UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
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ATLANTA, GEORGIA 30303-8960

JUN 19 2007

VIA FIRST CLASS MAIL (RETURN RECEIPT REQUESTED)
Mr. Gene A. Wilson
101 Madison Street
P.O. Box 702
Louisa, Kentucky 41230

VIA INTRA OFFICE MAIL
Zylpha Pryor, Esq. and
Paul Schwartz, Esq.
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303

Re: In the Matter of Gene A. Wilson
Docket No. SDWA-04-2005-1016

Dear Mr. Wilson, Ms. Pryor and Mr. Schwartz:

On June 14, 2007, I issued an *Order on Motions for Summary Determination* (Order) in the above-captioned matter. However, it has come to my attention that the Order inadvertently contained a number of typographical errors that I had intended to edit prior to issuing the final version. Therefore, I am issuing an *Amended Order on Respondent's Motion for Summary Judgment and Complainant's Motion for Accelerated Decision on Liability* (Amended Order) for the purpose of correcting those errors.

Please take notice, other than the re-titling of my previous Order to more accurately reflect the subject motions and the revision of the date June 10, 1995 to June 10, 2005 on page 2, there are no changes substantive in nature. The attached Amended Order supersedes the Order issued on June 14, 2007.

Yours truly,

Susan B. Schub

Susan B. Schub
Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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

AMENDED ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

The above matter under Section 1423(c) of the Safe Drinking Water Act ("SDWA" or "the Act"), 42 U.S.C. 300h-2(c), was commenced with the filing of an Administrative Complaint on May 16, 2006. In accordance with the undersigned's Order establishing further proceedings the prehearing exchange process was completed on or about December 7, 2006.

Early in the proceeding, on August 8, 2006, Respondent filed a Motion for Summary Judgment.[1] By Order dated September 29, 2006, the undersigned ruled that Respondent's Motion was premature and that a determination would be held in abeyance pending completion of the prehearing exchange of information. Thereafter, on December, 11, 2006, upon completion of prehearing exchange, Respondent, Gene A. Wilson, filed a Motion for Summary Judgment (Respondent's Motion) incorporating by reference his earlier Motion for Summary Judgment. Thereafter, on February 14, 2007, Complainant filed a Motion for Accelerated Decision on Liability. Both motions are ripe for determination.

[1] Simultaneous with the filing of Respondent's first Motion for Summary Judgment, on August 8, 2006, Respondent also filed a Motion to Strike or Consolidate. An Order on the Motion to Strike or Consolidate is being issued separately, along with rulings on Respondent's other subsequently filed motions.

Each party filed timely response and reply pleadings. The parties' positions set forth in their respective motions are, to a great extent, the same as those contained in their responsive pleadings. I will address both parties' motions simultaneously below.

BACKGROUND

On May 16, 2006, Complainant filed an Administrative Complaint against Respondent pertaining to the Gene A. Wilson #1 well, located in Lawrence County, Kentucky. Complainant alleges that Respondent violated the SDWA, 42 USC § 300f, *et seq.*, 40 CFR § 144.51(a), and the Underground Injection Control (UIC) Permit #KY10376, issued on January 12, 1990. The bases for the alleged violations are a) Respondent's failure to test for mechanical integrity from the date of an initial test on October 15, 1993, through the date the well was plugged on June 10, 2005; and b) Respondent's failure to submit annual monitoring reports during the life of the well. Based upon the information contained at paragraph 21 of the Complaint, the period for both violations begins May 16, 2001, five years from the date of the filing of the Complaint, and ends on June 10, 2005, the date on which the well was plugged. At the time of filing of the Complaint, Complainant sought an order assessing a civil penalty not to exceed the maximum allowable of $6500 per day, per violation, or a total of $157,000. However, at the time of filing its prehearing exchange, Complainant adjusted the penalty sought to a total of $10,291.

Respondent filed his response to the Complaint on June 14, 2006, as a "Counterstatement of Facts and Answer to Administrative Complaint". His arguments are, for all intent and purpose, re-asserted in his Motion seeking dismissal and/or

summary determination. Respondent's position with regard to his failure to perform Mechanical Integrity Tests (MITs) can be summarized as follows: The permit issued is invalid because he failed to satisfy financial requirements for its issuance; The subject well was never put into operation since the permit did not address his operational needs for the well; He tried to have his permit modified but lacked the requisite response and information from EPA[2]; In lieu of modifying his permit, EPA ordered that an MIT be performed; The MIT was scheduled to take place on January 21, 1999, but due to poor weather was rescheduled for April 26, 1999; Through no fault of Respondent, the EPA inspector failed to show up and the Agency representative responsible for rescheduling the test never contacted Respondent to reschedule. Further, Respondent acknowledges a communication with EPA in 2000, but asserts that EPA failed to even contact him regarding the MIT until February, 2005, when he was notified that he was in violation of the SDWA.

With respect to the second cause of action, failure to submit annual monitoring reports, Respondent denies that failure to do so was either a violation of the Act or the permit. He asserts that in accordance with the terms of the permit, the requirement to submit reports was to begin on the date on which the well commenced operations. Since, as he argues, the well never commenced operation, there was no requirement to submit the annual reports.

Included among the evidence submitted in support of Respondent's case, are affidavits of a) Gene A. Wilson (Respondent) attesting to facts set forth in his Motion, b) Patty Carter, addressing issues regarding cancellation and rescheduling of MITs;

[2] Respondent sold his other operation on Cam Creek, in November 1992, thus making the permit completely obsolete as it only authorized brine from that operation.

and c) James Clark, describing the MIT conducted in April, 1999, when the EPA inspector failed to appear.

Complainant vehemently disagrees that there would be any basis for dismissal/summary judgment in favor of Respondent, contending that Respondent's assertions are relevant to penalty assessment rather than liability. Furthermore, on February 14, 2007, Complainant filed its own Motion for Accelerated Decision on Liability, seeking summary determination on liability based upon there being no material facts in genuine dispute. Affidavits of Carol Chen, addressing the scheduling and cancellation of the MITs and William Mann, supporting the fact that a record search did not reveal any annual monitoring reports submitted on the Gene Wilson #1 well, are submitted in support of Complainant's Motion.

DISCUSSION

Section 22.20 of the Consolidated Rules covers both accelerated decisions and decisions to dismiss. That provision states:

> "(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 without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 CFR § 22.20(a)

Whether Respondent's Motion is one seeking summary judgment or dismissal, it is well established that the procedure set out at Section 22.20(a) of the Consolidated Rules, 40 CFR § 22.20(a), is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See In the Matter of C.W. Smith, Grady Smith, & Smith's Lake Corporation, Order on Motions, EPA ALJ, February 6, 2002, citing In re CWM Chem. Serv., 6 E.A.D. 1, 12 (EAB 1995).

As argued in response to Respondent's Motion and in Complainant's own Motion for Accelerated Decision, Complainant contends that there are no material issues in dispute that Respondent had a permit and failed to comply with its terms.

The threshold question is whether there exists a valid permit. The argument presented is that requisite financial responsibility was never submitted so that EPA should not have issued the permit. However, as reflected on the face of the permit, Mr. Wilson applied for the permit on August 22, 1989, which, along with subsequent amendments were reviewed and a final permit issued on January 12, 1990. As stated on page 3, "In accordance with 40 CFR § 144.36, the permit will be in effect for the life of the well or project, unless it is otherwise modified, revoked and reissued, or terminated as provided at 40 CFR § 144.39, 144.40 and 144.41." No evidence is presented supporting a finding that any of the aforementioned actions occurred. The permit was issued, remained valid and in full force and effect during the period that is the subject of this proceeding. Therefore, liability rests on whether or not Respondent violated the terms of the permit and the regulations.

One undisputed fact is that the last *supervised* mechanical integrity test was performed in 1993. (Complainant's Exhibit 9); However, assuming no other supervised MIT was conducted anytime after 1993 due to failure on the part of EPA to provide an inspector for the test, a question arises as to whether or not it was possible for Respondent to comply with the permit. A material issue of fact indeed exists on this point, based upon the November 24, 2006, affidavit of Respondent's former employee James Clark, in which he states that EPA's inspector did not appear for the test as scheduled on April 26, 1999. In addition, the affidavit also states that while waiting for the inspector the MIT was performed and the well passed the test. Complainant contests the validity of what is represented based upon logic, that Respondent would have, or should have, made these statements at other more relevant points in time. Specifically, Complainant writes, "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." This is a material fact in dispute and one related to credibility of a witness to be determined at hearing. Complainant's affidavit of EPA employee Carol Chen is, without further testimony, insufficient to contradict Respondent's claims and/or to establish what transpired with regard to the MIT appointment.

Equally important, Complainant takes the position that even if an MIT had been performed in 1999, additional MITs were due to be performed in 2001 and 2003. However, there is inconsistency and ambiguity regarding this alleged permit requirement. The permit section relied upon is contained in UIC Permit, part II, Section F. 3, and provides,

"Inactive Wells. After a cessation of injection for two years the permitee shall plug and abandon the well in accordance with the plan unless he:

(a) Provided notice to the Director including a demonstration that the well will be used in the future; and

(b) Described actions or procedures, which are deemed satisfactory by the Director, that the permittee will take to ensure that the well will not endanger USDWs during the period of temporary abandonment. These actions and procedures shall include compliance with the technical requirements applicable to active injection wells unless waived, in writing, by the Director."

The technical requirements contained in the permit for mechanical integrity are found at Part II Section G 3. They require that in accordance with 40 CFR § 146.8, a demonstration of mechanical integrity shall be made *no later than five years from the date of the last approved demonstration.* (Emphasis added) Complainant's Exhibit 6

However, in its Motion for Accelerated Decision, filed subsequent to the Complaint, Complainant omits the claim that the violation amounts to failure to conduct MITs every two years – in 2001 and then again in 2003. Simply, referring to the permit plugging and abandonment requirement at Part II F 3, Complainant claims that Respondent/ permittee should have either plugged the well after two years of inactivity, that is by October 15, 1995, or demonstrated that it had mechanical integrity by that date. There is no mention that by virtue of not having plugged and abandoned the well, Respondent/permittee was then obligated to again conduct MITs every two years thereafter.

Complainant states that this requirement is found at Part II G. 3. As set forth above, this section requires an MIT once each five years of the life of the well and for requiring establishing and maintaining the mechanical integrity, respectively, **no later than five years from the date of the last approved demonstration.** Therefore,

Complainant concludes that since an MIT was performed on October 15, 1993, it follows that after two years of inactivity, by October 15, 1995, Respondent should have either plugged the well or demonstrated that it had mechanical integrity. As discussed above, this is inconsistent with Complainant's January 10, 2007, Reply to Respondent's Motion, in which Complainant claims that even if an MIT was conducted in 1999, another would have been due in 2001 and again in 2003, based upon the every two year requirement.[3]

If Complainant's position is that this requirement is one of the terms of the permit and/or regulations, then it will need to establish this as a matter of fact. Similarly, if it is Complainant's position that the requirement to plug and abandon a well after two years of inactivity, by implication establishes the two year interval for MITs during years of inactivity, this too will need to be established at hearing.

With regard to the second cause of action, related to the failure to submit annual monitoring reports, the fact that Respondent never submitted any such reports is sufficiently established through the uncontested affidavit of William Mann, an EPA permit writer. Based upon a record search no annual monitoring reports were ever submitted. However, it is a material matter in dispute whether or not this requirement applied to a well never put into service. As Respondent points out in its Facts and Exhibits for Stipulation and Motion for Summary Judgment p. 5 – referring to Permit Part I, Section c 2, -the permit language provides that "observation and recording of injection pressure, annulus pressure, flow rate and cumulative volume shall be made over equal time intervals *beginning on the date on which the well commences operation*".

[3] Furthermore, on the first page of Complainant's Rebuttal Prehearing Exchange filed on December 7, 2006, Complainant writes, "Regardless of any attempts to modify his permit, Respondent was still responsible for demonstrating the mechanical integrity of his well at least once every 5 years."

(Emphasis added). Therefore, it is a material issue in dispute whether or not the well commenced operations, and what relevance that would have on the requirement to submit annual monitoring reports. This issue is more appropriately determined at hearing. Therefore, notwithstanding a finding of fact that no annual monitoring reports were ever submitted there is insufficient basis to determine liability on this issue.

SUMMARY

Both Respondent's Motion for Summary Determination and Complainant's Motion for Accelerated Decision are denied. The bases for denial and summary of some of the issues to be addressed at hearing are set forth below:

1. Since the period covered in this action runs from May 16, 2001 to June 25, 2005, on what date is the first violation alleged to have occurred? Was an MIT conducted in 1999, and what is the relevance of establishing whether or not an MIT was conducted in 1999, two years prior to the period covered by this action?

2. Respondent argues that his well was tested for mechanical integrity on April 26, 1999, absent the inspector who failed to appear without notice. Additional evidence must be heard in order to conclude that the MIT was performed or whether it had been rescheduled for that date. However, as noted above, even if this is established, what is the relevance of the MIT conducted prior to the date the "violation period" commences, May 16, 2001?

3. Assuming *arguendo*, that the inspector failed to appear and that no further information or rescheduling was confirmed by Complainant, what is the ramification of such a test having been performed without government supervision?

4. The cancellation of the follow-up inspection to be conducted on January 21, 1999, is in dispute. The Carol Chen affidavit addressing normal course of business does not sufficiently establish that the inspection was cancelled by Respondent. Complainant writes, "All of the evidence submitted by Respondent is in the nature of arguable efforts to comply or misunderstanding regarding the legal obligation and thus does not create an issue of fact regarding his liability." Complainant's Motion p. 5. However, the issues that must be resolved are essential to a finding on liability – does Respondent have a valid defense for any failure to conduct mechanical integrity tests and even assuming no defense to his failing to conduct the tests, how many tests were required during the "period of violation covering this action?

Notice is taken that Permit # KY 10376 was a validly issued permit covering the Gene Wilson # 1 well. Notice is also taken that no annual monitoring reports were submitted from the date of permit issuance. However, these findings of fact do not establish Respondent's liability at this time.

I find that neither Complainant nor Respondent has met its burden of establishing that without further hearing, or upon the affidavits submitted, that no genuine issue of material fact exists so as to be entitled to judgment as a matter of law.

Under separate Order the undersigned will schedule the time and location of a hearing to take place in this matter.

Dated: 6/19/07

Susan B. Schub
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Amended Order on Respondent's Motion for Summary Judgment and Complainant's Motion for Accelerated Decision on Liability, in the Matter of Gene A. Wilson, Docket No., SDWA-04-2005-1016, on the parties listed below in the manner indicated:

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(Certified Mail – Return Receipt Requested)

Zylpha Pryor, Esq. and
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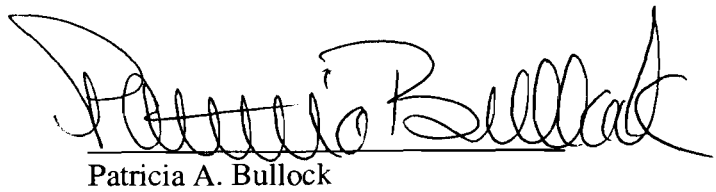
(via Intra-Office Mail)

Date: 6-19-07



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