UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
MR. C. E. McCLURKIN d/b/a J-C OIL COMPANY BOWRING, OKLAHOMA	)	DOCKET NO. VI-UIC-98-0001
RESPONDENT	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION AND INITIAL DECISION

Pursuant to Section 1423(c) of the Safe Drinking Water Act, Mr. C. E. McClurkin d/b/a J-C Oil Company (Respondent), is assessed a civil penalty of $1,000.00 for violating the Underground Injection Control (UIC) regulations of the Safe Drinking Water Act.

BY: EVAN L. PEARSON
Regional Judicial Officer

DATED: February 10, 2000

APPEARANCES:

For Complainant

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Assistant Regional Counsel (6RC-EW)
U.S. Environmental Protection Agency
Region 6
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For Respondent

C. E. McClurkin
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I. INTRODUCTION

This is a proceeding under Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. §300h-2(c), by the United States Environmental Protection Agency, Region 6, (Complainant), against Mr. C. E. McClurkin d/b/a J-C Oil Company (Respondent) for violations of the Underground Injection Control (UIC) regulations of the SDWA. Specifically, the Complainant alleged that the Respondent operated an injection well without mechanical integrity, and failed to report production volumes. For the reasons set forth below, I find that the Respondent committed the two violations alleged by the Complainant, and assess a civil penalty of $1,000.00.

II. STATUTORY AND REGULATORY FRAMEWORK

A. BASIS FOR THE PROCEEDING

Part C of the SDWA, 42 U.S.C. § 300h *et seq*, provides for the protection of underground sources of drinking water. Pursuant to Sections 1421 and 1422 of the SDWA, 42 U.S.C. §§ 300h and 300h-1, EPA was required to establish a program to prevent underground injection which endangers drinking water sources within the meaning of Section 1421(d)(2) of the SDWA, 42 U.S.C. § 300h(d)(2).[1] Pursuant to these provisions, EPA established a permit program to protect underground

[1]Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons. 42 U.S.C. § 300h(d)(2).

sources of drinking water. In this case, the authority for the permit program for Class II UIC wells located on the Osage Mineral Reserve is found at 40 C.F.R. Part 147, Subpart GGG. This permit program is administered by EPA. 40 C.F.R. § 147.1852.

On April 26, 1990, the United States Environmental Protection Agency, Region 6, issued Permit No. 06S1261P5443 (Permit) to the Respondent to convert a well to a Class II salt water disposal injection well and operate such well pursuant to the Permit and the Osage Class II Underground Injection Control Program and Regulations.[2] Administrative Record, Exhibit 42.[3] The Permit was

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[2]The Osage Mineral Reserve in Oklahoma was established by an Act of Congress in 1906, which allows the Osage Indian Tribe, through the Bureau of Indian Affairs (BIA), to establish leasing policies and obtain royalties from oil and gas production. *See* 49 *Fed. Reg.* 45,292, 45,300 (Nov. 15, 1984). Because of the nature of this grant of authority, the State of Oklahoma does not regulate mineral extraction activities on the Reserve and the Oklahoma UIC program for Class II wells, approved in 1981, does not apply to injection activities on the Reserve. *Id.* In 1984, the Agency established a federal Class II UIC program in the Osage Mineral Reserve at 40 CFR Part 147 Subpart GGG. *Id.* In consideration of the large number of wells in the Osage Mineral Reserve and the fact that the Reserve already had a considerable history of regulation of Class II wells, the Agency tailored the UIC program specifically to the Reserve by drawing from existing BIA requirements, requirements from the approved Oklahoma UIC program in effect in the rest of the State, the EPA UIC minimum requirements, and the expressed preferences of the Osage Tribe. *Id.*

The foregoing was taken verbatim from *Osage (Pawhuska, Oklahoma)*, 4 E.A.D. 395, 396, fn. 2 (EAB 1992).

[3]Unless otherwise noted, all references to exhibits are to the exhibits in the Administrative Record filed by the Complainant on October 8, 1998.

modified on October 4, 1991, and April 29, 1996. Exhibits 38 and 36. The Complainant alleges that Condition II.E.1 of the Permit requires that "all injection wells must have and maintain mechanical integrity consistent with 40 C.F.R. § 147.2920(b), citing Exhibit 43 of the Prehearing Exchange.[4] Complainant's Motion for Accelerated Decision at 10. However, Exhibit 43 is a draft permit. The final permit (Exhibit 42) is incomplete, because it is missing Part II, which includes Condition II.E.1. However, 40 C.F.R. § 147.2916 provides that the owner or operator of a new Class II injection well or any other Class II well required to have a permit in the Osage Mineral Reserve shall comply with, *inter alia*, 40 C.F.R. § 147.2920(b). This regulation requires all wells to have mechanical integrity. In addition, Permit Condition I.B.4, as modified on October 4, 1991, requires the Respondent to report production from well numbers 101, 102 and 103 in the Northwest Quarter of Section 36, Township 29 North, Range 11 East annually. Exhibit 38.

B. BASIS FOR ENFORCEMENT

Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c), authorizes the Administrator to issue an administrative order for violations of any regulation or other requirement of Part C of the SDWA (UIC

[4]There was no Exhibit 43 to the Complainant's Prehearing Exchange in the copy filed with the Regional Hearing Clerk. Exhibit 43 was also not referenced in the Complainant's Prehearing Exchange. Apparently, the Complainant is referring to Exhibit 43 of the Administrative Record, which is a draft permit.

program). This authority has been delegated by to the Director of the Compliance Assurance and Enforcement Division of EPA Region 6 by EPA Delegation No. R6-9-34 (August 7, 1995). The Order may assess a civil penalty of not more than $5,000 for each day of violation for any past or current violations, up to a maximum administrative penalty of $125,000, or require compliance with such regulation or other requirement, or both. 42 U.S.C. § 300h-2(c)(2).[5]

Originally, this proceeding was governed by the UIC Administrative Order Issuance Procedures Guidance, issued November 28, 1986 (UIC Guidance Document). However, on July 23, 1999, EPA promulgated revisions to 40 C.F.R. Part 22 (Part 22), with an effective date of August 23, 1999. 64 *Fed. Reg.* 40138. SDWA cases brought under Section 1423(c) of the SDWA are now governed by Part 22, Subpart I. 40 C.F.R. § 22.50(a)(2). The preamble to the regulations provide that Part 22 shall apply to all proceedings commenced prior to August 23, 1999, unless to do so would result in substantial injustice. 64 *Fed. Reg.* at 40138. Since Part 22 provides greater procedural protection than the UIC Guidance Document, the Presiding Officer finds that the imposition of the Part 22 rules would not result in substantial injustice.

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[5]This has been increased to $5,500 for each day of violation, up to a maximum of $137,500. This change took effect for any violation which occurred after January 30, 1997. 40 C.F.R. Part 19. Therefore, the Complainant could have sought a maximum daily penalty of $5,500, since the violations took place after January 30, 1997.

III. BACKGROUND AND PROCEDURAL HISTORY

On October 8, 1997, the Complainant issued a Proposed Administrative Order with Penalties (Proposed Order) to the Respondent, alleging that the Respondent violated the SDWA and the Osage Underground Injection Control Regulations promulgated under the SDWA by: (1) operating an injection well without mechanical integrity; and (2) failing to report production volumes. The Proposed Order sought a $5,000 civil penalty.[6] By letter dated November 6, 1997, the Respondent requested an informal hearing.

By Order dated July 16, 1998, the Parties were notified that the undersigned Regional Judicial Officer had been appointed as the Presiding Officer for this proceeding. The July 16, 1998 Order also provided the Parties the opportunity to elect between two hearing procedures, either the UIC Guidance Document, or the proposed revisions to 40 C.F.R. Part 22, specifically proposed Subpart I (Proposed Subpart I Rules). Use of the Proposed Subpart I Rules required agreement of both parties and the Presiding Officer. If the Parties wished to proceed under the Proposed Subpart I Rules, they were required to complete the Election of Hearing Procedures form and return it to the Regional Hearing Clerk by August 17, 1998. Once the decision on hearing procedures was made, a scheduling order would be

[6] *See* footnote 5, *supra*.

issued. The return receipt green card shows that the Respondent received a copy of the July 16, 1998 Order on July 20, 1998.

In order to answer any questions about the hearing procedures prior to the election deadline, the July 16, 1998 Order also scheduled a conference call for August 5, 1998, at 10 a.m. At the scheduled time, the Presiding Officer contacted the counsel for the Complainant, who informed the Presiding Officer that Mr. Steve Riley now represented the Respondent.[7] When the Presiding Officer called Mr. Riley at the number, he was given - (918) 587-3161, Mr. Riley was not available. The Presiding Officer left a message for Mr. Riley to reschedule the call. Mr. Riley never called back. The Presiding Officer also attempted to call Mr. McClurkin, but was told by the woman answering the phone that Mr. McClurkin was not going to be back until later that evening. The Presiding Officer left a message for Mr. McClurkin to call. Thus, no conference call was held on August 5, 1998.

On August 6, 1998, Mr. McClurkin called and informed the Presiding Officer that he didn't think that he had told Mr. Riley about the conference call. Neither Party filed an Election of Hearing Procedures form. Thus, the case proceeded under the UIC Guidance, and a Scheduling Order was issued on September 2, 1998.

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[7]The Presiding Officer was not informed of Mr. Riley's representation until told by Complainant's counsel.

The Scheduling Order was served on both Mr. Riley and the Respondent. The return receipt green cards show that Mr. Riley received a copy of the Scheduling Order on September 9, 1998, and the Respondent on October 13, 1998.

The Scheduling Order set forth deadlines for the submission the administrative record by the Complainant, a detailed response by the Respondent, the Parties' respective prehearing exchanges, and set dates for a prehearing conference call and the hearing. In addition, the Scheduling Order provided that if Mr. Riley was representing the Respondent, he was to file a Notice of Appearance with the Regional Hearing Clerk, and serve a copy on the Complainant and the Presiding Officer. No such Notice of Appearance was filed by Mr. Riley. Thus, the Presiding Officer concluded that Mr. Riley was not representing the Respondent in this matter. Therefore, no further documents were served on Mr. Riley.

The Complainant filed the administrative record on October 9, 1998, and served copies upon the Respondent and the Presiding Officer, as provided by the Scheduling Order. The Respondent was required to file a response which specified the specific factual and legal issues in dispute, and the specific factual and legal grounds for its defense no later than October 9, 1998. The Respondent failed to file such a response or ask for an extension of time.

The Parties were also required to serve and file their respective prehearing exchanges by October 26, 1998. The Complainant filed its prehearing exchange, while the Respondent failed to file such a document. The Scheduling Order also noted that failure to list witnesses or submit documents as part of the prehearing exchange may result in exclusion of those witnesses from testifying or the documents not being admitted into evidence.

Because the Respondent failed to submit a written response or a prehearing exchange, as required by the Scheduling Order, on November 10, 1998, the Presiding Officer ordered the Respondent to show cause, by December 7, 1998, why a hearing should be held. The Order stated that:

> Failure to file a response by December 7, 1998 shall result in a waiver of the Respondent's right to a hearing. If a hearing is not held, this case will be decided on the written submissions received to date, or such additional written submissions as ordered by the Court. This decision will be made after the Court has received the Respondent's response.

The return receipt green card shows that the Respondent received a copy of the Order on November 28, 1998. However, the Respondent failed to respond to the Order to Show Cause, thus waiving its right to a hearing.

On May 14, 1999, the Presiding Officer determined that additional submissions were necessary to render a decision. Therefore, the Complainant was ordered to filed a motion for

accelerated decision on liability and penalty, in accordance with 40 C.F.R. § 22.20(a). Despite the fact that the Respondent failed to respond to previous Orders, the Respondent was allowed to file a response to the motion. On June 11, 1999, the Complainant filed a motion for accelerated decision on liability and penalty. On June 29, 1999, the Respondent requested a 60 day extension of time in which to respond to the motion. On June 30, 1999, the Presiding Officer gave the Respondent until August 30, 1999 in which to file a response. On August 9, 1999, the Respondent sent financial documents to the Complainant. On August 26, 1999, the Complainant filed the financial documents with the Regional Hearing Clerk.

IV. STANDARD FOR MOTION FOR ACCELERATED DECISION

Although the Presiding Officer could have found for the Complainant due to the Respondent's failure to comply with the Presiding Officer's Orders, the lack of procedural safeguards in the UIC Guidance Document raised some concerns in the Presiding Officer's mind. Since the proceeding is now governed by 40 C.F.R. Part 22, Subpart I, the Presiding Officer will use the accelerated decision standard found in 40 C.F.R. § 22.20(a). The section provides that:

> 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. § 22.16(b) provides that "any party who fails to response within the designated period waives any objection to the granting of the motion." Since the Respondent only filed copies of financial documents in response to the motion, the Presiding Officer finds that the Respondent waived all objections to the granting of the motion for accelerated decision, except for the civil penalty factor concerning the economic impact of the penalty on the violator (commonly referred to as inability to pay). Nevertheless, the Complainant's Motion must be analyzed on its merits.

The Complainant has alleged that the Respondent committed two violations: (1) operating an injection well without mechanical integrity [Count 1]; and (2) failing to report production volumes [Count 2].[8]

ANALYSIS OF ALLEGED VIOLATIONS

A. ELEMENTS COMMON TO BOTH COUNTS

As a preliminary matter to finding liability, the Complainant must first establish the following elements which are common to both counts:

1. The Respondent is a "person" as that term is defined by Section 1401(2) of the SDWA, 42 U.S.C. § 300f(12);

[8]Although the two violations were not denominated as "counts" in the Proposed Administrative Order, the Complainant labeled these two violations as Counts I and II in its Prehearing Exchange and Motion for Accelerated Decision. Therefore, this decision will refer to these violations as Counts I and II.

2. The Respondent is the “owner” or “operator”;

3. Of a new Class II injection well.

1. Person

Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12) defines “person” as “an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency).”

The Proposed Order alleges that the Respondent is Mr. C. E. McClurkin d/b/a as J-C Oil Company. Proposed Order ¶ 1. Therefore, the Respondent is an individual and/or a company and thus a “person” as defined by Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12).

2. Owner or Operator

The Proposed Order alleges that the Respondent is the owner/operator of an injection well which is a “new Class II well”. Proposed Order ¶ 3. “Owner/operator” is defined at 40 C.F.R. § 147.2902 as “the owner/operator of any facility or activity subject to regulation under the Osage UIC program.” The analysis below will show that the Respondent’s wells are subject to regulation under the Osage UIC program.

3. New Class II Injection Well

“New Class II wells” are defined at 40 C.F.R. § 147.2902 as “wells constructed or converted after the effective date of this

program, or which are under construction on the effective date of this program." On April 26, 1990, the United States Environmental Protection Agency, Region 6, issued Permit No. 06S1261P5443 (Permit) to the Respondent to convert a well to a Class II salt water disposal injection well and operate such well pursuant to the Permit and the Osage Class II Underground Injection Control Program and Regulations. Exhibit 42. Because the injection well was converted after November 15, 1984 (the date of approval of 40 C.F.R. Part 147, Subpart GGG), the well would be considered a "new Class II well", as defined by 40 C.F.R. § 147.2902. The well in question is identified as well number 104, and is also identified by EPA inventory number OS5443. The well is located in the Northwest Quarter of Section 36, Township 29 North, Range 11 East, Hickory Creek District, Osage County, Oklahoma. Proposed Order ¶ 3. Because the well is subject to regulation under the Osage UIC program, the Respondent is an owner/operator of the well.

B. COUNT I - OPERATING AN INJECTION WELL WITHOUT MECHANICAL INTEGRITY

40 C.F.R. § 147.2903(a) states that "any underground injection, except as authorized by permit or rule issued under the UIC program, is prohibited." 40 C.F.R. § 147.2916 provides that the owner or operator of a new Class II injection well required to have a permit

in the Osage Mineral Reserve shall comply with 40 C.F.R. §§ 147.2903, 147.2907, 147.2918 - 147.2928.

The Complainant alleged that on June 5, 1997, the Respondent operated Well No. 104 without mechanical integrity of the casing, tubing, or packer, in violation of 40 C.F.R. §§ 147.2916, 147.2920(b), and 147.2925(a), and Condition II.E.1 of the Permit.[9] Proposed Order ¶¶ 3, 9 and 10. 40 C.F.R. § 147.2920(b) requires that each injection well must have mechanical integrity. Mechanical integrity is met only 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 through vertical channels adjacent to the well bore. 40 C.F.R. § 147.2920(b)(1) and (2).

The following is taken from the Affidavit of Gary J. Scott, a field inspector for the Osage UIC Office in Pawhuska, Oklahoma.

> On June 5, 1997, I inspected Well No. 104. I arrived at 12:10 p.m. Well No. 104 is located in the Northwest Quarter of Section 36, Township 29 North, Range 11 East, Hickory Creek District, Osage County, Oklahoma.
>
> I took a pressure reading of the well form the tubing with a underground injection control (UIC) gauge. The pressure reading indicated that the well was taking fluid at 525 lbs/square inch.

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[9]Since Exhibit 42 is missing Part II - Conditions Applicable to All Permits, Condition II.E.1 is not a part of the record in this case (Exhibit 43, which was cited by the Complainant in its brief, is a draft permit). Therefore, the Presiding Officer could not find the Respondent in violation of 40 C.F.R. § 2925(a) and Condition II.E.1. However, the Respondent was found in violation of 40 C.F.R. §§ 147.2916 and 147.2920(b).

> I then proceeded to take a pressure reading from the annulus. The annulus was equipped with a ½ inch valve with a six inch nipple screwed into the valve. I cracked the annulus open and measured the annulus with a UIC gauge. The annulus showed absolutely no sign of pressure at that time. The UIC gauge indicated a reading of zero. The complete absence of pressure in the annulus is very unusual since most wells show at least a little amount of pressure or a small vacuum. Because the valve on the annulus was rusted and in poor shape, I wanted to determine if the valve was open or clogged so that an accurate pressure measurement could be made. An open valve provides direct access to the annulus to be measured. I stuck a screwdriver in the nipple of the valve to make sure the valve was open since the valve was in such poor condition and the zero reading of the annulus was abnormal. This is not out of the ordinary for inspectors like myself to do this. At the moment I put the screwdriver into the nipple, the screwdriver was blown out of my hand and saltwater dispersed everywhere. Before closing the valve, I looked down at my fingers to make sure I did not lose any of them from the sudden and unexpected release of the saltwater. I located the screwdriver 62 feet behind me. I also found the plug that was in the nipple of the annulus that was composed of cloth and weeds. I then went back to the well and took a second reading of the annulus which read 525 lbs/square inch.
>
> Because the pressure from the tubing and the annulus were equal, 525 lbs/square inch, a loss of mechanical integrity was indicated.

Affidavit of Gary J. Scott, ¶¶ 4 - 7 (attached to the Complainant's Motion for Accelerated Decision).

Therefore, the Respondent violated 40 C.F.R. §§ 147.2916 and 147.2920(b) by failing to maintain the mechanical integrity of Well No. 104. Thus, an accelerated decision on liability shall be entered in favor of the Complainant on Count I.

C. COUNT II - FAILING TO REPORT PRODUCTION VOLUMES

40 C.F.R. § 147.2925(a) requires, *inter alia,* that the Respondent comply with all permit conditions. Noncompliance is grounds for an enforcement action. Permit Condition I.B.4, as modified on October 4, 1991, requires the Respondent to report monthly produced volumes (oil and water) on the annual injection report. Exhibit 38. The Complainant has alleged that the Respondent has not produced volumes from the production wells as required by Permit Condition I.B.4. Proposed Order ¶ 12.

According to the Affidavit of Ronald Van Wyk, "On March 31, 1997, EPA sent Respondent a letter stating he was required to submit an annual report of injection activities to EPA. On May 12, 1997, EPA sent Respondent a second letter stating that this was the Agency's second notice requesting the required annual well operation report." Affidavit of Ronald Van Wyk at 3; Exhibits 69 and 70. The Respondent also did not respond to this allegation, thus waiving any objection to finding for the Complainant. 40 C.F.R. § 22.16(b). Therefore, the Respondent violated 40 C.F.R. § 147.2925(a) and Condition I.B.4 of the Permit by failing to report production volumes. Thus, an accelerated decision on liability will be entered in favor of the Complainant on Count II.

VI. ANALYSIS OF CIVIL PENALTY CRITERIA

Section 300h-2(c)(2) of the SDWA, 42 U.S.C. § 1423(c)(2) provides the following:

> In any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation, or other requirement of this part relating to -
>
> > (A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production, or
> >
> > (B) any underground injection for the secondary or tertiary recovery of oil or natural gas,
>
> the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $5,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both.[10]

Section 300h-2(c)(4)(B) of the SDWA, 42 U.S.C. § 1423(c)(4)(B) enumerates the factors that the Presiding Officer must consider in assessing a civil penalty, namely:

A. the seriousness of the violation;

B. the economic benefit (if any) resulting from the violation;

C. any history of such violations;

D. any good faith efforts to comply with the applicable requirements;

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[10] *See* footnote 5, *supra*.

E. the economic impact of the penalty on the violator; and

F. such other matters as justice may require.

40 C.F.R. § 22.27(b) provides the following:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act.

In addition to its explanation in its Prehearing Exchange, the Complainant sets forth the Affidavit of Ronald Van Wyk in support of its proposed penalty of $5,000. Although the Complainant's Prehearing Exchange and Mr. Van Wyk's Affidavit discuss the statutory factors, Mr. Van Wyk's penalty calculations are based upon the "Interim Final UIC Program Judicial and Administrative Order Penalty Policy" dated September 27, 1993 (UIC Settlement Policy).

However, the UIC Settlement Policy specifically states that "the Agency will not use the Settlement Penalty Policy in arguing for a penalty at trial or in an administrative penalty hearing." UIC Settlement Policy at 2. Although EPA noted that it reserves the right "to act at variance with the policy at any time" (UIC Settlement Policy at 1), the Complainant failed to explain why it is necessary to use this policy in support of this accelerated decision. The Complainant also failed to include the UIC Settlement Policy as an exhibit in its Prehearing Exchange or as an exhibit to Mr. Van

Wyk's Affidavit.[11] In addition, the Complainant did not calculate a separate penalty for each violation, which the UIC Settlement Policy contemplates.

Furthermore, the Complainant may not want to establish the precedent that other Presiding Officers would use the UIC Settlement Policy to reduce a proposed penalty. *See Bollman Hat Company*, 8 E.A.D. ___, EPCRA Appeal No. 98-4, slip op. at 14 and 17 (February 11, 1999). Thus, the Presiding Officer declines to use the UIC Settlement Policy in calculating the penalty, and will instead analyze the statutory factors. *See DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995) (the Presiding Officer is free to disregard the civil penalty guidelines issued by the Agency when the circumstances warrant).

A. SERIOUSNESS OF THE VIOLATION

The Presiding Officer finds that operating an injection well without mechanical integrity in this instance is an extremely serious violation. The Presiding Officer adopts the following from Mr. Van Wyk's affidavit:

> This loss of mechanical integrity can lead to the release of saltwater which poses a danger to living matter. Saltwater is highly corrosive and if ingested by animals or humans, it can be detrimental to their health. Furthermore, by failing to maintain mechanical integrity

[11]Assuming that the Presiding Officer would have used the UIC Settlement Policy, a penalty calculation worksheet would have been helpful.

> in the well, Respondent allowed the likelihood of saltwater leaching into the groundwater. Saltwater contaminating the groundwater makes groundwater undrinkable. The loss of mechanical integrity also posed a serious danger to the inspector. The plug of weeds and cloth in the fitting and/or cut off valve on the well annulus concealed the lack of mechanical integrity violation. This plug was released when the value was opened and when the inspector put the screwdriver in the nipple of the valve. At that moment, the inspector's screwdriver was blown out of his hand due to the sudden and unexpected release of saltwater from the well. Fortunately, the screwdriver did not impale or injure the inspector.

Affidavit of Ronald Van Wyk at 5 - 6.

As to Count II - Failing to report production volumes, the Complainant claims that "it was a reporting violation that posed little or no threat to the environment." Affidavit of Ronald Van Wyk at 6. Apparently, the Complainant believes that this particular reporting violation poses no threat to the integrity of the UIC program. In this case, the Presiding Officer has no evidence to dispute the Complainant's conclusion.

B. THE ECONOMIC BENEFIT (IF ANY) RESULTING FROM THE VIOLATION

In Mr. Van Wyk's Affidavit, he states that he used the BEN model to calculate the economic benefit.[12] For Count I - (operating

[12]"BEN is a computer model used across EPA programs to calculate the economic benefit of noncompliance in *settlement* calculation amounts." UIC Settlement Policy at 4 (emphasis added). EPA "developed the BEN computer model to calculate the economic benefit a violator derives from delaying and/or avoiding compliance with environmental statutes. *EPA uses the model to assist its staff in developing settlement penalty figures. BEN can also develop testimony for trial or hearings, but an expert is necessary to*

an injection well without mechanical integrity), the economic benefit was calculated to be $108. For Count II - (failing to report production volumes) the economic benefit was zero. Affidavit of Ronald Van Wyk at 7 - 8.

However, the actual BEN calculations were not included in either the Complainant's Prehearing Exchange or Motion for Accelerated Decision. Thus, there is no evidence in the record of the amount of money that the Respondent delayed spending to repair the well that was used to calculate the alleged $108 economic benefit.[13] In addition, there is no evidence in the record providing a foundation for the use of the BEN model in calculating the economic benefit. Therefore, the Presiding Officer declines to assess any economic benefit for these two violations.

C. ANY HISTORY OF SUCH VIOLATIONS

The Respondent had no history of noncompliance. Affidavit of Ronald Van Wyk at 8 - 9.[14] Therefore, no adjustment was made for this element.

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explain its methodology and calculations." BEN User's Manual at 1-1 (April 1999) (emphasis added).

[13]The alleged economic benefit is only 2.16% of proposed $5,000 penalty.

[14]However, in its Prehearing Exchange, the Complainant states that the Respondent does not have a history of serious violations under the UIC program, but does have a history of UIC violations. The Complainant then cited four alleged violations. Complainant's Prehearing Exchange at 6. However, the Complainant did not identify the exhibits which proved that the violations occurred. In addition, the UIC Settlement Policy does not give any standard for determining what formally constitutes a prior violation (e.g., notice of violation, consent order, etc.). *See e.g.,* RCRA Civil Penalty Policy at 35 (October 1990).

D. ANY GOOD FAITH EFFORTS TO COMPLY WITH THE APPLICABLE REQUIREMENTS

In his affidavit, Mr. Van Wyk states that for Count I, he made an upward adjustment because the Respondent did not take any action to repair the loss of mechanical integrity before any enforcement action was taken, and the Respondent did not respond to the June 9, 1997 letter which required the Respondent to perform a mechanical integrity test (Exhibit 67). No adjustment was made for Count II - failing to report production volumes. Affidavit of Ronald Van Wyk at 9.

The Presiding Officer believes that an upward adjustment is justified in view of the Respondent's failure to timely correct the loss of mechanical integrity. EPA terminated the Respondent's authority to inject on August 27, 1997 because of the Respondent's failure to demonstrate mechanical integrity. Exhibit 49. The well wasn't tested for mechanical integrity until September 26, 1997, over three months after the violation occurred. Exhibit 65. Contrary to the assertions of the Complainant, the Presiding Officer believes that an upward adjustment is justified for the Respondent's failure to report production volumes. This reporting requirement was imposed through a permit modification on October 4, 1991. Exhibit 38. The Respondent received two notices from EPA concerning its failure to

comply.[15] As of the date the Proposed Order was issued, the Respondent had not submitted the necessary information. Affidavit of Ronald Van Wyk at 7. Thus, an upward adjustment is justified.

E. THE ECONOMIC IMPACT OF THE PENALTY ON THE VIOLATOR

Another way to say "economic impact of the penalty on the violator" is "inability to pay". The Environmental Appeals Board, in *New Waterbury, Ltd.*, stated the following concerning the inability to pay element:

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any specific evidence to show the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of a penalty must respond with the introduction of additional evidence to rebut the respondent's claim or through cross-examination it must discredit the respondent's contentions.

New Waterbury, Ltd., 5 E.A.D. 529, 542 - 43 (EAB 1994) (emphasis in original).

In its Prehearing Exchange, the Complainant stated that the base penalty was reduced by 70% for small companies, as provided for by the UIC Settlement Policy. Complainant's Prehearing Exchange at

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[15] *See* Affidavit of Ronald Van Wyk at 3; Exhibits 69 and 70.

7. However, there is no penalty calculation sheets showing the reduction, and what the original calculation was. The Complainant also stated that it had requested financial information from the Respondent, but the Respondent did not submit the requested documentation. Complainant's Prehearing Exchange at 7; Complainant's Prehearing Exchange, Exhibits 105, 106, and 107; Affidavit of Ronald Van Wyk at 6. The Complainant didn't received the requested financial information until August 9, 1999, in response to its Motion for Accelerated DecisionNo analysis of the financial information or other argument accompanied the Respondent's documents. However, a review of the Respondent's federal income tax returns revealed the following: from 1994 - 1997, the Respondent's gross income remained relatively stable [$58,473 - $55,031], but decreased significantly in 1998 [$25,379]. Total expenses also decreased each year from $96,370 to $38,661. The Respondent reported losses each year, decreasing from 1994 to 1997 [$37,387 to $49], and then increasing to $12,256. However, if one subtracts depreciation from the expenses,[16] then the

[16]"Depreciation is an accounting concept that spreads out the costs of a capital assess over its estimated useful life. Depreciation expense reduces the taxable income of an entity, but does not reduce the cash." Black's Law Dictionary at 441 (6th Ed. 1990). Thus, depreciation expense is not an out of pocket expense for the Respondent.

Respondent would have reported profits from 1994 - 1997.[17] Thus, the Respondent's business appears to be minimally profitable.

The tax returns do list property which could be sold to satisfy a civil penalty. The tax returns also show that the Respondent has sold business property in the past.[18] It is not uncommon for individuals or businesses to sell property in order to satisfy debts.[19] Therefore, the Presiding Officer believes that although the Respondent may not have the ability to pay the full $5,000 civil penalty, it can pay a lesser amount.[20]

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[17]The Respondent reported the following depreciation expenses: 1994 - $42,156, 1995 - $33,559, 1996 - $24,670, 1997 - $20,367, 1998 - $7,447.

[18]1998 Federal Income Tax Return, Form 4797. It should be noted that although the Respondent reported a loss for tax purposes, it does not mean that the Respondent didn't make a profit. The Form does not indicate the sales price of the assets, only the depreciation and cost basis. Therefore, this Form cannot be relied upon to show that the Respondent lost money on these sales.

[19]*See* Interim Policy on Settlement of CERCLA Section 106(b)(1) Penalty Claims and Section 107(c)(3) Punitive Damages Claims for Noncompliance with Administrative Orders at 17, fn 21 (September 30, 1997); Guidance on Determining a Violator's Ability to Pay a Civil Penalty at 2 (December 16, 1986).

[20]The Presiding Officer notes that FIFRA Penalty Policy provides that "even where the net income is negative, four percent of the gross income will be used as the 'ability to continue in business/ability to pay' guidance, since companies with a positive gross income will be presumed to have sufficient cash flow to pay penalties even where there have been net losses." FIFRA Penalty Policy at 23 (July 2, 1990).

F. SUCH OTHER FACTORS AS JUSTICE MAY REQUIRE

The final element, such other factors as justice may require, "vests the Agency with broad discretion to reduce the penalty *when other adjustment factors prove insufficient or inappropriate to achieve justice*." *Catalina Yachts, Inc.*, 8 E.A.D. at ___, EPCRA Appeal Nos. 98-2 & 98-5, slip op. at 22 (March 24, 1999) (emphasis in original). The Environmental Appeals Board went to state:

> use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just. (citation omitted). Thus, it is clear that the justice factor comes into play only where application of the other adjustment factors has not resulted in a "fair and just" penalty.

Id.

The Presiding Officer declines to use this factor in that the other factors, particularly the economic impact on the violator factor, will result in a fair and just penalty.

G. APPROPRIATE CIVIL PENALTY

EPA proposed a $5,000 penalty for the two violations. Absence an ability to pay defense, the Presiding Officer would have awarded the full penalty. Furthermore, EPA could have very easily justified a significantly higher penalty for the first violation. Although EPA was limited to $5,000 for each violation,[21] it appears that EPA could have easily justified multi-day penalties, based on the Respondent's

[21] *See* footnote 5, *supra*.

failure to timely correct the violations. The well wasn't tested for mechanical integrity until September 26, 1997, over three months after the violation occurred. In addition, the inspector could have been injured due to the Respondent's violation. The Respondent also tried to hide the leak by stuffing the pipe (nipple) connected to the annulus with rags and weeds. Therefore, the Presiding Officer would have been inclined to assess a significantly higher penalty than the $5,000 penalty proposed by EPA.

However, even if EPA had proposed a higher penalty, the Respondent's economic status would probably resulted in the same penalty being assessed. Although the Respondent's ability to pay is limited, the Presiding Officer cannot in good conscience completely eliminate the penalty. The actual and potential harm to the environment, along with potential injury to the inspector, and the delay in making repairs require that the Respondent pay some penalty. Therefore, based on the foregoing, the Presiding Officer assesses the Respondent a $1,000.00 penalty.[22]

[22]The Presiding Officer notes that the $1,000 penalty is less than the 4% guideline used by the TSCA and FIFRA penalty policies to determine a company's ability to continue in business. Use of the 4% guideline would result in a civil penalty of $1,945. *See* footnote 20, *supra*; *James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 601 - 602 (EAB 1994); *New Waterbury, Ltd.*, 5 E.A.D. 529, 547 (EAB 1994).

VII. ORDER

Pursuant to the authority granted to the Presiding Officer, it is hereby **ORDERED** that:

1. A civil penalty in the amount of $1,000.00 is assessed against Mr. C. E. McClurkin d/b/a J-C Oil Company.

2. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

Regional Hearing Clerk
EPA - Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, shall accompany the check.

4. Pursuant to 40 C.F.R. § 22.27, this Initial Decision shall become the final order of the Environmental Appeals Board (EAB) within forty-five (45) days after its service upon the parties and without further proceedings unless:

(a) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a);

(b) a party appeals this Initial Decision to the EAB. Any party may appeal this Initial Decision by filing a notice of appeal and an accompanying appellate brief with the EAB within thirty (30) days after service of this Initial Decision. The procedures for filing an appeal are found in 40 C.F.R. § 22.30; or

(c) the EAB elects, upon its own motion, to review the Initial Decision.

Dated this 10th day of February, 2000.

/S/
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 2000, I served true and correct copies of the foregoing Order Granting Complainant's Motion for Accelerated Decision and Initial Decision on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

C. E. McClurkin
HC 73, Box 569
Pawhuska, Oklahoma 74056

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental Appeals Board (1103B)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

INTEROFFICE MAIL

Ellen Chang
Assistant Regional Counsel (6RC-EW)
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

_____
Lorena S. Vaughn
Regional Hearing Clerk