

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

EnerVest Operating, LLC
Gaylord, Michigan

Respondent.

) Docket No. SDWA-05-2019-0003
)
) Proceeding Seeking
) Assessment of a Civil
) Penalty Under Section
) 1423(c) of the Safe
) Drinking Water Act,
) 42 U.S.C. § 300h-2(c)
)
)



Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(c), and Sections 22.13(b) and 22.18(b)(2) and (3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules) as codified at 40 C.F.R. Part 22.
2. The Complainant is, by lawful delegation, the Director of the Water Division, United States Environmental Protection Agency (U.S. EPA), Region 5.
3. Respondent engages in the disposal of brines associated with the production of petroleum and natural gas, and does business in the State of Michigan.
4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).
5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.
8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 1421 of SDWA, 42 U.S.C. § 300h, requires U.S. EPA to promulgate regulations for State underground injection control (UIC) programs to ensure the protection of underground sources of drinking water, including inspection, monitoring, recordkeeping and reporting requirements.
10. Section 1422(b) of SDWA, 42 U.S.C. § 300h-1(b), provides that States, upon receipt of U.S. EPA's approval of a proposed UIC program, may implement a Federally-enforceable UIC program in that State and obtain primary enforcement responsibility of that program (hereinafter "primacy").
11. Pursuant to Sections 1421 and 1422 of SDWA, 42 U.S.C. §§ 300h and 300h-1, respectively, U.S. EPA promulgated UIC regulations at 40 C.F.R. Parts 144-147.
12. Federal regulations, at 40 C.F.R. § 144.3, define "well" as "a bored, drilled, or driven shaft whose depth is greater than the largest surface dimension; or, a dug hole whose depth is greater than the largest surface dimension; or, an improved sinkhole; or a subsurface fluid distribution system."

13. Federal regulations, at 40 C.F.R. § 144.6, define six classes of injection wells, including, but not limited to, wells for the reinsertion of brines associated with the production of petroleum and natural gas (Class II).
14. The UIC program for the State of Michigan is set forth at 40 C.F.R. Part 147, Subpart X.
15. Pursuant to 40 C.F.R. § 147.1151, at all times relevant to this CAFO, U.S. EPA had primacy over Class II wells, as defined by 40 C.F.R. § 146.5, in the State of Michigan.
16. Pursuant to 40 C.F.R. § 147.1151, the UIC program for the State of Michigan for Class II wells, as defined by 40 C.F.R. § 146.5, consists of the UIC program requirements set forth at, *inter alia*, 40 C.F.R. Parts 124, 144, 146, 147 (Subpart X) and 148, and was effective on June 25, 1984.
17. The UIC program set forth at 40 C.F.R. § 147.1151, constitutes the “applicable underground injection control program” as defined by Section 1422(d) of SDWA, 42 U.S.C. § 300h-1(d), for the State of Michigan.
18. Section 1423(a) of SDWA, 42 U.S.C. § 300h-2(a), provides, *inter alia*, that the Administrator may issue an order under Section 1423(c), of SDWA, 42 U.S.C. § 300h-2(c), to any person found to be in violation of any regulation or requirement of an applicable UIC program in a State that does not have primacy.
19. Section 1423(c)(1) of SDWA, 42 U.S.C. 300h-2(c)(1), provides that U.S. EPA may issue to any person in violation of any regulation or requirement other than those relating to (A) the underground injection of brine or other fluids brought to the surface in connection with oil or natural gas production or (B) underground injection

for the secondary or tertiary recovery of oil or natural gas, an administrative order assessing a civil penalty of not more than \$10,000 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 requirement, or both. For violations of the previously referenced exceptions to Section 1423(c)(1) of SDWA, 42 U.S.C. 300h-2(c)(1), found at Section 1423(c)(2) of SDWA, 42 U.S.C. 300h-2(c)(2), U.S. EPA may issue an administrative order 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 requirement, or both. Pursuant to the Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996 (“DCIA”), 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. Part 19, the statutory maximum penalty increased to \$7,500 per day for SDWA violations occurring after January 12, 2009 through November 2, 2015; and to \$11,181 per day for SDWA violations occurring after November 2, 2015 and assessed after January 15, 2018. The maximum civil penalty EPA may seek in this action was also increased to \$187,500 for violations occurring after January 12, 2009 through November 2, 2015 and to \$279,536 for violations occurring after November 2, 2015 and assessed after January 15, 2018.

Factual Allegations and Alleged Violations

20. Respondent is a “person,” as that term is defined at Section 1401(12) of SDWA, 42 U.S.C. § 300f(12), and 40 C.F.R. § 144.3.

21. Pursuant to the regulations at 40 C.F.R. Part 144, U.S. EPA issued an Underground Injection Control permit (“the permit”) to EnerVest Operating, LLC for well Noirot-Otsego BDW #1-18 (permit MI-137-2D-0007) issued September 30, 1986.
22. At all times relevant to this CAFO, Respondent was the operator of well Noirot-Otsego BDW #1-18 (“the Well”) in Otsego County, Michigan.
23. The Well is a bored, drilled, or driven shaft, or dug hole, whose depth is greater than the largest surface dimension.
24. The Well is a “well” as defined at 40 C.F.R. § 144.3.
25. At all times relevant to this CAFO, Respondent was authorized to operate the Well, pursuant to its U.S. EPA UIC permit or regulations.
26. Brine and fresh water are materials or substances which flow or move in a semisolid, liquid, sludge, gas, or any other form or state.
27. Brine and fresh water are “fluids” as defined at 40 C.F.R. § 144.3.
28. The subsurface emplacement of brine and fresh water through the Well is “well injection” as defined at 40 C.F.R. § 144.3.
29. Respondent's “well injection” is an “underground injection” as defined by 40 C.F.R. § 144.3.
30. The Well is a Class II well as defined by 40 C.F.R. §§ 144.6 and 146.5.
31. In an August 13, 2018 letter (the Notice), U.S. EPA notified Respondent of its plans to file a Civil Administrative Complaint due to violations of the permit for the Well.
32. Respondent, upon receipt of the Notice, began cooperative and engaged discussions with U.S. EPA regarding the Well's compliance.

33. Via electronic mail on September 18, 2018, Respondent provided copies of monthly monitoring reports from June 2017 through July 2018 (the Reports) and a February 1, 1988 letter (the Letter) from U.S. EPA that modified terms of the permit.
34. Respondent submitted the Reports to attest that the Well has maintained positive annulus pressure from June 2017 to July 2018.
35. The Letter was submitted to demonstrate that analysis of the fluid injected into the well is required annually, not quarterly.

COUNT I

Failure to Maintain Positive Annulus Pressure

36. Complainant incorporates paragraphs 1 through 35 of this CAFO as if set forth in this paragraph.
37. Section G(1)(a)(iv) of the permit (*See* Page 10 of the permit) requires a positive pressure to be maintained on the annulus.
38. From January 2014 to May 2017, Respondent reported annulus pressures of zero in the well.
39. Respondent's failure to maintain a positive pressure on the annulus constitutes a violation of Section G(1)(a)(iv) of the permit.
40. Respondent's violation of Section G(1)(a)(iv) of the permit subjects Respondent to the issuance of an administrative order for penalty pursuant to Section 1423(c)(2) of SDWA, 42 U.S.C. § 300h-2(c)(2).

COUNT II

Failure to Report Noncompliance

41. Complainant incorporates paragraphs 1 through 35 of this CAFO as if set forth in this paragraph.
42. Section E(13) of the permit (*See* Page 6 of the permit) requires reports of instances of noncompliance.
43. From January 2014 to May 2017, Respondent failed to report instances of noncompliance with the permit.
44. Respondent's failure to report instances of noncompliance constitutes a violation of Section E(13) of the permit.
45. Respondent's violation of Section E(13) of the permit subjects Respondent to the issuance of an administrative order for penalty pursuant to Section 1423(c)(2) of SDWA, 42 U.S.C. § 300h-2(c)(2).

Civil Penalty

46. Section 1423(c)(4)(B) of SDWA, 42 U.S.C. § 300h-2(c)(4)(B), provides that, in assessing a civil penalty under Section 1423(c), U.S. EPA must take into account (i) the seriousness of the violation, (ii) the economic benefit (if any) resulting from the violation, (iii) any history of such violations, (iv) any good faith efforts to comply with the applicable requirements, (v) the economic impact of the penalty on the violator, and (vi) such other matters as justice may require.
47. Based upon the factors set forth at Section 1423(c)(4)(B) of SDWA, 42 U.S.C. § 300h-2(c)(4)(B), and applicable penalty policies, including *Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy* –

Underground Injection Control Guidance No. 79 (September 27, 1993),

Complainant has determined that an appropriate civil penalty to settle this action is \$22,780 (TWENTY-TWO THOUSAND SEVEN HUNDRED EIGHTY DOLLARS).

48. Within 30 days after the effective date of this CAFO, Respondent must pay a \$22,780 civil penalty for the SDWA violations by Electronic funds transfer, payable to "Treasurer, United States of America," and sent to:

Federal Reserve Bank of New York
ABA No. 021030004
Account No. 68010727
33 Liberty Street
New York, New York 10045

Field Tag 4200 of the Fedwire message should read: "D68010727 Environmental Protection Agency." In the comment or description field of the electronic funds transfer, state the following: EnerVest Operating, LLC and the docket number of this CAFO.

49. Respondent must send a copy of a document showing payment and a transmittal letter, stating Respondent's name, the case title, Respondent's complete address, and the case docket number to:

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Andrew Greenhagen (WU-16J)
Underground Injection Control Branch
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Padma Bending (C-14J)
Office of Regional Counsel

U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

- 50. This civil penalty is not deductible for federal tax purposes.
- 51. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties, and the United States enforcement expenses for the collection action. The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.
- 52. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

- 53. This Agreement, upon incorporation into a Final Order and full satisfaction by the parties, shall be a complete and full resolution of the Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.
- 54. This CAFO does not affect the rights of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law not alleged in this CAFO.
- 55. This CAFO does not affect Respondent's responsibility to comply with SDWA and other applicable federal, state, and local laws.

56. Complainant is providing public notice of and a reasonable opportunity to comment on the proposed assessment of an administrative penalty against Respondent. The public notice and comment period will last for no less than 40 days before the issuance of an order assessing a civil penalty pursuant to 40 C.F.R. §22.45.
57. The terms of this CAFO bind the Complainant, the Respondent and Respondent's successors, and assigns.
58. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.
59. Each party agrees to bear its own costs and attorney's fees in this action.
60. This CAFO constitutes the entire agreement between the parties.

In the Matter of: EnerVest Operating, LLC
Docket No. SDWA-05-2019-0003

EnerVest Operating, LLC, Respondent

11-5-18

Date

Barry Lay ^{2H}

Barry Lay
Senior Vice President
EnerVest Operating, LLC

United States Environmental Protection Agency, Complainant

12-04-18

Date

Linda Holst

Linda Holst
Acting Division Director
Water Division

Final Order
In the Matter of: EnerVest Operating, LLC
Docket No. SDWA-05-2019-0003

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall be considered issued on the date this Final Order is signed, and shall become effective immediately upon filing with the Regional Hearing Clerk, which shall be done no less than 30 days after this Final Order is issued. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18, 22.31, and 22.45. IT IS SO ORDERED.

Date

Ann Coyle
Regional Judicial Officer
United States Environmental Protection Agency Region 5