UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
Rocky Well Service, Inc.,	)	
and	)	
Edward J. Klockenkemper,	)	DOCKET NO. SDWA-05-2001-002
	)	
Respondents.	)	

Partial Accelerated Decision

I. Introduction

This proceeding is subject to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22. The original Complaint was filed in this matter on July 2, 2001, and named the corporation, Rocky Well Service, Inc. (Rocky Well), as the Respondent. It alleged violations of Section 1423 of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c), (SDWA), consisting of the corporation's failure to conduct mechanical integrity testing on six Class II underground injection wells as required by Title 62 Illinois Administrative Code (IAC) § 240.760 and 40 C.F.R. § 147.701. The Complaint also alleged that the corporation failed to submit annual monitoring reports in violation of 62 IAC § 240.780(e) and 40 C.F.R. § 147.701. The Complainant proposed the assessment of a civil penalty of $107,817.

Rocky Well Service, Inc. timely filed its Answer. On May 1, 2002, Complainant moved to amend its Complaint to add Respondent Edward J. Klockenkemper in his individual capacity. The motion was granted and Complainant filed an Amended Complaint against both Respondents on February 20, 2003. The Amended Complaint did not differ substantively from the original Complaint except to add Mr. Klockenkemper as a Respondent.

Respondent Klockenkemper then filed a Motion to Dismiss arguing that he cannot be held personally liable for the violations alleged because he is not the permittee of the Class II wells at issue. That Motion to Dismiss was denied. In addition, the parties filed several procedural motions which were decided in an Order dated May 17, 2006. Each party has now moved for partial accelerated decision.

II. Statutory and Regulatory Background

The Safe Drinking Water Act, 42 U.S.C. § 300f et seq., originally passed by Congress in 1974, provides U.S. EPA with the authority to control the underground injection of fluids to protect underground drinking water sources from contamination and ensure safe drinking water supplies and, thus, protect public health. Section 1421 of the SDWA, 42 U.S.C. § 300h, requires that U.S. EPA promulgate regulations which contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources and which include inspection, monitoring, recordkeeping and reporting requirements. U.S. EPA has promulgated underground injection control (UIC) regulations at 40 C.F.R. Parts 144 through 147.

Section 1422 of the SDWA, 42 U.S.C. § 300h-1, provides that each state with respect to which U.S. EPA has determined that a UIC program may be necessary to assure that underground injection will not endanger drinking water sources must submit to U.S. EPA for its approval a UIC program that meets the requirements of the federal UIC regulations in effect under section 1421 of the SDWA. Upon receipt of U.S. EPA's approval of its proposed UIC program, the state may implement a federally enforceable UIC program in that state and obtain primary enforcement responsibility for that program. On March 3, 1984, pursuant to Section 1425 of the SDWA, 42 U.S.C. § 300h-4, U.S. EPA approved the State of Illinois UIC program for Class II wells in Illinois. A Class II well is one which injects fluids which are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production, or for enhanced recovery of oil or natural gas, as defined by 40 C.F.R. §§ 144.6 and146.5.

III. Factual Background

The allegations of the Complaint and Amended Complaint are straightforward. There are six wells at issue. Count I alleges that both Respondents were required but failed to test the mechanical integrity of two wells (Huelsing #1 and Zander #2) by December 19, 1996, five years after the mechanical integrity of the wells had been previously tested. Count II alleges that both Respondents were required but failed to test the mechanical integrity of the four other wells (Atwood #1, Harrell #1, Twenhafel #2 and Wohlwend #6) by September 1, 1995, the deadline for Class II wells not subjected to an internal mechanical integrity pressure test by September 1, 1990. Count III alleges that both Respondents were required but failed to submit an Annual Well Status Report for each of the six wells for the years 1991 and 1993 through 1998 and for five of the wells for the year 2001. Each report was due by May 1 of the following year.

Complainant proposes that Respondents be assessed a civil penalty of $107,817 and that a compliance order be issued requiring them "to take all actions reasonable and necessary to assure full compliance with their permits, any and all applicable UIC regulations, including, but not limited to, the permit conditions and regulations that are the subject of this action."

IV. Legal Standard for Accelerated Decision

The Consolidated Rules provide 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, 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.

40 C.F.R. § 22.20(a). Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate as guidance. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

First it must be determined whether, under FRCP 56(c), the movant has met its initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (quoting FRCP 56(c)).

If the initial burden of the movant is met, then it must be determined whether the party responding to a motion for summary judgment has met its obligation to designate specific facts showing that there is a genuine issue for trial by presenting affidavits, admissions or other evidence. *Id.* at 324. The motion for summary judgment places the nonmovant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164, 1167-68 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the nonmovant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings "may turn something up." *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 n.24 (EAB 1997).

V. Respondents' Motion for Partial Accelerated Decision: Statute of Limitations and Laches

Respondents have moved for an accelerated decision, arguing that there are no genuine issues of material fact as to the issues of statute of limitations and laches, and that they are entitled to judgment as a matter of law. Specifically, Rocky Well argues that all of Count II (failure to integrity test four wells) and at least some of Count III's claims

(reporting violations) are barred by the statue of limitations set forth in 28 U.S.C. § 2462. As to Count I and the remaining claims of Count III, Rocky Well argues that they are barred by the doctrine of laches.

Respondent Klockenkemper argues that all of Count I (failure to integrity test two wells) and II (failure to integrity test four wells), and at least some of Count III's claims (reporting violations) are barred by 28 U.S.C. § 2462. Respondent Klockenkemper also argues that the remaining claims for reporting violations in Count III are barred by the doctrine of laches.

Complainant argues that, as to Count I, the Complaint against Rocky Well Service was filed within the five year limitation period of 28 U.S.C. § 2462. In addition, Complainant argues that the claims of Counts I and II as to both Respondents are "continuing violations" and not barred by the statute of limitations. As to Count III, Complainant argues that it based its penalty calculation only on the reporting violations for the years 1996 through 1998 (due May 1 of 1997, 1998 and 1999) and that, as to Rocky Well, these claims are not barred by the statute of limitations.

As to all three counts against Mr. Klockenkemper, Complainant argues that its claims are not barred by the statute of limitations because the Amended Complaint "related back" to the original Complaint filed against Rocky Well on July 2, 2001, and for the reasons it advances with respect to Rocky Well, its claims against Mr. Klockenkemper are likewise not barred.

Thus, Respondents' Motion for Accelerated Decision presents the following issues for resolution by the Presiding Officer: (1) What is the statute of limitations that applies, if any? If so, were any of the claims filed within the applicable limitation period? (2) If some were not, does the theory of "continuing violation" extend the applicable limitations period? (3) Does the "relation back" rule apply to Complainant's Amended Complaint? (4) Does the doctrine of laches bar any of Complainant's claims?

Case law establishes and the parties agree that the five-year statute of limitations on civil penalty actions at 28 U.S.C. § 2462 applies to EPA's actions for civil penalties against Rocky Well and Mr. Klockenkemper.[1] The statute of limitations bars the government from

[1] 28 U.S.C. § 2462 reads:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

This provision applies only to Complainant's claims for civil penalties, but does not bar its claims for injunctive relief. *United States v. Telluride Co.*, 146 F.3d 1241, 1248 (10th Cir. 1998); *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); *In re Lazarus, Inc.*, 7 E.A.D. 318, 379

commencing an action for penalties after the limitations period has expired. The limitations period begins to run when a violation first accrues. *In re Lazarus, Inc.*, 7 E.A.D. 318, 364 (EAB 1997). A violation does not, however, necessarily "accrue" when it first "occurs." The doctrine of continuing violations provides a special rule for determining when a violation first accrues. *Toussie v. United States*, 397 U.S. 112, 115 (1970) (doctrine of continuing offenses essentially extends the limitations period). Under this special accrual rule, the limitations period for continuing violations does not begin to run until "an illegal course of conduct is complete," not when an action to enforce the violation can first be maintained. Thus, if the doctrine of continuing violations applies to any of the violations at issue in this case, an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased. *In re Lazarus,* 7 E.A.D. at 364-65; citing *In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 45 (EAB 1997).

The Environmental Appeals Board (EAB) addressed the application of the continuing violations doctrine in the statute of limitations context in the *Harmon* case, and reaffirmed that approach in *Lazarus*. In those two cases, the EAB looked first to the statutory language that serves as the basis for the specific violations at issue. The Board also consulted legislative history to analyze the statutory language and examined implementing regulations for an indication of the continuing nature of the statutory requirement:

> Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame (footnotes omitted).

In re Lazarus, 7 E.A.D. at 366-67. We now turn to each claim of the Amended Complaint to determine its timeliness of filing.

a. Statute of Limitations as applied to Count I against Rocky Well

As an initial matter, at least one of the counts in EPA's Complaint can be readily addressed. As to Rocky Well, Count I alleges failure to integrity test in accordance with section 240.760(e)(6) of IAC Title 62, that is, at least once every five years from the date of the last successful test, unless a temporary abandonment has been approved by the state. Two wells (Huelsing #1 and Zander #2) were last successfully tested on December 19, 1991, and were thus required to be tested by December 19, 1996. Count I of the Complaint against Rocky Well, filed on July 2, 2001, thus was within the five year limitation period of 28 U.S.C. § 2462.

b. Statute of Limitations as applied to Count II against Rocky Well and Counts I and II against Mr. Klockenkemper

None of the remaining claims in Counts I and II against Rocky Well or Mr. Klockenkemper allege violations that first occurred within five years of the filing of the

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n.104 (EAB 1997).

Complaints against either Respondent.[2] Thus, it is necessary to examine Complainant's arguments that all of the claims it alleges in Counts I and II are "continuing violations" which extend the period for filing of enforcement actions.

Both counts involve failure to conduct mechanical integrity testing by a specified date. Count I of the complaint is based on 62 IAC § 240.760(e)(6). That section provides in part that "[a]n internal mechanical integrity test shall be performed . . . at least once every 5 years measured from the date of the last successful test unless a temporary abandonment is approved in accordance with Section 240.1132." Count II is based on section 240.760(f) of that same title which provides: "All Class II UIC wells not subjected to an internal mechanical integrity pressure test as of September 1, 1990, were required to be tested by September 1, 1995, unless Future Use status was approved prior to July 14, 2000. . . ." We first look to the statutory language to determine whether a violation of these provisions is a "continuing" one which tolls the running of the statute of limitations.

Section 1423 of the Safe Drinking Water Act sets forth the applicable enforcement provision regarding the protection of underground sources of drinking water and provides that "[a]ny person who violates any requirement of an applicable underground injection control program. . . shall be subject to a civil penalty of not more than $25,000 *for each day of violation*." 42 U.S.C. § 300h-2(a)(1). The Administrator is authorized to issue an order assessing a civil penalty of not more than $5000 *for each day of violation* for any past or current violation. . . ." 42 U.S.C. § 300h-2(c)(2). These provisions of the SDWA are very similar in phrasing to the RCRA provisions in *Harmon* and the TSCA provision in *Lazarus* that the EAB found to be indicative of a continuing violation.

Examination of other UIC provisions also indicates that the requirements of mechanical integrity testing are continuous in nature. The SDWA establishes a basic framework for state UIC programs. Such programs must contain "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b)(1). In order to be approved by U.S. EPA, a state UIC program "shall prohibit . . . any underground injection in such State which is not authorized by a permit issued by the State." 42 U.S.C. § 300h(b)(1)(A). State UIC programs shall require that "an applicant for such a permit must satisfy the State that the underground injection will not endanger drinking water sources. . . ." 42 U.S.C. § 300h(b)(1)(B). These provisions clearly contemplate that the UIC permit program should protect underground sources of drinking water continuously over time. State programs also must "include inspection, monitoring, recordkeeping and reporting requirements," 42 U.S.C. § 300h(b)(1)(B), requirements which must be met at various times over the life of a permit.

The federal regulations promulgated under the SDWA that provide the minimal program requirements for authorizing state UIC programs reiterate the statutory framework: "Any

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[2] For purposes of this statute of limitations analysis, the Amended Complaint is deemed to have been filed on May 1, 2002, the date the Motion for Leave to Amend and Proposed Amended Complaint were filed by Complainant. *Greenfield v. Shuck*, 856 F. Supp. 705, 711 (D. Mass. 1994).

underground injection, except into a well authorized by rule or except as authorized by permit issued under the UIC program, is prohibited. . . ." 40 C.F.R. § 144.51(a). In addition, of particular note with respect to mechanical integrity testing, these regulations include a duty to establish mechanical integrity *prior to* commencing underground injection but also mandate that such mechanical integrity *be maintained* thereafter. 40 C.F.R. § 144.51(q). The regulations further require that when a state program director determines that a Class II well lacks mechanical integrity, he shall give written notice to the owner or operator and, unless the director requires immediate cessation, the owner or operator "shall cease injection into the well with 48 hours. . . ." 40 C.F.R. § 144.51(q)(2). Again, these federal regulations impose a duty that is ongoing, not one that ends at a date certain.

Similarly, the Illinois UIC regulations, promulgated in accord with U.S. EPA's state program requirements, set conditions on the operation of underground injection wells. Both of the regulations at issue in Count I and Count II of the Complaint are regulations that constitute the same type of "use authorization" that the EAB examined in *Lazarus*. Section 240.760(e)(6) of IAC Title 62 provides that an internal mechanical integrity test must be performed at least once every five years *unless* a temporary abandonment is approved by the state. Similarly, section 240.760(f) provides that an internal mechanical integrity test must be performed *unless* a future use status is approved. The "unless" clauses of the two regulations indicate that the requirements mandate a continuing course of conduct rather than a discrete act. The regulations provide that an underground injection well owner/operator with a choice – either conduct the mechanical integrity test *or* properly abandon the well or obtain future use status. To do neither is, in both instances, a continuing violation which tolls the statute of limitations until the violating behavior has ceased. The "alternative" language of the regulations clearly signals that the owner/operator of the underground injection well should either test the well or take appropriate steps to cease operation of the well.[3] Given that mechanical integrity testing is an integral part of an effective UIC program to maintain the integrity of underground sources of drinking water, timely compliance with such UIC permit requirements is an obligation that must continue as the permit continues in effect if the permit is to serve as a means of protecting that resource.

Finally, the Illinois UIC regulations make it clear that the successful completion of an internal mechanical integrity test is a prerequisite to continued operation of an underground injection well:

> Any Class II UIC well which fails an internal mechanical integrity test, or on which an internal mechanical integrity test has not been performed when required by subsections (e) and (f), *shall be shut in until the well is plugged or until remedial work is completed and an internal mechanical integrity test is successfully*

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[3] See also Letter dated May 19, 1999, from IDNR to U.S. EPA Region 5 (C Ex. 33) which states in part: "In order to abate these violations, Rocky Well has four (4) options under state law. The options are: perform a successful internal mechanical integrity test, obtain Department approval for temporary abandonment, plug the well or obtain a permit for [sic] convert the well to another type of well (not a Class II well)."

> *completed.* The necessary work shall be completed and an internal mechanical integrity test successfully completed within 90 days, or within any greater length of time established by the Department due to weather conditions.

62 IAC § 240.760(h) (emphasis added). I find this case similar to *Harmon*, where respondent failed to obtain a RCRA waste disposal permit and failed to meet the requirements that such a permit would have imposed, such as groundwater monitoring and financial responsibility. As in *Harmon*, the threat here to underground sources of drinking water is an ongoing one, and the need to conduct integrity testing is likewise ongoing.

Concluding that the two mechanical integrity testing regulations impose continuing obligations on the owners and operators of the wells, we now look to when the cause of action first accrues, which, under the continuing violation theory, is the date that the violations *ceased*. *In re Lazarus,* 7 E.A.D. at 364. The parties do not dispute that each of the six wells at issue in this matter has either been successfully tested in accordance with the applicable regulation, or plugged by Rocky Well, or, in the case of one well, a new permittee.[4] The earliest date on which any of the six wells was brought into compliance with the mechanical integrity testing requirements was March 14, 2001. Respondents' Joint Motion at 3. Since the Complaint against Rocky Well was filed on July 2, 2001, and against Mr. Klockenkemper on May 1, 2002, I conclude that under the continuing violations theory the allegations of Counts I and II are not barred by the five year limitations period in 28 U.S.C. § 2462 as to either Respondent.[5]

c. The statute of limitations as applied to Count III against Rocky Well and Mr. Klockenkemper

The Amended Complaint alleges that Rocky Well and Mr. Klockenkemkper failed to submit Annual Well Status Reports for each of the six wells for the years 1991 and 1993 - 1998, and for five of the six wells for the year 2001. These reports were due on May 1 of the following year. In its penalty calculation, however, Complainant states that it relied *only* on the violations alleged for the years 1996 through 1998. *See* Complainant's Response to [Respondents'] Joint Motion for Partial Accelerated Decision for Dismissal of Entire Cause or Certain Claims (filed August 28, 2006) (Complainant's Response) at 14. In addition, as for the 2001 report, due May 1, 2002, Complainant has stated it will not pursue enforcement because Respondents have submitted proof of filing. *See* Complainant's Memorandum in Support of Motion for a Partial Accelerated Decision as to the Liability of Respondents (Complainant's Memorandum) (filed July 21, 2006) at 25 n. 1.

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[4] See Respondent's Joint Motion for Accelerated Decision and Dismissal of Entire Cause or Certain Claims with Prejudice (filed July 21, 2006)(Respondents' Joint Motion) at 1, 3-4.

[5] Because I conclude that Counts I and II are not barred by the statute of limitations because they are continuing violations, there is no need to reach the "relation back" theory as applied to these claims.

Complainant's Response contains an extensive discussion of the "relation back" rule of FRCP 15(c) and argues that the Amended Complaint "relates back" to the original and was therefore timely filed. *See* Complainant's Response at 14-18. This theory, however, would not serve to preserve the claims for the 1991 and 1993-1995 reports against Mr. Klockenkemper because the original Complaint against Rocky Well was not filed within the five-year limitations period for those claims.[6] Accordingly, the claims based on failure to file the 1991 and 1993-1995 reports are hereby dismissed as to both Respondents as they are barred by the statute of limitations. In light of Complainant's statement that it will not pursue enforcement regarding the 2001 report, that claim is also dismissed as to both Respondents. As applied to Rocky Well, I conclude that the five-year statute of limitations does *not* bar the government's claims with respect to the 1996, 1997 and 1998 reports (due May 1 of 1997, 1998 and 1999) which were filed on July 2, 2001. As applied to Mr. Klockenkemper, the government's claims for those years are similarly *not* barred, because Complainant's Amended Complaint is deemed to have been filed on May 1, 2002, the date it filed its Motion to Amend (see *supra* n.2). In sum, the claims for failure to file the 1996, 1997 and 1998 Annual Well Status Reports are the only claims in Count III that remain, and they remain as to both Respondents.

d. Laches

Finally, Respondents argue that the doctrine of laches bars those claims against them that are not otherwise barred by the statute of limitations. An environmental action may be barred by the equitable defense of laches if: (1) there has been unreasonable delay in bringing suit; and (2) the party asserting the defense has been prejudiced by the delay. *Park County Resource Council, Inc. v. U.S. Department of Agriculture*, 817 F.2d 609, 617 (10th Cir. 1987). It is, however, a doctrine that must be invoked sparingly because "ordinarily the plaintiff will not be the only victim of alleged environmental damage." *Id.*, citing *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 855 (9th Cir. 1982).

The undisputed facts are as follows. By letter dated May 19, 1999, the IDNR referred this matter to EPA Region 5 for enforcement. U.S. EPA issued Notices of Violation to Rocky Well Service on September 8, 2000, and to Mr. Klockenkemkper on January 25, 2002. U.S. EPA subsequently filed this administrative action against Rocky Well on July 9, 2001, and moved to amend its Complaint to add Mr. Klockenkemper as respondent on May 1, 2002. This timeline does not constitute the "unreasonable delay" that is required to invoke the doctrine of laches and Respondents' claim that the doctrine bars U.S. EPA's claims in this case is rejected. In addition, laches is an equitable defense to equitable actions. *See In re Crown Central Petroleum Corp.* No. CWA-08-2000-06 (Jan. 8, 2002) slip op. at 55. While the Amended Complaint in this matter seeks penalties and injunctive relief against Respondents, it is unclear to the Presiding Officer whether there remains any injunctive relief to be granted in this case, as the

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[6] For example, the report for the calendar year 1995 was due on May 1, 1996, more than five years before the original Complaint was filed on July 2, 2001. Complainant appears to concede this point. See Complainant's Response at 15.

parties are in agreement that all six wells at issue have either been integrity tested in accordance with the Illinois regulations, or plugged. Respondents' Joint Motion at 3-4.

VI. Complainant's Motion for Partial Accelerated Decision against Rocky Well

Complainant argues that the evidence in this matter, consisting of the pleadings and other documentation presented in the parties' prehearing exchanges, demonstrates that Respondent Rocky Well violated the Illinois UIC Class II well regulations and the SDWA as set forth in the Amended Complaint and that, therefore, it is entitled to an accelerated decision as to Rocky Well's liability. The Presiding Officer agrees.

The material facts as to which there is no genuine issue are as follows: Rocky Well is a "person" as that term is defined by section 1401(4)(C)(12) of SDWA, 42 U.S.C. § 300f(4)(C)(12), and 62 IAC § 240.10. Rocky Well Service Incorporated's Answer to Amended Administrative Complaint and Request for Hearing (RW Answer) at ¶ 16. As alleged in Count I, 62 IAC § 240.760(e)(6) required Rocky Well to test the internal mechanical integrity of two wells by December 19, 1996, five years from the date of Rocky Well's last successful tests on these wells. *Id.* at ¶ 45. Rocky Well did not test the mechanical integrity of the two wells by December 19, 1996, although Rocky Well did successfully test the Huelsing #1 well on March 14, 2001. *Id.* at ¶ 47. Rocky Well did not receive approval from the State of Illinois for a temporary abandonment of either of the two wells subject to Count I of the Amended Complaint. *Id.* at ¶ 44.

As alleged in Count II, 62 IAC § 240.760(f) required Rocky Well to perform a successful internal mechanical integrity test by September 1, 1995, for each Class II UIC well that had not been subjected to an internal mechanical integrity pressure test by September 1, 1990. RW Answer ¶ 51. Rocky Well failed to subject the four wells at issue in Count II to the internal mechanical integrity test by the 1990 deadline and thus was required to test them by September 1, 1995. *Id.* at ¶ 52. Rocky Well failed to test the mechanical integrity of these wells by that date. *Id.* at ¶ 53.

Rocky Well raises an affirmative defense as to Count II that "interference by owners of working interests and the surface owner prevented [it] from performing mechanical integrity tests" on these wells. RW Answer at ¶ 58. "Said interference included vandalism and sabotage to the wells, obstruction or plowing of lease roads and similar acts which effectively precluded [Rocky Well] from operating the injection wells." *Id.* Rocky Well offers an affidavit in support of these facts (see R Ex. 99).[7] Nonetheless, such "interference" if proven, does not constitute a defense to the allegations of Count II, but will be considered in evaluating the appropriateness of Complainant's proposed penalty at a later time in this proceeding.

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[7] The parties' exhibits are cited to as C Ex. (Complainant's exhibit) and R Ex. (Respondents' exhibit).

Rocky Well also reiterates arguments regarding impossibility of performance that have already been addressed by the Presiding Officer in this case. *See* Decision and Order on Motions dated May 17, 2006 at 6-7, 13. The impact of state court litigation over the wells and the alleged inability of Rocky Well to obtain access to the wells are not matters that would present a defense to liability in this case. While these facts may raise issues relevant to the determination of the appropriate penalty in this matter, they do not constitute affirmative defenses to liability.

As alleged in Count III, 62 IAC § 240.780(e) provides that an Annual Well Status Report on each permitted Class II well must be filed on forms prescribed by the Department of Natural Resources. Complaint ¶ 61; RW Answer ¶ 61. The report shall be filed by May 1 of each year for the preceding calendar year for all wells which have not received Department approval for temporary abandonment or been plugged by the end of the reporting year. *Id.* Rocky Well denies that it failed to submit the annual reports. RW Answer ¶¶ 63 and 64. While several of these claims have been dismissed on statute of limitations and other grounds, see *supra* p. 9, Complainant's claims for the calendar year reports for the years 1996 through 1998 (due 1997 through 1999) remain. For each of these years, Complainant has submitted evidence consisting of Notices of Violation (NOVs) issued by IDNR and IDNR Director's Decisions affirming those NOVs. *See* C Exs. 22 - 27.

With regards to Count III, Rocky Well cites to a series of Amended Directors Decisions issued May 10, 2004, (R Exs. 96, 112-116) and argues that they raise questions of fact as to the violations alleged in the NOVs. The Amended Directors Decisions were issued pursuant to 62 IAC § 240.160(h) in regard to several Notices of Violation for failure to submit Annual Well Status Reports. The Illinois regulations provide that an Amended Directors Decision can be issued for two reasons: (1) to extend the amount of time provided to complete remedial action necessary to abate the violation; or (2) to reduce the civil penalty assessed. 62 IAC § 240.160(h)(2). In this case, the Amended Directors Decisions terminated the NOV and waived the penalty previously assessed.

The Amended Directors Decisions contain no explanation as to why such action was taken and Respondent proffers none. It is possible that IDNR decided to terminate the NOVs because of this EPA enforcement action. Whatever the reason, summary disposition may not be avoided by mere allegations that a factual dispute may exist. *See In re Green Thumb Nursery*, 6 E.A.D. at 782 n.23 (1997). Complainant has met its initial burden of showing there exists no genuine issue of material fact in its motion for accelerated decision and Respondent has failed to provide any probative evidence to the contrary.

For these reasons, Complainant's Motion for Accelerated Decision as to liability against Rocky Well Service, Inc., is granted as to all three counts of the Complaint with the exception of those claims that have otherwise been dismissed (see *supra* p. 9).

VI. Complainant's Motion for Partial Accelerated Decision against Respondent Klockenkemper

Complainant maintains that the evidence in this matter demonstrates that Respondent Klockenkemper is a "person" as defined by the SDWA and the Illinois UIC regulations, that he was subject to the SDWA and those regulations, and that he violated the statute and regulations. Complainant thus claims it is entitled to an accelerated decision as to Respondent Klockenkemper's liability.

Complainant's argument is as follows: (1) Mr. Klockenkemper is a "person" under the SDWA and the Illinois UIC regulations; (2) the Illinois UIC regulations must be as stringent as their federal counterparts; (3) the federal UIC regulations apply to "owners and operators" and thus the state regulations must so apply as well. Complainant cites to several cases to support its argument that an operator can be liable for violations of the SDWA and regulations promulgated pursuant thereto. Complainant then argues that the evidence in the record establishes that Klockenkemper directly participated in the operational activities of Rocky Well and had knowledge and information of compliance and related business issues regarding Rocky Well. Complainant argues that Respondent Klockenkemper is directly liable as an individual for the violations it alleges; it does not argue derivative liability based on a "piercing the corporate veil" theory. Respondent Klockenkemper opposes Complainant's motion on numerous grounds, and those that are relevant are discussed herein.

First, we look to the statute and the regulations at issue. The SDWA provides:

> Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources. . . that *any person* who is subject to a requirement of an applicable injection control program in such State is violating such requirement. . .

the Administrator, after notice to the state and the person violating such requirement, can issue an order requiring the person to comply with such requirement. 42 U.S.C. § 1423(a)(1). "Person" is defined by the SDWA 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). 42 U.S.C. § 1401(12). By including the phrase "officers, employees, and agents of any corporation" in its definition, Congress acknowledged that mere corporate form should not shield from liability any person who is otherwise liable.

The Illinois Oil and Gas Act, 25 Ill. Comp. Stat. 725, pursuant to which the Illinois UIC regulations are promulgated, similarly provides that "*any person* who violates any provision of this Act or any valid rule, regulation, permit or order of the Department made hereunder . . . shall be subject to a civil penalty . . . ." 225 Ill. Comp. Stat. § 725/26. The Act defines "person" to mean "any natural person, corporation, association, partnership, governmental agency or other legal entity, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind." 225 Ill. Comp. Stat. 725/1. The enforcement provisions of the statute apply to "any

permittee, or any person engaged in conduct or activities required to be permitted under this Act." 225 Ill. Comp. Stat. 725/8a. It is clear, then, that the state statute authorizing the regulations Respondent Klockenkemper is alleged to have violated contemplates that liability could extend beyond just the permittee to any person "engaged in conduct or activities required to be permitted."

The Illinois UIC regulations Respondent Klockenkemper is alleged to have violated at times refer to the "permittee" (see 62 IAC § 240.780(e) which provides that the "*permittee* of each Class II UIC well shall file the Annual Well Status Report") and at other times are written in the passive voice (see 62 IAC § 240.760(e) which provides that "an internal mechanical integrity test *shall be* performed"). The enforcement provisions of the regulations, like the statute, however, extend to "any permittee, or *any person* engaged in conduct or activities required to be permitted under the Act." 62 IAC § 240.150. The UIC regulations define "person" in a manner identical to the statute, a definition that includes "any natural person." 62 IAC § 240.10. Mr. Klockenkemper is clearly a "person" as defined by SDWA, the Illinois Oil and Gas Act, and the Illinois UIC regulations. The question remains whether, as a matter of law, he can be held liable as a "person" for the violations alleged in this matter.

Despite Respondent's protestations to the contrary, case law clearly establishes that an individual can be held personally liable for violations of environmental laws where it is proven that the person, even a corporate officer, had "active involvement and oversight of all aspects of [a corporations's] operations" such that "he should have ensured his company's compliance" with the law. *In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218, 230 (EAB 1999). Courts have found "personal liability on the part of corporate officers where it has been proven that the person had direct personal participation in the wrongful conduct, as where the defendant was the 'guiding spirit' behind the wrongful conduct or the 'central figure' in the challenged corporate activity." *Id.* As the Second Circuit has held, there is "no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for statutorily proscribed activity." *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F. 2d 133, 135 (2d Cir. 1985).

In *In re Safe & Sure Products, Inc. and Lester J. Workman*, 8 E.A.D. 517 (EAB 1999), the Environmental Appeals Board affirmed the holding of the Presiding Officer that the Mr. Workman, "the principal stockholder and the only functioning corporate officer" was personally liable for violations of FIFRA, as he was "the person who always made the decisions for [the corporation]." *Id.* at 524 (citing to Initial Decision at 42). Similarly, in *In re Sunbeam Water Company, Inc*, 1999 EPA ALJ Lexis 79 (1999), the Administrative Law Judge found two individuals, a father and son, liable for violations of the SDWA where both "participated in and had actual knowledge of [the corporations's] failure to comply" with an administrative order. The ALJ found that the father had delegated the "day-to-day responsibility for operating [the corporation]" to the son "whom he also saw daily in the course of running the family businesses." "As president and primary officer of [the corporation, the father] had the ultimate authority to control the corporation." *Id.* The ALJ found that both "had knowledge of and participated in" the corporation's failure to comply with the administrative order and found them both, along with the corporate respondent, liable.

The question then remains whether Complainant has established the facts necessary to demonstrate Mr. Klockenkemper's personal liability. I conclude that it has, based on the following findings of fact:

1. Respondent Klockenkemper is the President, Treasurer and Secretary and Agent for Rocky Well Service Inc. Answer ¶ 17; C Ex. 33.

2. Respondent Klockenkemper directly participated in the operational activities of Rocky Well's business.

(a) He personally performed work at the wells. C Ex. 60.14a.
(b) He also hired others to perform maintenance and operational activities at the wells. C Exs. 60.14d, 60.14e, 60.14f.
(c) He sought access to the wells from property owners. C Ex. 60.14b.
(d) He supervised and personally directed work being performed on the wells by others. C Ex. 60.14f.
(e) He was the person in charge of Rocky Well Service and the operational and maintenance activities at the wells. C Exs. 60.14c, 60.14e, 60.14f, 60.14g.

3. Respondent Klockenkemper had knowledge and information about compliance and related business issues regarding Rocky Well and was the corporate officer who responded to third parties on behalf of Rocky Well on issues regarding environmental compliance, operations and general business matters. R Exs. 6, 8, 12, 14, 17, 26, 32, 40, 43, 45, 47, 54, 55, 60.[8]

Respondent raises several arguments to rebut Complainant's evidence, but fails to raise a genuine issue of material fact that would preclude the grant of a motion for accelerated decision. First, Klockenkemper raises the fact that the U.S. EPA investigator's report is dated roughly two years before the declarations were signed as well as the fact that U.S. EPA has not produced the original investigator notes. Neither fact detracts significantly from the cumulative evidentiary weight of the seven signed declarations on which Complainant relies. Respondent also attacks several declarations on the grounds that they include some hearsay and that they contain certain discrepancies when compared to the investigator's report. Hearsay and minimal discrepancies, however, do not rob the declarations of their probative value on the issue of Respondent Klockenkemper's involvement with the day-to-day operations of the business of Rocky Well Service, Inc.

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[8] Additionally, Complainant argues that Respondent Klockenkemper's participation as an individual in litigation involving Rocky Well's oil and gas leases in several state court cases demonstrates his role as the "operator" of the well leases at issue in this case. See Complainant's Memorandum at 52-55. The facts involving these cases are not entirely clear cut and might be better sorted out at a hearing. Because I have determined that Mr. Klockenkemper is personally liable on the basis of other facts, however, a hearing to determine the facts involving the state litigation is not necessary.

Finally, Respondent Klockenkemper raises several affirmative defenses, none of which defeat the liability Complainant has established. Respondents have the burden of presentation and persuasion with respect to any affirmative defenses. 40 C.F.R. § 22.24(a). First, intentional, deliberate, fraudulent or illegal conduct is not a prerequisite to finding personal liability on the part of a corporate officer. Nor is "piercing the corporate veil" required. Second, as discussed *supra* at p. 11, the Amended Director's Decisions are insufficient to defeat the liability otherwise established by Complainant. Third, Respondent has not established affirmative misconduct on the part of the government or reasonable reliance thereon. Therefore, estoppel is not an affirmative defense in this matter. Nor has Respondent established the facts for his seventh, twelfth and fourteenth affirmative defenses (arbitrary and capricious enforcement, selective enforcement and impossibility). Finally, laches has been addressed above, and has not been established as a defense to this action.

On the facts established by Complainant, I conclude that Respondent Klockenkemper is personally liable for the violations alleged in Counts I, II and III in this matter and accordingly grant Complainant's Motion for Accelerated Decision on these counts, except for those claims otherwise dismissed (see *supra* p. 9).

Order

1. Complainant's Motion for Accelerated Decision is GRANTED as to the Liability of Rocky Well Service Inc. and Edward J. Klockenkemper as to Counts I and II and those claims of Count III not otherwise dismissed.

2. Respondent's Motion for Partial Accelerated Decision is GRANTED as to those claims in Count III for failure to submit the Annual Well Status Reports for the calendar years 1991, 1993, 1994, and 1995 and those claims are dismissed.

3. Count III of the Amended Complaint is also DISMISSED with respect to the claim for failure to submit an Annual Well Status Report for the calendar year 2001.

4. As previously ordered by the Presiding Officer, a hearing in this matter is scheduled to commence on April 24, 2007. That hearing will be for the sole purpose of determining the amount of any penalty to assess for the violations found herein.

Dated: December 27, 2006

Marcy A. Toney
Presiding Officer

IN THE MATTER OF Rocky Well Service, Inc., and Edward J. Klockenkemper, Respondents
Docket No. SDWA-05-2001-002

CERTIFICATE OF SERVICE

I certify that the foregoing Decision and Order on Motions, dated December 27, 2006, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604-3590

Copy hand delivered to
Attorneys for Complainant:

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U.S. Environmental Protection
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Felipe Gomez
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Dated: 12/27/06

By: Mary Ortiz
Administrative Support Assistant