

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
Rocky Well Service Inc., and)	SDWA Appeal No. 08-04
Edward J. Klockenkemper,)	
)	
Docket No. SDWA-05-2001-002)	
)	

REVISED BRIEF OF RESPONDENT
ROCKY WELL SERVICE, INC.

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I. Statement of Issues Presented for Review

Rocky Well Service, Inc. incorporates herein by reference those issues, including but not limited to jurisdictional issues and errors by the Presiding Officer, which have been raised by Co-Respondent Edward J. Klockenkemper in his Appeal (SDWA Appeal No.08-03) and adopts the arguments presented by Respondent Klockenkemper in Revised Appellate Brief filed March 2, 2009. In supplement thereto, this Respondent specifically asserts error in Presiding Officer Toney's determination that Respondents Rocky Well Service, Inc. and Edward J. Klockenkemper can afford to jointly pay the penalty assessed in this matter. (Initial Decision, page 24.)

II. Statement of Nature of the Case

This case arises from the assessment of joint liability and a joint administrative penalty of \$105,590 under section 1423 (c) of the Safe Drinking Water Act as amended, (42 U.S.C. §300h-2(c) (SDWA) and under 40 Code of Federal Regulations Part 22 (Consolidated Rules of Practice) (40 C.F.R. 22) against Respondents Rocky Well Service, Inc. and Edward J. Klockenkemper. Region 5 Presiding Officer Marcy A. Toney issued the Initial Decision on July 23, 2008 and Respondent Rocky Well Service, Inc. filed its Notice of Appeal with the Environmental Appeals Board on August 5, 2008. Respondents received an extension until October 31, 2008 to file brief in support of its Appeal. On January 7, 2009, the Environmental Appeals Board granted this Respondent until March 9, 2009 to file a revised brief solely for the purpose of correcting internal page citations and page references. Respondent Rocky Well Service, Inc. objects to the restrictions placed on it by the terms of said Order, since it was unable to ascertain the extent of the revised arguments presented by Respondent E. J. Klockenkemper until after his Revised Appellate Brief was filed March 2, 2009 and is therefore unduly limited in presenting the positions of Rocky Well Service, Inc. in these proceedings.

III. Facts Relevant to the Issues Presented for Review

Rocky Well Service, Inc. adopts the recitation of facts as set forth by Respondent E.J. Klockenkemper in his Revised Appellate Brief . Of particular importance to the issue presented herein is Presiding Officer Toney’s acknowledgment that “Ms. Perenchio’s testimony states that “Complainant’s financial expert has determined that Rocky Well Service has little or no independent ability to pay a penalty.” (Initial Decision, p.16). Notwithstanding the foregoing statement of Complainant’s penalty witness, Presiding Officer Toney concludes “ Rocky Well Service’s little or no ability to pay a penalty should not result in the reduction of a penalty in this matter because Mr. Klockenkemper has been found personally liable for the violations and has not demonstrated an inability to pay. I find that Respondents Rocky Well Service and Edward J. Klockenkemper can afford to jointly pay the penalty assessed in this matter.” *Footnotes omitted* (Initial Decision, p. 17).

IV. Argument on the Issues Presented

A. No statutory citation or case law precedent for imposition of joint liability/penalty

As Respondent Klockenkemper has noted in his Revised Brief at pages 54 and 55, the Illinois statute and regulations implementing the Safe Water Drinking Act, 225 ILCS 725, *et. seq.* (Illinois Oil and Gas Act) and 62 Illinois Administrative Code Section 240, *et. seq.* do not provide for joint liability for violations, nor does the statute, 225 ILCS 725/8a, or the regulations, 62 Ill. Admin. Code 240.155, provide for joint and several liability for any penalties imposed for violations of the Act. The only authority for imposition of a joint penalty cited by the Presiding Office is her reference on page17 of her Initial Decision at footnote 45 to *Sunbeam Water Co., Inc.* SDWA-10-97-0066, 1999 EPA ALJ Lexis 93, *27-28, 32 (Oct.28, 1999). Presiding Officer Toney’s reliance on the *Sunbeam* decision in support of her imposition of joint liability is misplaced, as the liability and penalty imposed in that case was based upon the violation of the terms of a consent order (CAFO) into which the individuals and corporation voluntarily entered. The penalties imposed as a consequence of the violation of that order were based upon the order itself, and not strictly a

statutorily-imposed penalty. Further, *Sunbeam* was a PWS case, not a UIC case and, unlike the present case, involved a piercing of the corporate veil. Presiding Officer Toney does not cite any other statutory authority or case law in support of her position that would allow for imposition of a joint penalty in the manner so imposed in this case.

B. Imposition of joint penalty ignores statutory factor of economic impact

The imposition of a \$105,590 penalty against Rocky Well Service, Inc. cannot be supported because the imposition of a penalty of that magnitude against a permittee who has “little or no independent ability to pay” is clearly violative of the statutory mandate that the agency consider the economic impact of the penalty on the violator as required by Section 1423 (c)(4)(B)(v) of the Safe Drinking Water Act, 42 U.S.C. §300h-2(c)(4)(B)(v) - Statutory Factor 5. The assessment of a joint penalty against this Respondent and Respondent Klockenkemper can only be supported by ignoring the economic impact of the penalty on Rocky Well Service, Inc. There is no evidence in the record that Rocky Well Service, Inc. can afford to pay any penalty, let alone a penalty of the magnitude imposed by Presiding Officer Toney. In fact, the hearing officer acknowledges that the EPA’s witness testified that “Rocky Well Service has little or no independent ability to pay a penalty.” Initial Decision, page 16. The decision of Presiding Officer Toney in this cause regarding the assessment of a penalty against Rocky Well Service, Inc. is against the preponderance of the evidence and thus must be set aside because the Initial Decision does not comply with Consolidated Rules of Practice Section 22.24(b), 40 C.F.R. §22.24(b).

V. Conclusion

The Presiding Officer’s erroneous decision to assess a joint administrative civil penalty against both Rocky Well Service, Inc. and Edward J. Klockenkemper should be reversed by the Environmental Appeals Board because there is no support in law or in fact for assessment of a joint penalty. The Environmental Appeals Board should modify said decision against Edward J. Klockenkemper as requested by that Respondent in his Brief and should determine that no penalty,

or at most a penalty not to exceed \$1,000.00, be assessed against Rocky Well Service, Inc.

VI. Alternative Findings of Fact

Rocky Well Service, Inc. urges the Environmental Appeal Board to adopt the alternative findings of fact as incorporated by Respondent Klockenkemper in his Revised Brief at page 70 with regard to the particular issues set forth in this Brief, Rocky Well Service, Inc. respectfully suggests that the following Finding of Fact, as set forth on page 24 of the Presiding Officer's Initial Decision be deleted:

24. Respondents Rocky Well Service, Inc. and Edward J. Klockenkemper can afford to jointly pay the penalty assessed in this matter.

The aforesaid Finding of Fact should be replaced with the following:

24. Respondent Rocky Well Service, Inc. has little or no independent ability to pay a penalty in the instant matter.

VII. Alternative Conclusion of Law

In light of the proposed alternative Finding of Fact, the Presiding Officer's following Conclusion of Law, also set forth on page 24 of the Initial Decision, should be deleted:

28. Upon consideration of the penalty factors set forth in the Safe Drinking Water Act, the Region 5 UIC Penalty Policy, the evidence at hearing and the administrative record in this matter, Respondents are jointly assessed a penalty of \$105,590.

The aforesaid Conclusion of Law should be replaced with either of the following:

28. Upon consideration of the penalty factors set forth in the Safe Drinking Water Act, the Region 5 UIC Penalty Policy, the evidence at hearing and the administrative record in this matter, no penalty is assessed against Respondent Rocky Well Service, Inc. in light of the Respondent's inability to pay a penalty.

Or:

28. *Upon consideration of the penalty factors set forth in the Safe Drinking Water Act, the Region 5 UIC Penalty Policy, the evidence at hearing and the administrative record in this matter, a penalty in the amount of \$1,000 is assessed against Respondent Rocky Well Service, Inc. based upon Respondent's limited ability to pay a penalty.*

Respondent requests that Environmental Appeal Board substitute the Respondent's proposed findings of fact and conclusion of law for those adopted by the Presiding Officer in the Initial Decision.

Respectfully submitted this 6th day of March, 2009.

/s/ Richard J. Day

Richard J. Day, Esq.
Attorney for Rocky Well Service, Inc.

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CERTIFICATE OF FILING AND SERVICE

The undersigned does certify that the original of this Brief of Rocky Well Service, Inc. was delivered for filing, via FedEx carrier to the United States Environmental Protection Agency, Clerk of the Environmental Appeals Board, 1341 G Street, N.W., Suite 600, Washington D.C., 20005, and that a copy was served by U.S. First Class Mail on 1) Regional Hearing Clerk, USEPA, 77 W. Jackson, (C-13J) Chicago, IL. 60604-3590; 2) USEPA Presiding Officer Marcy Toney, Office of Regional Counsel, USEPA, 77 W. Jackson (C-14J), Chicago, IL. 60604-3590; 3) Counsels Ms. Cynthia Kawakami and 4) Ms. Mary McAuliffe, at Office of Regional Counsel (C-14J), 77 W. Jackson, Chicago, IL. 60604-3590, and 5) Mr. Felipe N. Gomez, Esq. P.O. Box 220550, Chicago, IL. 60622, on this 6th day of March, 2009.

/s/ Richard J. Day
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