

Sixth Circuit Affirms Injunction and Penalties Against Kentucky Injection Well Owners

The U.S. Court of Appeals for the 6th Circuit has affirmed a district court's decision approving fines and injunctive relief against an oil company owner who violated a unilateral administrative order and failed to respond to the government's request for information under the Safe Drinking Water Act (SDWA).

JAF Oil Company, Inc. (JAF) was founded by Peter E. Jolly (Jolly) and others in California in 1977. JAF owned and operated eighty-nine injection wells on oil and mineral leases in Hancock County, Kentucky. These injection wells inject fluid underground under high pressure in order to force oil up through regular production wells. JAF's injection wells are regulated by the Environmental Protection Agency (EPA) and its Underground Injection Control (UIC) Program, as prescribed by the SDWA.

By the mid-1980's, Jolly had become JAF's sole shareholder, officer, director and employee. The EPA notified JAF in 1985 that its injection wells were regulated under the SDWA and its UIC program, and that the wells were not being maintained as required by those regulations. Although in 1988 JAF received protection under Chapter 11 of the Bankruptcy Code, JAF continued to operate the injection wells.

In July 1991, the EPA attempted to negotiate an Administrative Order of Consent with JAF to resolve its continuing SDWA violations, but was not successful. The EPA then notified JAF that it intended to issue a unilateral Administrative Order (AO) to resolve the violations. As required by law, the EPA published a public notice of the AO and provided individual notices of the proposed AO to inform JAF of its violations. EPA also notified JAF of its right to request a hearing and submit written comments with thirty days.

JAF ignored EPA's the proposed AO and did not request a hearing within thirty days of the notice. The final AO, issued in January 1992, informed JAF that the AO would become effective in thirty days if JAF did not appeal to the federal district court. The final AO required JAF and its successors to comply with provisions intended to bring JAF's wells into compliance. The AO did not assess any civil penalties, and simply warned that failure to comply could subject JAF to penalties in a future action. After thirty days had passed with no appeal from JAF, the final AO became effective.

After the final AO went into effect, Jolly continued to operate the eighty-nine injection wells under the name of a new Nevada corporation, Strategic Investments, Inc. (SI). In September 1995, the United States sued JAF, SI and Jolly to enforce the final AO. The lawsuit sought an injunction and civil penalties against JAF, Jolly and SI for violating UIC requirements. The United States claimed that 1) JAF violated the AO by failing to meet deadlines for compliance with the AO; 2) Jolly was individually liable for violations committed by JAF and SI; and 3) JAF, SI and Jolly were all liable for failing to comply with various regulatory requirements. An additional claim was later added alleging that SI failed to answer a request for information from the EPA.

The government then filed a motion in district court for a decision that JAF, SI and Jolly were liable for all of the government's claims (a "partial summary judgment"). In March 1998 the district court granted the government's motion for partial summary judgment, and held both JAF and SI liable for all violations of the AO and any underlying regulations alleged in the complaint. In addition, the district court found that, under Kentucky law, Jolly was individually liable for the violations by JAF and SI.

In December 1998, the government asked the district court to order JAF and SI to comply with the AO and pay civil penalties. The district court issued the order in April 1999 requiring SI to immediately terminate all injection well activities, unless authorized to continue by the EPA. The court also imposed a civil penalty of \$500,000 each for JAF, SI and Jolly individually. Jolly appealed.

On appeal, Jolly raised the following issues: 1) whether the EPA denied Jolly due process of law when it unilaterally issued the AO; 2) whether the government showed that there was an "underground source of drinking water" beneath Jolly's wells; and 3) whether the court's injunction and civil penalties were an "abuse of discretion."

The appeals court first considered Jolly's third claim – whether the court's injunction and civil penalties were an "abuse of discretion." Section 300h-2(6) of the SDWA allows persons to appeal administrative orders to a federal district court. Section 300h-2(6) states:

Any person against whom an order is issued or who commented on a proposed order pursuant to paragraph (3) may file an appeal of such order with the United States District Court for the District of Columbia or the district in which the violation is alleged to have

occurred. Such an appeal may only be filed within the 30-day period beginning on the date the order is issued. Appellant shall simultaneously send a copy of the appeal by certified mail to the Administrator and to the Attorney General . . . Notwithstanding section 300j-7(a)(2) of this title, any order issued under paragraph (3) shall be subject to judicial review exclusively under this paragraph.

Thus, Jolly's only recourse against the final AO was an appeal to the local federal district court within thirty days after the final AO was issued.

But because Jolly failed to appeal the final AO in federal district court within thirty days, he could not challenge the validity of the AO in the Court of Appeals. Instead, the appeals court was only authorized to consider whether or not Jolly complied with the AO. The appeals court did not even consider Jolly's argument that the EPA's failure to hold an evidentiary hearing denied him due process. Accordingly, the Court of Appeals affirmed the found the district court's grant of partial summary judgment.

Jolly next argued that the government's request for over \$1,500,000 in civil penalties was unwarranted because he had suffered financial hardship and health problems. In addition, he claimed that the injunction was improper because he did not violate UIC regulations requiring him to respond to requests for information.

But the United States replied that the district court's injunction and civil penalties were not an abuse of discretion in light of Jolly's "history of uncooperative and deceptive behavior and continuous noncompliance." Also, the Court of Appeals observed that Jolly offered no evidence of financial hardship in the district court, and only first mentioned his financial problems on appeal.

Under the SDWA, the court may enter judgment "as protection of public health may require." It also provides for both civil and criminal penalties as follows:

Any person who violates any requirement of an applicable underground injection control program or an order requiring compliance. . . (1) shall be

subject to a civil penalty of not more than \$25,000 for each day of such violation, and (2) if such violation is willful, such person may. . . be imprisoned for not more than 3 years, or fined in accordance with Title 18, or both.

The SDWA also provides that violation of a request for information by a well operator may result in the immediate termination of the right to operate the wells.

Jolly argued that he did not violate the information request because he never received it. Accordingly, Jolly believed that he should not have been directed to stop the operation of the wells.

But the appeals court found that there was sufficient evidence demonstrating that Jolly had received the request for information and just failed to reply. The letter requesting the information had been faxed to Jolly's known fax number, and a fax delivery confirmation had been received. Therefore, the appeals court held that the injunction should be affirmed.

Lastly, Jolly disputed the monetary penalties assessed by the district court for \$500,000 against each defendant (Jolly, JAF, and SI). In deciding on the penalties, the district court considered the maximum penalty of \$25,000 per day for each violation over a seven-year period as authorized by the SDWA. The district court then considered several factors used by the EPA when calculating an appropriate penalty for violations assessed in an AO, which included the seriousness of the violations, any prior history of such violations, the economic impact the penalty would have on the violator, and other factors.

Because the district court considered all of the applicable penalty factors, including Jolly's ability to pay, the Court of Appeals affirmed the lower court's penalty decision. In particular, the district court noted Jolly's history of noncompliance, his refusal to accept service of notices and pleadings, and the seriousness of his offenses. Based on the evidence of Jolly's bad conduct, the appeals court found that the civil monetary penalty was not an abuse discretion by the district court, and affirmed the lower court's grant of injunctive relief and imposition of civil penalties.

United States v. Jolly, No. 99-5700, 51 ERC 2083 (6th Cir. Nov. 20, 2000)

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