UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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

COMPLAINANT'S REPLY TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, Counsel for Complainant and files this response to Respondent's Motion for Summary Judgment. For the following reasons, this motion should be denied.

An accelerated decision is appropriate when there are no material facts in genuine dispute and the moving party is entitled to judgment as a matter of law. The standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In re Green Thumb Nursery, Inc., 6 E.A.D. 782, 793 (EAB 1997); In re CWM Chem. Serv., 6 E.A.D. 1, 12 (EAB 1995); In the Matter of Hing Mau, Inc., Docket No. FIFRA-9-2001-0017 (August 13, 2002). Thus, under the Consolidated Rules of Practice, 40 C.F.R. § 22.20:

> (a) General. "The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . ."

40 C.F.R. § 22.20(a). As demonstrated below, Respondent has failed to demonstrate that it is entitled to judgment as a matter of law. Accordingly, the Motion should be denied.

Respondent's Motion makes a number of statements and arguments which, while they might be relevant to a discussion of the amount of penalty that should be assessed, do not controvert the allegations of the Complaint: that Respondent had a Permit and did not comply with its terms. Specifically, Respondent argues that he did not need the permit issued to him, and did not fulfill all of the application requirements, and made certain efforts to comply with regulatory requirements. However, Respondent does not demonstrate that he complied with the

terms of the Permit[1] that are alleged to have been violated and his Motion should therefore be denied.

First, Respondent seems to be arguing that the permit should not have been issued because he did not satisfy certain requirements for its issuance. The fact of the matter is that Respondent sought a permit for the Gene Wilson #1 well and EPA was satisfied enough with the information he submitted to issue a permit to him for the well. Respondent also states that " ... he did not fulfill the listed items since he could not use the proposed permit." If Respondent did not want the permit, he had only to notify EPA to that effect. EPA sent Respondent a letter dated October 20, 1989, which transmitted a draft of the permit. [Complainant's Exhibit 3]. That draft states in Part I, Section B.1., that he could inject only fluids from his operations in the Martha Field. If Respondent had no need for such a permit, he could have informed EPA that he was withdrawing his application. Respondent did no such thing, but allowed the permit to go through public notice and then be issued to him on January 12, 1990. [Complainant's Exhibit 6]. It was not until November 1992, that Respondent expressed a desire to modify the permit to take fluids from other operators. [Complainant's Exhibit 8].

There is nothing in the record to support Respondent's assertion that EPA verbally agreed to allow him to modify the permit. However, EPA did notify Respondent of the need to demonstrate the mechanical integrity of his well subsequent to the initial demonstration performed on October 15, 1993. [Complainant's Exhibit 9]. Since Respondent had not submitted annual monitoring reports, the information available to EPA indicated that the well was due for mechanical integrity testing again in October 1998.[2] Accordingly, EPA timely notified Respondent that the well needed a mechanical integrity test and that the annual monitoring reports and fluid analysis had not been submitted. [Complainant's Exhibit 12]. If

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[1]Specifically, the Complaint alleges that Respondent violated the SDWA, 40 CFR §§ 144.51(a), 144.52(a)(6), and permit #KY10376 by failing to demonstrate the mechanical integrity of the subject well at least once every two (2) years or to timely plug and abandon the subject well and failing to submit annual monitoring reports.

[2]See Respondent's permit [Complainant's Exhibit 6], Part II, G.3., and 40 CFR § 144.28(g)(2)(iv)(A).

Respondent had been submitting the monitoring reports as required, EPA would have known that the Gene Wilson #1 well had not been used and therefore should have either been plugged or demonstrated mechanical integrity after two years of inactivity. [See Complainant's Exhibit 6, The Final UIC Permit, Part II, Section F. 3. Inactive Wells.]

There is nothing in the record to support Respondent's contention that he conducted the mechanical integrity test under the mistaken belief that it was a "pre-request" to amending the permit. Part I, Section A. 4.(b) of Respondent's permit plainly states that injection into the well may not commence until the permittee has demonstrated that the well has mechanical integrity. In a June 21, 1991 letter from Respondent to Ken Harris of EPA regarding the scheduling of the mechanical integrity test, no mention whatsoever is made of amending the permit for any reason. [Complainant's Exhibit 7]. It is in Respondent's November 11, 1992 letter to Greg Fraley of EPA that we find the first record of any desire on Respondent's part to amend the permit. [Complainant's Exhibit 8]. Respondent insists that he continually requested that EPA modify the permit, but all that is found is a second letter dated August 11, 1993, which transmitted to Jean Dove of EPA the letter originally sent to Greg Fraley. Again, as noted above, even assuming that Respondent sought modification of the permit, information of this nature is conceivably relevant to penalty amount, but has no bearing on whether Respondent violated the permit in the manner alleged in the Complaint.

Finally, EPA has no record of any occasion on which its inspector failed to show up for a mechanical integrity test of the subject well. Respondent submitted a January 5, 1999 letter from EPA to Respondent which has a note attached to it purporting to set a different date for the mechanical integrity than that contained in the letter itself. [Respondent's Exhibit 5]. EPA has no records showing that the testing was rescheduled. Respondent also submitted a November 24, 2006 affidavit by one of his former employees in which the employee states that EPA's inspector did not appear for a mechanical integrity test on April 26, 1999. The employee also states in the affidavit that he and another man performed an MIT test on the well while waiting for the inspector and that the well passed the test. Yet, in response to an August 2, 2000 letter from EPA requesting a copy of the most recent mechanical integrity test, Respondent made no mention of this alleged failure of EPA's inspector to appear for a test on April 26, 1999. [See Complainant's

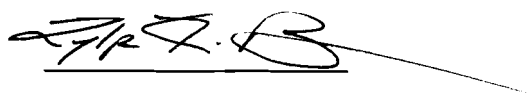
Exhibits 16 and 17]. In fact, Respondent stated in that August 22, 2000 letter that "Only the initial mechanical integrity was performed" and that he planned on plugging the well as soon as Mr. Ed Jordan was available to do so. Surely if EPA had failed to show up on April 26, 1999, and the well had been tested by Respondent's employee and passed the test, Respondent would have stated this in his August 2000 letter. Also, Respondent made no mention in this letter of EPA's alleged non-responsiveness to his continual efforts to modify the permit.

Even if the affidavit of Respondent's employee was accepted as true, Part I, Section A.3.(a) of Respondent's permit requires that the mechanical integrity test be witnessed by an EPA representative, which this test was not. This same permit provision requires that the test be submitted to EPA, which it was not. Finally, even if this had been a valid test, another test would have been due in 2001, and another in 2003. Respondent made no effort to demonstrate mechanical integrity or plug the well during these years or any years after 1999.

Respondent's assertions in his Motion for Summary Judgment find no support in Complainant's or Respondent's exhibits. In fact, if anything, the record contradicts his assertions. Moreover, nothing in Respondent's Motion for Summary Judgment demonstrates that Respondent did not violate his permit in the manner alleged in the Complaint.

For the foregoing reasons, Respondent's Motion for Summary Judgment should be denied.

Respectfully submitted,



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