14.

42. Mr. Wiser also testified under cross examination there was no evidence that he was aware of that indicates there was any leakage from the Ferguson # 1 Well into the surrounding formations other than the perforations where it was permitted to be injected into. *Id.* at 70:15-20. Mr. Wiser also testified that if the EPA believed that there was any unpermitted leakage from the well into the surrounding formations, the EPA may have required Maralex to perform remediation, but the EPA never required Maralex to remediate the surrounding ground water. *Id.* at 71:1-18.

43. The purpose of Guidance No. 35 is intended as an aid to UIC field inspectors, such as Mr. Wisner, to follow when they observe excessive annulus pressure in an injection wells. *Id.* at 57:1-6; 39:6-22. Stipulated Ex. 34 at p. 1. Pages 2-3 of Guidance No. 35 sets forth a table entitled “Procedures to Follow When Excessive Annular Pressure is Observed.” Mr. Wisner testified that it is important that inspections should be standard and that the purpose and one of the feature of Guidance No. 35 is to have standard inspections. Tr. at 61:13-24. Mr. Wisner also recognized that the reason for Guidance No. 35 is for the EPA to have consistent inspections and consistent outcomes. *Id.* at p. 62:15-18.

44. Guidance No. 35 instructs the field inspector to open the annulus for up to sixty seconds to see whether the pressure reduces to zero. *Id.* at p. 2.

45. Guidance No. 35 also instructs the EPA technical expert to determine whether the annulus pressure returns within 14 days. If it does not, then the well is considered to have mechanical integrity. If annulus pressure returns within that time frame, the EPA technical expert is directed to design a mechanical integrity test and the EPA compliance officer will require the operator to conduct the test within 14 days. Stipulated Ex. 34 at p. 3. Mr. Wisner never requested that Maralex observe and recorded the annulus pressure for 14 days and did not provide Maralex with the 14-Day Pressure Monitoring form found at page 5 of Guidance No. 35. Tr. at 63:25 – 64:6.

46. Mr. Wiser did not follow Guidance No. 35 during his May 26, 2010 inspection (Stipulated Ex. No. 9). Tr. at 64:1-21. Mr. Wiser did not provide Maralex with the 14- Day Pressure Monitoring form found at page 5 of Guidance No. 35 at that inspection. *Id.* at 64:22-24. Instead, twelve days later, EPA sent Maralex the June 7, 2010 Notice of Violation letter (Stipulated Ex. No. 11). *Id.* at 63:25 – 64:19. There was no 14-day monitoring period between the May 26, 2010 inspection and the June 7, 2010 Notice of Violation. *Id.* at 65:20-25. There was no evidence that the annulus pressure returned during the twelve-day period between May 26, 2010 and June 7, 2010.

b. DENNIS REIMERS:

47. In addition to testifying as a fact witness with respect to the construction and operation of the Ferguson # 1 Well and the various EPA inspections, Mr. Reimers was qualified to testify as an expert in petroleum engineering and underground injection control. Tr. at 137:8-10. Mr. Reimers has extensive experience in the construction and operation of injection wells. Tr. at 133:14 – 134:14; Stipulated Ex. No. 27.

48. Based on testing of the Ferguson # 1 Well, Maralex discovered that the well was experiencing an intermittent pinhole leak that was sporadic. Tr. at 152:24 – 153:25.

49. Mr. Reimers opined as an expert that the annulus pressure that the well experienced was due to temperature increases and temporary, intermittent leaks caused by loose tubing connections that under certain pressures, conditions and harmonics of the tubing string, would have a temporary leak. Tr. at 158:14 – 159:24.

50. Mr. Reimers opined as an expert that the Ferguson # 1 Well maintained mechanical integrity because the leaks were “extremely minor” and there was never any loss of liquid from the annular other than what Maralex bled off. Tr. at 158:14 – 161:7. Mr. Reimers opined that the leaks were not “significant” but were minor, pinhole leaks in the seal between different joints that occurred only on an intermittent basis. *Id.* at 161:8 – 162:8.

c. ALEXIS MICHAEL O’HARE:

51. In addition to testifying as a fact witness with respect to the construction and operation of the Ferguson # 1 Well, Mr. O’Hare was qualified to testify as an expert witness in petroleum engineering and the operation of UIC wells. Tr. at 194:23-25. Mr. O’Hare has many years of extensive experience in the construction and operation of underground injection wells. *Id.* at 178:13 – 181:6; 182:4 – 194:16; Stipulated Exhibit No. 29.

52. As an expert witness, Mr. O’Hare testified that he had no concern that the Ferguson # 1 Well had lost mechanical integrity because there was not a

significant leak in the tubing and there was no evidence of fluid flow into an underground source of water. Tr. at p. 205:1-10. Mr. O'Hare based his opinion that the tubing leak was not significant on the fact that bleeding off 60 gallons of water out of 10,000 gallons in the annulus, the annulus pressure reduced to zero and there was no flow after that, even through they were injecting approximately 100,000 gallons a day and the fact that Maralex had performed a number of mechanical integrity tests, some of which were not reported to the EPA, which gave Maralex great assurance that it was impossible that water could be leaking into an underground source of water. *Id.* at 205:11-22. Mr. O'Hare also opined that the intermittent leak from the loose connections of tubing was never significant because if it were, the well would have continued to flow even though the pressure had been bled off, particularly during times of injection. Tr. at p. 207:3 – 208: ln. 9.

53. Mr. O'Hare opined as an expert in petroleum engineering that fluid from the Ferguson # 1 Well never migrated from the wellbore into the surrounding formations, other than where it was allowed to do so under the terms of the Permit. *Id.* at 206: 2-9. Mr. O'Hare based this opinion on the fact that Maralex never had a significant flow of fluid from the well and the only flow that came from the well was controlled by Maralex when it was manually bleeding that fluid at the surface. He also based his opinion on the following facts: the 7-inch casing showed mechanical integrity both before there was any pressure and at various times

afterwards; the casing never failed a mechanical integrity test number of factors; Maralex never had to repair the casing; and a failure in the casing, which there was none, is the only way fluid could flow into USDW. *Id.* at 205:10 – 207:2 .

54. If Mr. O’Hare believed that the Ferguson # 1 Well had lost mechanical integrity, he would have shut in the well. Tr. at 205: 23 – 206:1.

55. As a fact witness, Mr. O’Hare testified that Maralex followed any specific instructions from the EPA. Tr. at 208:10 – 24.

C. WEEKLY OBSERVATIONS OF THE ANNULUS PRESSURE

56. Weekly observations of annulus pressure are required for the Ferguson #1 Well under the terms of the Permit at Part II(D)(1). Stipulation at ¶ 7. Respondent violated the Permit and therefore the SDWA by failing to observe weekly annulus pressure measurements of the Ferguson #1 Well *Id.* at ¶ 8.

57. The Respondent admits that it did not make consistent weekly observations of the annulus pressure although it did observe the annulus pressure several times per month and, on some occasions, several times per week. *Id.* at ¶ 9.

58. The person responsible for making these observations was Mr. Pete Tree, who was later terminated by Maralex for inadequate performance, including his failure to monitor the annulus pressure. *Id.* at 165:16 – 166:9.

59. Mr. Reimers monitored the pressure at least twice a month. *Id.* at 166:24 – 167:2. In addition, Mr. O’Hare monitored the annulus pressure on an average of once every three to four weeks. *Id.* at 201:9-14.

D. ANNUAL REPORTING

60. On February 18, 2011, the EPA received from Maralex the 2010 annual monitoring report that reported minimum and maximum annulus pressures of zero pounds per square inch for every month of 2010. Stipulation at ¶ 19.

61. The reporting of the annulus pressure in the 2010 report was incorrect because it did not reflect the increased annulus pressures recorded during the EPA inspections. *Id.* at ¶ 20.

5. SUMMARY OF THE ARGUMENT

The facts of this case are not in dispute. The conclusions of law drawn from those facts, however, are very much in dispute.

The evidence establishes that minor, intermittent leaks were caused by loose tubing connections that under certain pressures and tubing string conditions would result in a temporary tubing leak leading to an occasional rise in annulus pressure. A rise in pressure caused in this manner would always reduce to zero after liquid was bleed from the annulus. There was no evidence of any fluid movement

whatsoever from the well into unpermitted formations and, therefore, no evidence of any harm to any USDWs.

The Presiding Judge's holding that Maralex was liable for failing to maintain the mechanical integrity of the well was based on Maralex's failure to maintain zero annulus pressure and also the presence of intermittent leaks. Initial Decision at 10. The Presiding Judge's decision is wrong as a matter of law because under 40 C.F.R. 168, an injection well has mechanical integrity by definition if there is no significant leak in the casing, tubing, or packer and there is no significant movement of fluid movement into an underground source of drinking water.

The Presiding Judge also erred in assessing the appropriate penalties for violations of Counts I and III. These violations were minor and technical in nature and the penalties disproportional. In the event that the Board upholds the Presiding Judge's decision regarding Count II, the penalty assessed together with the increases assessed, are not supported by the record evidence.

6. ARGUMENT

9. Standard of Review

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. 40 C.F.R. 22.30(f) (the Board shall "adopt, modify, or set aside" the Presiding Judge's findings of fact and conclusions of law or exercise of discretion): *see* Administrative Procedure Act § 8(b), 5 U.S.C. §

557(b) (“[o]n appeal from or review of the initial decision, the agency has all of the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule”). *In Re San Pedro Forklift, Inc.*, CWA Appeal No. 12-02 (April 22, 2013), slip op. at 6-7; *In re City of Marshall, Minnesota*, 10 E.A.D. 173, 180 (EAB, October 31, 2001).

The EPA has the burden of persuasion to show by the preponderance of evidence that the violations set forth in the Complaint 40 C.F.R. § 22.24(a). The Presiding Office shall decide this controversy based upon a preponderance of evidence. 40 C.F.R. § 22.24(b). *See, e.g., In re Mayes*, 12 E.A.D. 54, 62, 87-88 (EAB 2005), *aff’d* No. 3:05-CV-478, 2008 WL 65178 (E.D. Tenn. Jan. 4, 2008).

In exercising *de novo* review, the Board will grant deference to a Presiding Judge’s determinations regarding witness credibility and any factual findings based on a credibility finding since the Presiding Judge had “the opportunity to observe the witness testify and to evaluate their credibility.” *In re: Echevarria*, 5 E.A.D. 6226, 639 (EAB 1994). In this case, however, the Presiding Judge did not make any credibility findings in regard to any of the witnesses.

B. THE SAFE DRINKING WATER ACT AND ITS REGULATORY IMPLEMENTATION AS APPLICABLE TO THIS PROCEEDING

In 1974, Congress, passed the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f to 300j-8 (1991 & Supp.

2000)), with the basic goal of protecting the purity of the drinking water provided by the nation's public water systems.

The purpose of the Act, in the words of its drafters, is to “assure that water supply systems serving the public meet minimum national standards for protection of public health.” H.R. Rep. No. 93-1185, [Cong., 2d Sess. At 31, U.S.Code Cong. & Admin.News 1974 p. 6484]. In other words, the framers of the Act were concerned with ensuring that consumers of public water systems have access to safe drinking water, with the safety of the water to be judged according to objective criteria developed by the EPA.

United States v. Massachusetts Water Resources Authority, 256 F.3d 36, 56 (1st Cir. 2001).

Part C of the SDWA establishes a regulatory program for the protection of underground sources of drinking water. *See* 42 U.S.C. §§ 300h to 300h-8. Pursuant to Part C of the SDWA, the EPA has adopted certain regulations governing injection wells. SDWA defines underground injection to mean the “subsurface emplacement of fluids by well injection.” 42 U.S.C. Sec. 300h(d)(1). The Ferguson # 1 Well is a Class II injection well, defined as “[w]ells which inject fluids: (1) [w]hich are brought to the surface in connection with ... conventional oil or natural gas production . . .” 40 C.F.R. § 144.6(b); Statement of Facts at ¶ 7 (“SOF at ¶ 7”).

In its Complaint, the EPA alleged that Maralex violated 40 C.F.R. § 144.51(q)(1) and Part II(C)(B) by failing to maintain the mechanical integrity of the Ferguson # 1 Well. Complaint at ¶ 20. 40 C.F.R. § 144.51(q)(1) imposes a

duty on Maralex, as the operator of the Ferguson # 1 Well, to its maintain mechanical integrity as provided by 40 C.F.R. § 146.8. This regulation defines mechanical integrity as follows:

An injection well has mechanical integrity if:

- (1) There is no significant leak in the casing, tubing or packer; and
- (2) There is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore.

9. THE FERGUSON # 1 WELL NEVER FAILED TO MAINTAIN MECHANICAL INTEGRITY AS IT IS DEFINED IN 40 C.F.R. § 146.8

iii. THE INITIAL DECISION IS BASED ON THE ERRONEOUS LEGAL DETERMINATION THAT AN INCREASE OF ANNULUS PRESSURE CAUSED BY MINOR LEAKS CONSTITUTES A FAILURE TO MAINTAIN MECHANICAL INTEGRITY

The EPA alleges that Maralex violated 40 C.F.R. § 144.51(q)(1) and the Permit at Part II(C)(6) by failing to maintain mechanical integrity for the Ferguson # 1 Well between at least May 5, 2010 and May 24, 2011. Complaint at ¶ 20. The Presiding Judge agreed, basing her liability finding on the fact that the annulus pressure was above zero on several occasions and the excess annulus pressure was more likely caused by a leak and/or loose connections rather than thermal fluctuations. Initial Decision at 10.

The Presiding Judge’s error stems from attempting to make a distinction between a “failure to maintain” mechanical integrity and a “loss” of mechanical integrity. *See, id.* at 16. The Presiding Judge acknowledged that the Ferguson # 1 Well never “lost” mechanical integrity, but found that it failed to “maintain” mechanical integrity, presumably when the leaks caused the annulus pressure to rise above zero.

Specifically, in Section II(B) of the Initial Decision, the Presiding Judge found that the Ferguson # 1 Well did not, in fact, lose mechanical integrity:

Respondent provides much testimony on the thickness and build of the well. The expert testimony of Mr. Reimers indicates that great care was taken in going above the industry standard to “over build” this well for protection. (See, Tr. 140-143). **This testimony is tangential and may illustrate why there was no loss of mechanical integrity**, but it does not rebut Respondent’s liability. (Emphasis supplied.)

Initial Decision at p. 9, n. 14.

In Section III of the Initial Decision, addressing the civil penalty, after noting that 40 C.F.R. § 146.8 provides that an injection well has mechanical integrity if “there is **no significant** leak in the casing, tubing or packer” and “there is **no significant** fluid movement into an underground source of drinking water,” the Presiding Judge wrote that “I agree with Respondent that Complainant provided no evidence on how significant the leak or amount of fluid movement was with respect to the Dara Ferguson Well # 1.” *Id.* at 15-16 (emphasis in

original). Without any evidence regarding whether the leak was significant or the amount of fluid movement with respect to the well, it is not possible, as a matter of law, to conclude that the well lost mechanical integrity as defined by 40 C.F.R. § 146.8.

Finally, the Presiding Judge stated that the EPA “never presented a case of actual loss of mechanical integrity.” *Id.* at 17.

The Presiding Judge noted that Maralex asserted “that there is no evidence that: ‘no water could be leaking into a[n] underground source of drinking water] USDW,’ ‘no fluid from the well migrated from the wellbore into surrounding [formations]’ and that there was never ‘a significant flow from the well that was not controlled by Maralex.’ ” Initial Decision at 10, citing to Tr. 205-06.

The Presiding Judge, however, found these facts are irrelevant, holding that they “do not address the simple question of liability under the SDWA of failure to comply with permit conditions.” Initial Decision at 10. Instead, the Presiding Judge found liability based on the pinhole leaks and the loose tubing connection, neither of which is significant enough to constitute a failure to maintain “mechanical integrity” as it is defined in 40 C.F.R. § 146.8. *Id.*

The Presiding Judge’s Initial Decision is in error as a matter of law because her decision imposing liability on Maralex is premised, not on the definition of mechanical integrity as set forth in 40 C.F.R. § 146.8, but rather on the fact that

there were minor leaks and two loose connections in the tubing that caused an increase in the annulus pressure. The Presiding Judge's confusion stems from distinguishing between failing to "maintain" mechanical integrity, which she found to have occurred with the Ferguson # 1 Well, and there being a "loss" of mechanical integrity, which she acknowledged did not occur. By definition, if an injection well does not lose its mechanical integrity, then its mechanical integrity has been maintained. Or, put another way, when a well fails to maintain mechanical integrity, it has lost its mechanical integrity.

The Presiding Judge's Initial Decision is also flawed because she misconstrues the allegations in the EPA's Complaint. The underlying premise of the Presiding Judge's liability decision is that Maralex's failure to maintain zero annulus pressure due to intermittent, minor tubing leaks constitutes a failure to maintain mechanical integrity. The EPA, however, does not allege that Maralex violated Part II(C)(6) of its Permit by failing to maintain the annulus pressure at zero. Instead, the EPA alleged that Maralex failed to maintain the mechanical integrity of the Ferguson # 1 Well and thereby violated 40 C.F.R. § 144.51(q)(1) and the Permit at Part II(C)(6). *See* Complaint at ¶ 20.

Failure to maintain annulus pressure at zero is not a violation of Part II(C)(6) of the Permit. Instead, if annulus pressure rises, then the permittee is required to follow Guidance 35. As the Presiding Judge held, Guidance 35 is not a comment

and notice rulemaking, but merely a guidance that is not legally binding on either the EPA or Maralex. Initial Decision at 9. Mr. Wisner agreed that Guidance 35 is not binding on the EPA and stated that he did not follow its protocols during his site inspections. In any event, the Presiding Judge held that Part II(C)(6) of Maralex's Permit "is immaterial" because it was written to determine the cause of annular pressure and because Maralex admitted to "pinhole leaks," that Maralex had to bleed off a barrel of liquid to reduce the pressure to zero and that there were two loose connections found during the rework of the well and, therefore, the Presiding Judge concluded that the Ferguson # 1 Well lacked mechanical integrity. *Id.*

Maralex agrees that Guidance 35 is only a "guidance" and that it is not legally binding on either the EPA or Maralex. Maralex also agrees that Guidance 35 is immaterial to this proceeding because the EPA is not alleging that Maralex violated the terms of its Permit on the basis of not being able to maintain the annulus pressure at zero and/or failing to follow Guidance 35.

The record evidence shows that Maralex did follow Guidance 35 as that Guidance applies to Maralex. Specifically, when the EPA observed annulus pressure above zero at the May 5, 2010 inspection, Maralex bled off the pressure to zero. SOF at ¶ 19. At the May 26, 2010 inspection, Mr. Reimers and Mr. Wisner again bled off the pressure to zero. *Id.* at ¶ 22. Both of these actions are consistent

with Guidance 35. Mr. Wiser testified, however, that he did not use Guidance 35 during the inspections, that he never requested that Maralex monitor the well for 14 days to determine whether the annulus pressure returned, and also that neither he nor any other EPA personnel designed a mechanical integrity test as required by Guidance 35. SOF at ¶¶ 42, 45-46. Moreover, every time that Maralex saw excessive pressure, it bled the annulus and the pressure reduced to zero and did not build back up. SOF at ¶ 13. Thus, Maralex followed Guidance No. 35.

ii. THE FERGUSON # 1 WELL MAINTAINED MECHANICAL INTEGRITY AT ALL TIMES BETWEEN MAY 5, 2010 AND MAY 23, 2011

The undisputed facts establish that the Ferguson # 1 Well did not, as a matter of law, lose mechanical integrity at any time between May 5, 2010 and May 24, 2011, nor at any other time. By definition, in order to have a lack of mechanical integrity, the leak in the casing, tubing or packing has to be “significant” and also must lead to “significant” fluid movement into an underground source of drinking water. 40 C.F.R. § 146.8. The EPA failed to establish that the leak in the tubing was anything other than a minor, intermittent leak, that there was a separate leak in the casing, or that the minor, intermittent tubing leak could not have caused a migration of any fluid into unpermitted formations, let alone a significant amount of fluid into any USDW.

As the First Circuit held in *United States v. Massachusetts Water Resources Authority*, the purpose of the SDWA is to ensure that consumers of public water systems have access to safe drinking water and that the safety of that water is to “be judged according to objective criteria developed by the EPA.” 256 F.3d at 56. The objective criteria in this case is the definition of mechanical integrity as set forth in 40 C.F.R. § 146.8, an objective criteria that the Presiding Judge found Maralex satisfied. Thus, the Presiding Judge’s finding of liability, based on minor, intermittent leaks and two loose tubing connections cannot stand.

Mr. Wisner, the EPA’s own expert, testified that during the time of his supervision of the Ferguson # 1 Well, he never found that the Ferguson # 1 Well lacked mechanical integrity. SOF at ¶ 41. (Mr. Wisner was in charge of inspecting the wells in Region 8 until late 2010 and early 2011. *Id.* at ¶ 26.) Significantly, Mr. Wisner acknowledged that if at any time he thought that the Ferguson # 1 Well lacked mechanical integrity, he would have ordered that it be immediately shut-in, an action that he never took. *Id.* at ¶ 41. His failure to order the Ferguson # 1 Well to be shut-in until it passed a mechanical integrity test establishes that the person in charge of the EPA’s UIC inspections in Region 8 believed that the Ferguson # 1 Well has mechanical integrity through at least early 2011.

Mr. Wisner also admitted that there is no evidence that that any fluid ever left the wellbore and migrated into any USDW, let alone a “significant” amount as is necessary to trigger a violation of the SDWA. SOF at ¶ 42.

Mr. Reimers and Mr. O’Hare, Maralex’s two experts, both testified consistent with Mr. Wisner regarding the mechanical integrity of the Ferguson # 1 Well. Mr. Reimers, who was qualified as an expert in petroleum engineering and underground injection control, testified the annulus pressure was caused by temperature increases and temporary, intermittent pinhole leaks due to loose tubing connections that under certain pressures, conditions and harmonics of the tubing string would create temporary pinhole leak. SOF at ¶ 47-49. Mr. Reimers also opined that the Ferguson # 1 Well maintained mechanical integrity during the relevant period because the leaks were intermittent, “extremely minor,” and there was never any loss of liquid from the annular other than what Maralex bled off in following Guidance No. 35. *Id.* at 50.

Mr. O’Hare, an expert in petroleum engineering and operation of UIC wells, with many years and extensive background with respect to the construction and operation of underground injection wells, opined that the Ferguson # 1 Well maintained mechanical integrity because there was not a significant leak in the tubing and there was no evidence of fluid flow into any USDW. SOF at ¶¶ 51-53. Mr. O’Hare based his opinion on the following: after Maralex bled water from the

annulus, the annulus pressure reduced to zero and there was no flow after that, even though they were injecting somewhere around 100,000 gallons a day; Maralex had performed a number of mechanical integrity tests all of which the Ferguson # 1 Well passed; and the intermittent leak from the loose connections of tubing was never significant because if it were, the well would have continued to flow even though the pressure had been bled off, particularly when water was being injected into the well. *Id.* at ¶ 52.

Mr. O'Hare also opined that fluid from the Ferguson # 1 Well never migrated from the wellbore into the surrounding formations, other than where it was allowed to do so under the Permit. SOF at ¶ 53. He based his opinion on the facts that the 7-inch casing showed mechanical integrity both before there was any pressure and at various times afterwards, the casing never failed a mechanical integrity test and never needed repair. *Id.*

The expert opinion's of Messrs. Wisner, O'Hare and Reimers, that the Ferguson # 1 Well never failed to maintain mechanical integrity, is supported by the facts. The re-work on the well demonstrated that the leaks were pinhole leaks in the tubing caused by two loose connections and, after tightened, ended the leaks. SOF at ¶¶ 31-33. During the first three inspections, Maralex bled off the annulus pressure to zero, the pressure did not return and there was no flow. SOF at ¶ 19 (2008 inspection); ¶ 20 (May 5, 2010 inspection); and ¶ 23 (May 26, 2010

inspection). (During the April 13, 2011 inspection, Ms. Roberts did not bleed off the annulus. *Id.* at ¶ 29.) Moreover, every other time that Maralex found excessive annulus pressure, it bled the annulus, the pressure dropped to zero and did not build back up. *Id.* at 13.

In addition, Ms. Roberts' letter ordering the Ferguson # 1 Well to be shut-in was improper because she failed to bleed off the annulus pressure during her site visit to determine whether it returned to zero, as set forth in Guidance No. 35, but instead merely read the annulus pressure. SOF at ¶ 29. As Mr. Wiser admitted, the mere presence of annulus pressure is insufficient to establish that an injection well lacks mechanical integrity because it could be explained by the effects of temperature. *Id.* at ¶ 20.

D. THE AMOUNT OF THE PENALTIES ASSESSED BY THE PRESIDING JUDGE ARE EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE

iv. COUNT I PENALTY - WEEKLY OBSERVATIONS OF ANNULUS PRESSURE

While Maralex admits that it violated the requirement for making weekly observations of the annulus pressure, Maralex submits that the amount of the penalty imposed by the Presiding Judge for this violation is excessive and not supported by the record evidence. The Presiding Judge found that the failure to make weekly observations of the annulus pressure was a Level I violation

warranting a \$10,000 penalty, increased by 20% for the duration of the violation by 50% for the lack of effort to comply with this regulation, for a total of \$17,000. Initial Decision at 20; 21 and 23. The facts do not support the imposition of the penalty that the Presiding Judge imposed.

The application of the penalty criteria to specific circumstances is highly discretionary. *In re Pepperell Assoc.*, 9 E.A.D. 83, 107 (EAB 2000), *aff'd* 246 F.3d 15, 29 (1st Cir. 2001). However, any discretionary decision by an administrative agency must be based on record evidence and the failure to do so is grounds for finding an abuse of discretion based on the arbitrary and capricious standard. 5 U.S.C. § 706(2)(a). *See e.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285 (1974) (framing the question as did the agency "articulate a rational connection between the facts found and the choice made"); *James Madison, Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (DC Cir. 1996) (noting that an agency's factual findings may be reversed if there is "clear error"); *Seo v. U.S. Dept. of Labor*, 523 F.2d 10, 13 (10th Cir. 1975) (holding that the Secretary of Labor abused his discretion by basing a decision on an unsubstantiated factual basis).

The Presiding Judge abused her discretion with respect to the penalty assessments because some of her factual findings were in clear error, she did not articulate a rational connection between the facts found and the choice made, and

she based some of her decisions on an unsubstantiated factual bases. Contrary to the Presiding Judge's finding that Maralex displayed a "total disregard to check the annulus pressure weekly", Initial Decision at 19, the record evidence showed that Mr. Reimers monitored the pressure at least twice a month, Mr. O'Hare monitored the pressure at least once every three weeks and that on some occasions that Maralex checked the annulus pressure several times per week. SOF at ¶ 57; 59.

Thus, over a course of twelve month period, from May 2010 until May 2011, Maralex observed the annulus pressure *at least* 41 times (at least 24 times by Mr. Reimers and at least 17 times by Mr. O'Hare), or 11 times short of the required 52 observations. This total number of observations does not account for the occasions when Maralex checked the annulus pressure several times per week. Based on this evidence, the Presiding Judge's finding that Maralex displayed a "total disregard" for checking the annulus pressure is in error.

Another factor in determining the seriousness of the violation is the potential harm under the SDWA that the violation presents. *In re: Gypsum North Corp.*, CAA-02-2001-1253, 2002 EPA ALJ LEXIS 70, * 26 (Nov. 1, 2002). As the Presiding Judge noted, high annulus pressure is "the first clear sign of an issue and the point where potential harm begins." Initial Decision at 19. In this case, however, there was never any potential harm to USDWs because even if the Board were to hold that the tubing leaks showed that Ferguson # 1 Well lacked

mechanical integrity, there was never an issue with the casing of the Ferguson # 1 Well and, therefore, there was never any possibility that any fluid would migrate into USDWs. SOF at ¶¶ 42; 50; 52-53.

Thus, the gravity of the violation should be Level II violation for failing to monitor. See Exhibit 3, Appendix A. A \$5,000 fine would be appropriate for such a violation, without any increase for duration, gravity or lack of effort to comply .

The fact that Maralex observed the annulus pressure at least 41 times during the 52 weeks at issue, militates against the Presiding Judge's 20% increase due to the duration of the violation. As the Judge noted, the EPA relied solely on the information from the pumper who stated that he only checked the pressure once every seven or eight months and used a 7-month duration to calculate its recommended penalty. Initial Decision at 20-21. The Presiding Judge appeared to use this measure to determine the duration of the penalty in increasing the penalty by 20%. *Id.* at 21. That measure is clearly erroneous as the record evidence demonstrates.

The fact that Maralex observed the annulus pressure at least 41 times during the 52 weeks at issue, and the unquestioned integrity of the casing, also undercuts the Presiding Judge's 30% under the gravity component and the increase of 20% on the lack of effort to comply with the weekly observation requirement. The fact that Maralex terminated the employee who failed to take the weekly observations

of the annulus pressure also argues against any increase in the penalty for lack of effort to comply with this requirement. SOF at ¶ 58.

Based on these considerations, Maralex submits that its penalty for failing to make weekly observations of the annulus pressure should be reduced from \$17,000 to \$5,000.

ii. COUNT II PENALTY – – LACK OF MECHANICAL INTEGRITY

To the extent that the Board finds a violation of 40 C.F.R. § 146.8 for failing to maintain mechanical integrity, the amount of the penalty imposed by the Presiding Judge is excessive and not supported by the record evidence. The Presiding Judge found that the failure to maintain mechanical integrity was a Level II violation and imposed a \$40,000 penalty, increased by 20% for the duration of the violation by 50% for the lack of effort to comply with this regulation, for a total of \$68,000. Initial Decision at 20; 21 and 23.

The Presiding Judge's main error in assessing this penalty was her finding that Maralex testified that there was a leak in the "casing" thereby increasing the risk of contamination. Initial Decision at 15, citing to Tr. at 172:17. Based on that finding, the Presiding Judge found that "the potential for harm is high given the admitted leak and movement of fluid." Initial Decision at 17. This reference to the transcript cites to the testimony of Christi Reid, a petroleum engineer employed

by Maralex. *Id.* at 168:16-18. Ms. Reid took over responsibility from Mr. Reimers for overseeing the operation of the Ferguson # 1 Well in August 2010. *Id.* at 169:10-18. In the testimony cited by the Presiding Judge, Ms. Reid was discussing the re-working of the well after it was shut-in per the EPA's order in May, 2012. *Id.* at 171:17 – 172-25. Ms. Reid testified that when they pulled the tubing from the well and tested it they found a pinhole leak caused by two loose connections. *Id.* at 172:12-25. She did not testify that there was a leak in the casing. *Id.*

What the record evidence does establish is that: there was no leak in the casing and no migration of fluids from the well to USDWs. (SOF at ¶¶ 42; 50; 52-53); Maralex over-designed the Ferguson # 1 Well to prevent any significant leaks (SOF at ¶¶ 15-17); the EPA failed to identify any contaminants that entered the well that could be a source of potential for contamination to USDWs (Initial Decision at n. 19); and the water injected into the well was filtered and is extremely clean, minimizing any alleged harm to any USDWs.¹ SOF at ¶ 10.

¹ The Initial Decision states that Maralex did not present evidence regarding the claim that the water was extremely clean and therefore minimizes any harm to USDWs and was raising the argument for the first time in the post hearing brief. However, Maralex did present evidence at the hearing regarding the quality of the water being injected into the well during the hearing. SOF at ¶ 10. Maralex raised the issue in its post-hearing brief, the first opportunity to make this argument as counsel for both parties agreed, with the Court's consent, to waive closing arguments at the close of hearing but instead make arguments in the post-hearing briefs. Tr. at 213:13-19.

Based on these facts, the potential for harm to USDWs caused by leaks in the tubing was non-existent because the facts do not support the Presiding Judge's finding that there was movement of fluid into any USDW. Thus, even if one were to classify the violation as a Level II, or even a Level I violation, the Presiding Judge's imposition of a \$40,000 penalty constitutes an abuse of discretion since it is based on findings that have no support in the record. Maralex submits that a reasonable penalty under the Guidelines would be no more than \$10,000.

There is no basis for the Presiding Judge increasing the penalty by 20% for duration, 30% for gravity and 20% for lack of effort to comply with the mechanical integrity requirement. First, with respect to the duration of the violations, all of the evidence shows that the leak was intermittent and that Maralex bled the annulus pressure to zero whenever there was excessive pressure. SOF at ¶¶ 13; 31-32; 49-50; and 52-53. Thus, increasing the penalty by 20% based on a finding that the well was in violation of the mechanical integrity requirement for 12 continuous months is contrary to the record evidence. Importantly, Mr. Wisner, the EPA employee charged with UIC compliance in Region 8, unequivocally testified that during his tenure, which ended in late 2010 or early 2011, the Ferguson # 1 Well never lacked mechanical integrity and if it had, he would ordered it shut in. SOF ¶ 41. Again, this establishes that the Ferguson # 1 Well was not in violation of the mechanical integrity requirement

continuously from May 2010 through May 2011 but, at the very most, was in violation from early 2011 through May 2011.

Thus, based on the intermittent nature of the leaks and the fact that Mr. Wisner did not find any violation during his tenure as the UIC inspector for Region 8, there is no basis for increasing this penalty based on duration of violation.

Finally, there is no basis to support an increase of 30% for gravity or 20% for lack of effort to comply with the mechanical integrity requirement. The record evidence showed that: the water being injected was filtered and did not contain any frac materials was relatively clean water; Maralex bled off the annulus pressure to zero whenever it found excessive pressure; Maralex over-built the well in order to prevent any fluid movement into USDW's, an effort that the Presiding Judge found to be successful; Mr. Wisner never found the Ferguson Well # 1 to have lacked mechanical integrity; the leak was a minor, intermittent pinhole tubing leak; there was no fluid movement into USDW's; Maralex followed Guidance No. 35; and Maralex shut in the well when directed to do so. SOF at ¶ 10; 13; 16, 42; 48-50; 52-53; *supra* at 30-31; Initial Decision at n. 14. All of this evidence demonstrates that Maralex was proactive in ensuring that the Ferguson # 1 Well maintained its mechanical integrity, starting with the over-building of the well and continuing through the re-work of the well in May 2011.

Maralex submits that based on the record evidence the amount of the penalty if a violation of Count II is found, should be reduced to \$10,000, without any increase during to duration, gravity or lack of effort to comply.

iii. COUNT III PENALTY – ANNUAL REPORTING OF ANNULUS PRESSURE

Maralex admits that its reporting of the annulus pressure in the 2010 report was incorrect, but this error did not impair or impede the EPA from carrying out its regulatory duties. The EPA knew from its own records that there annulus pressure for the Ferguson # 1 Well based on its two inspections held in 2011. SOF at ¶¶ 21 and 23.

Based on the fact that the incorrect reported caused no harm, Maralex submits that the proposed penalty should be reduced from \$3,900 to \$1,000.

7. Conclusion.

For the reasons set forth above, the Board should reserve the Presiding Judge's finding of liability with respect to Count II of the Complaint and hold that the Ferguson # 1 Well maintained its mechanical integrity from May 2010 through May 2011. In addition, the Board should reduce the penalty imposed under Count 1 to \$10,000 and reduce the penalty imposed under Count III to \$1,000

8. PROPOSED FINDINGS OF FACT

Maralex incorporates its Statement of Facts as its Proposed Findings of Fact.

9. PROPOSED CONCLUSIONS OF LAW

A. PENALTY CALCULATIONS FOR COUNTS I AND III

In 1974, Congress, passed the Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended at 42 U.S.C. §§ 300f to 300j-8 (1991 & Supp. 2000)), with the basic goal of protecting the purity of the drinking water provided by the nation's public water systems.

The purpose of the Act, in the words of its drafters, is to "assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. Rep. No. 93-1185, [Cong., 2d Sess. at 31, U.S.Code Cong. & Admin.News 1974 p. 6484]. In other words, the framers of the Act were concerned with ensuring that consumers of public water systems have access to safe drinking water, with the safety of the water to be judged according to objective criteria developed by the EPA.

United States v. Massachusetts Water Resources Authority, 256 F.3d 36, 56 (1st Cir. 2001).

Part C of the SDWA establishes a regulatory program for the protection of underground sources of drinking water. *See* 42 U.S.C. §§ 300h to 300h-8. Pursuant to Part C of the SDWA, the EPA has adopted certain regulations governing injection wells. SDWA defines underground injection to mean the "subsurface emplacement of fluids by well injection." 42 U.S.C. Sec. 300h(d)(1). The Ferguson # 1 Well is a Class II injection well, defined as "[w]ells which inject fluids: (1) [w]hich are brought to the surface in connection with ... conventional oil or natural gas production . . ." 40 C.F.R. § 144.6(b).

In its Complaint, the EPA alleged that Maralex violated 40 C.F.R. § 144.51(q)(1) and Part II(C)(B) by failing to maintain the mechanical integrity of the Ferguson # 1 Well. Complaint at ¶ 20. 40 C.F.R. § 144.51(q)(1) imposes a duty on Maralex, as the operator of the Ferguson # 1 Well, to its maintain mechanical integrity as provided by 40 C.F.R. § 146.8. This regulation defines mechanical integrity as follows:

An injection well has mechanical integrity if:

- (1) There is no significant leak in the casing, tubing or packer;
and
- (2) There is no significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore.

Applying the law to the undisputed facts establish that the Ferguson # 1 Well did not, as a matter of law, fail to maintain mechanical integrity at any time between May 5, 2010 and May 24, 2011, nor at any other time. By definition, in order to have a lack of mechanical integrity, the leak in the casing, tubing or packing has to be “significant” and also must lead to “significant” fluid movement into an underground source of drinking water. 40 C.F.R. § 146.8. The EPA failed to establish that the leak in the tubing was anything other than a minor, intermittent leak, that there was a separate leak in the casing, or that the minor, intermittent tubing leak could not have caused a migration of any fluid into unpermitted formations, let alone a significant amount of fluid into any USDW.

As the First Circuit held in *Massachusetts Water Resources Authority*, the purpose of the SDWA is to ensure that consumers of public water systems have access to safe drinking water and that the safety of that water is to “be judged according to objective criteria developed by the EPA.” 256 F.3d at 56. The objective criteria in this case is the definition of mechanical integrity as set forth in 40 C.F.R. § 146.8, an objective criteria that Maralex satisfied.

Mr. Wiser, the EPA’s own expert, testified that during the time of his supervision of the Ferguson # 1 Well, he never found that the Ferguson # 1 Well lacked mechanical integrity. (Mr. Wiser was in charge of inspecting the wells in Region 8 until late 2010 and early 2011.) Significantly, Mr. Wiser acknowledged that if at any time he thought that the Ferguson # 1 Well lacked mechanical integrity, he would have ordered that it be immediately shut-in, an action that he never took. His failure to order the Ferguson # 1 Well to be shut-in until it passed a mechanical integrity test establishes that the person in charge of the EPA’s UIC inspections in Region 8 believed that the Ferguson # 1 Well has mechanical integrity through at least early 2011.

Mr. Wiser also admitted that there is no evidence that that any fluid ever left the wellbore and migrated into any USDW, let alone a “significant” amount as is necessary to trigger a violation of the SDWA.

Mr. Reimers and Mr. O'Hare, Maralex's two experts, both testified consistent with Mr. Wisner regarding the mechanical integrity of the Ferguson # 1 Well. Mr. Reimers, who was qualified as an expert in petroleum engineering and underground injection control, testified the annulus pressure was caused by temperature increases and temporary, intermittent pinhole leaks due to loose tubing connections that under certain pressures, conditions and harmonics of the tubing string would create temporary pinhole leak. Mr. Reimers also opined that the Ferguson # 1 Well maintained mechanical integrity during the relevant period because the leaks were intermittent, "extremely minor," and there was never any loss of liquid from the annular other than what Maralex bled off in following Guidance No. 35.

Mr. O'Hare, an expert in petroleum engineering and operation of UIC wells, with many years and extensive background with respect to the construction and operation of underground injection wells, opined that the Ferguson # 1 Well maintained mechanical integrity because there was not a significant leak in the tubing and there was no evidence of fluid flow into any USDW. Mr. O'Hare based his opinion on the following: after Maralex bled water from the annulus, the annulus pressure reduced to zero and there was no flow after that, even though they were injecting somewhere around 100,000 gallons a day; Maralex had performed a number of mechanical integrity tests all of which the Ferguson # 1 Well passed;

and the intermittent leak from the loose connections of tubing was never significant because if it were, the well would have continued to flow even though the pressure had been bled off, particularly when water was being injected into the well. *Id.* at ¶ 52.

Mr. O'Hare also opined that fluid from the Ferguson # 1 Well never migrated from the wellbore into the surrounding formations, other than where it was allowed to do so under the Permit. He based his opinion on the facts that the 7-inch casing showed mechanical integrity both before there was any pressure and at various times afterwards, the casing never failed a mechanical integrity test and never needed repair.

The expert opinion's of Messrs. Wiser, O'Hare and Reimers, that the Ferguson # 1 Well never failed to maintain mechanical integrity, is supported by the facts. The re-work on the well demonstrated that the leaks were pinhole leaks in the tubing caused by two loose connections and, after tightened, ended the leaks. During the first three inspections, Maralex bled off the annulus pressure to zero, the pressure did not return and there was no flow (During the April 13, 2011 inspection, Ms. Roberts did not bleed off the annulus.) Moreover, every other time that Maralex found excessive annulus pressure, it bled the annulus, the pressure dropped to zero and did not build back up.

In addition, Ms. Roberts' letter ordering the Ferguson # 1 Well to be shut-in was improper because she failed to bleed off the annulus pressure during her site visit to determine whether it returned to zero, as set forth in Guidance No. 35, but instead merely read the annulus pressure. As Mr. Wiser admitted, the mere presence of annulus pressure is insufficient to establish that an injection well lacks mechanical integrity because it could be explained by the effects of temperature.

In sum, the EPA failed to establish the elements necessary to prove that Maralex failed to maintain the mechanical integrity of the Ferguson # 1 Well pursuant to 40 C.F.R. § 146.8.

B. PENALTY CALCULATIONS FOR COUNTS I AND III

The application of the penalty criteria to specific circumstances is highly discretionary. *In re Pepperell Assoc.*, 9 E.A.D. 83, 107 (EAB 2000), *aff'd* 246 F.3d 15, 29 (1st Cir. 2001). However, any discretionary decision by an administrative agency must be based on record evidence and the failure to do so is grounds for finding an abuse of discretion based on the arbitrary and capricious standard. 5 U.S.C. § 706(2)(a). *See e.g., Bowman Transp., Inc. v. Arkansas-Best Freight Sys. Inc.*, 419 U.S. 281, 285 (1974) (framing the question as did the agency "articulate a rational connection between the facts found and the choice made"); *James Madison, Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1094 (DC Cir. 1996) (noting that an agency's factual findings may be reversed if there is "clear error");

Seo v. U.S. Dept. of Labor, 523 F.2d 10, 13 (10th Cir. 1975) (holding that the Secretary of Labor abused his discretion by basing a decision on an unsubstantiated factual basis).

The Presiding Judge abused her discretion with respect to the penalty assessments because some of her factual findings were in clear error, she did not articulate a rational connection between the facts found and the choice made, and she based some of her decisions on unsubstantiated factual bases. While Maralex admits that it violated the requirement for making weekly observations of the annulus pressure, Count I of the Complaint, Maralex submits that the amount of the penalty imposed by the Presiding Judge for this violation is excessive and not supported by the record evidence. The Presiding Judge found that the failure to make weekly observations of the annulus pressure was a Level I violation warranting a \$10,000 penalty, increased by 20% for the duration of the violation by 50% for the lack of effort to comply with this regulation, for a total of \$17,000. Initial Decision at 20; 21 and 23. The facts do not support the imposition of the penalty that the Presiding Judge imposed.

Contrary to the Presiding Judge's finding that Maralex displayed a "total disregard to check the annulus pressure weekly", Initial Decision at 19, the record evidence showed that Mr. Reimers monitored the pressure at least twice a month, Mr. O'Hare monitored the pressure at least once every three weeks and that on

some occasions that Maralex checked the annulus pressure several times per week.

Thus, over a course of twelve month period, from May 2010 until May 2011, Maralex observed the annulus pressure *at least* 41 times (at least 24 times by Mr. Reimers and at least 17 times by Mr. O'Hare), or 11 times short of the required 52 observations. This total number of observations does not account for the occasions when Maralex checked the annulus pressure several times per week. Based on this evidence, the Presiding Judge's finding that Maralex displayed a "total disregard" for checking the annulus pressure is in error.

Another factor in determining the seriousness of the violation is the potential harm under the SDWA that the violation presents. *In re: Gypsum North Corp.*, CAA-02-2001-1253, 2002 EPA ALJ LEXIS 70, * 26 (Nov. 1, 2002). As the Presiding Judge noted, high annulus pressure is "the first clear sign of an issue and the point where potential harm begins." Initial Decision at 19. In this case, however, there was never any potential harm to USDWs because even if the Board were to hold that the tubing leaks showed that Ferguson # 1 Well lacked mechanical integrity, there was never an issue with the casing of the Ferguson # 1 Well and, therefore, there was never any possibility that any fluid would migrate into USDWs.

Thus, the gravity of the violation is a Level II violation for failing to monitor. A \$5,000 fine is the appropriate penalty for such a violation, without any increase for duration, gravity or lack of effort to comply .

The fact that Maralex observed the annulus pressure at least 41 times during the 52 weeks at issue, militates against the Presiding Judge's 20% increase due to the duration of the violation. As the Judge noted, the EPA relied solely on the information from the pumper who stated that he only checked the pressure once every seven or eight months and used a 7-month duration to calculate its recommended penalty. Initial Decision at 20-21. The Presiding Judge appeared to use this measure to determine the duration of the penalty in increasing the penalty by 20%. *Id.* at 21. That measure is clearly erroneous as the record evidence demonstrates.

The fact that Maralex observed the annulus pressure at least 41 times during the 52 weeks at issue, and the unquestioned integrity of the casing, also undercuts the Presiding Judge's 30% under the gravity component and the increase of 20% on the lack of effort to comply with the weekly observation requirement. The fact that Maralex terminated the employee who failed to take the weekly observations of the annulus pressure also argues against any increase in the penalty for lack of effort to comply with this requirement.

Based on these considerations, the penalty for failing to make weekly observations of the annulus pressure is reduced from \$17,000 to \$5,000. Maralex admits that its reporting of the annulus pressure in the 2010 report was incorrect, but this error did not impair or impede the EPA from carrying out its regulatory duties. The EPA knew from its own records that there annulus pressure for the Ferguson # 1 Well based on its two inspections held in 2011.

Based on the fact that the incorrect reported caused no harm, Maralex submits that the proposed penalty should be reduced from \$3,900 to \$1,000.

Dated this 15th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **Appellant's Brief** was sent on August 15, 2013, via First Class Mail, Postage Prepaid (and via email) to the following persons:

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