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

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| **In re:** | ) | |
| | ) | |
| **Rocky Well Service Inc., and** | ) | **E.A.B. Docket Nos. 08-03 and 08-04** |
| **Edward J. Klockenkemper,** | ) | **(SDWA-05-2001-002 (40 CFR Part 22))** |
| | ) | |
| **Respondents** | ) | |
| | ) | |

# APPELLATE BRIEF

## OF RESPONDENT

## EDWARD J. KLOCKENKEMPER

**(PART 1 of 2)**

**October 30, 2008**

**Law Office of Felipe N. Gomez**
**P.O. Box 220550**
**Chicago, IL 60622**
**312-399-3966**

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# APPELLATE BRIEF
## OF RESPONDENT EDWARD J. KLOCKENKEMPER
**(PART 1 of 2)**

Now Comes Respondent Klockenkemper, by and through undersigned counsel, and, by reference, Rocky Well Service, Inc., and pursuant to 40 CFR Part 22, submits this Part 1 of 2 of his Appellate Brief, setting forth jurisdictional and other errors and arguments regarding Presiding Officer Kossek's 2/6/03 and 5/3/05 Orders, and regarding Officer Toney's 12/27/06 Order on liability. Respondent incorporates herein by reference Part 2 of this Brief, including the Conclusions (Sec. X) and Proposed Findings and Conclusions (Sec. XI) set forth therein. The arguments herein are generally presented in keeping with the structure and order of arguments and issues set forth by the Officer within the order being discussed, and the specific relevant facts for each order challenged are discussed in conjunction with the arguments as to such order.

## I. STATEMENT OF GENERAL ISSUES FOR REVIEW

A. Whether EPA's January 25, 2002, Notice of Violation and/or February 20, 2003 Amended Complaint issued to Mr. Klockenkemper were well-pleaded and facially and factually sufficient to confer jurisdiction under the Illinois SDWA UIC Program (225 ILCS 725) or under the theory of Piercing the Corporate Veil, as to Mr. Klockenkemper, and, if not, whether the NOV and/or Complaint Should have been stricken and dismissed as to Mr. Klockenkemper (Kossek Orders of 2/6/03 and 5/3/05, Toney Order of 12/27/06), and, if so, whether 28 USC 2462 in any event barred EPA's pursuit of penalties for violations occurring over five years prior to the filing of the 7/9/01 and 2/20/03 complaints in this matter.

B. Whether EPA properly met its 40 CFR Part 22 burden as to Respondents sufficient to allow Officer Toney to impose joint and several liability under 225 ILCS 725 and 62 IAC 240 on

Respondents, or, as to Mr. Klockenkemper, under any other theory of indirect liability , and, whether Respondent Klockenkemper was denied due process and the right to hearing by imposing liability on summary judgement, rather than after hearing (Toney Order of 12/27/06).

C. Whether EPA and the Presiding Officer correctly applied the six SDWA statutory penalty factors to each violation at each well as to each Respondent, and if so, whether the assessed penalty is reasonable and equitable under the facts relied upon by the Officer (Toney Order of 7/23/08).

D. Whether Respondents were denied due process and a fair hearing due to various serious irregularities occurring at the April 24-26, 2007 hearing and during the post-hearing briefing period (Toney Orders of 7/12/07, 8/27/07, 10/2/07, and 11/29/07).

E. Whether Officer Toney erroneoulsy refused to allow/improperly struck certain affirmative defenses from Respondent Klockenkemper's proposed Answer and Amended Affirmative Defenses (Officer Toney Order of 5/17/06).

## II. NATURE OF THE CASE

### A. SUMMARY OF CASE BELOW

This matter arises from the assessment of joint liability and a joint administrative civil 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 CFR 22") against Respondents Rocky Well Service, Inc, and E.J. Klockenkemper ("Respondents"). Pursuant to 40 CFR 22.30, Respondents appeal from several orders below, including a December 27, 2006, Accelerated Decision and a July 23, 2008, Initial Decision by Presiding Officer Marcy Toney, Esq., as well as certain orders entered by the prior Presiding Officer Regina Kossek, Esq. Notices of Appeal were filed by Respondents on July 28, 2008, and an amended Notice was filed with this Brief.

### B. SUMMARY OF FACTS

At the time of the 1995-1996 and other violations asserted herein, Rocky Well Service, Inc. ("RWS"), was a duly licensed closely-held Nevada corporation in good standing and licensed to do business in Illinois, whose primary business was providing contract oilfield services related

to the production of oil and gas in the southern Illinois area. *C. Exh. 43 at para. 16 (2/20/03 Complaint) ; R. Exh 99 at paras. 3-4 (RWS 8/23/06 Declaration Opposing Liability)*. Edward Klockenkemper is, currently, one of the directors, the President and chief operating officer of RWS, and was the initial lessee for the six oil well leases involved in this matter, which leases are scattered across several counties in southern Illinois. *C. Exh. 37 at para. 16 (7/1/09 Complaint); R. Exh. 99 at para. 2*. By 1988, RWS had become the sole "permittee" responsible for the six injection wells subject to this action that were located on the leases, under 225 ILCS 725, which is the federally-approved SDWA Underground Injection Control program ("UIC Program") for Illinois. *C. Exh. 37 at paras. 20-23; R. Exh. 99 at paras. 6-7; 225 ILCS 725, et. seq.* Under that program, an oil lease operator, or an assignee of such rights (such as RWS) that wished to dispose of the brine that accompanies extraction of oil in that area by injection (rather than by trucking it off), was required to apply for and obtain a UIC permit to be allowed to utilize the injection well for such purpose, and thus became the authorized "permittee" for such well. *C. Exh. 37 at paras. 20-23; 62 IAC 240.10 and 240.330.*

Under the Illinois UIC regulatory scheme, RWS could thereafter be held liable for any permit violations related to the injection well for which it held the permit. *225 ILCS 725/8a; 62 IAC 240.150(a).* Alternatively, and as is the core thrust of the UIC program, a permittee such as RWS or an unpermitted lease operator (such as Mr. Klockenkemper), could be held liable for injecting brine into an injection well on the lease for which it did not have a permit. *Id.* Crucial to this case is the fact, *inter alia*, that the Illinois UIC program does not provide for allowing a non-permittee (such as Mr. Klockenkemper) to be authorized to inject into a permitted well by use of the permittee's license to do so, only the permittee is so authorized. *Id; Cf. C. Exh. 37 at paras. 20-23, 27.* At no time did Mr. Klockenkemper himself ever operate or inject into the six wells, since he had no permit to do so and since he cannot by law inject into another permittee's well (or an unpermitted well). *R. Exh. 99 at para. 8; 62 IAC 240.330.*

Prior to and at the time of the 1995-1996 Mechanical Integrity Testing ("MIT") violations, and during the annual reporting violation period 1996-1998, none of the six injection wells were operational or injecting, although the 2 wells that were potentially in a condition to allow operation without redrilling/recoonstructing the well, had already been MIT'd in 1991 in

compliance with the UIC program (Huelsing #1 and Zander #2). *See p54 infra, at fn 25; R. Exh. 99 at para. 15*. The other 4 wells (Atwood #1, Wohlwend #6, Twenhafel #2, and Harrell #1, were actually never were operated by RWS and all 6 were properly capped and shut-in prior to 1995-1996 and thereafter, as required by 62 IAC 240 while not in use and awaiting MIT. *Id.*

Due to various legal and other force majeure circumstances, RWS was unable to perform Mechanical Integrity Testing on the six wells by the 1995-1996 deadlines, and did not submit annual reports for the six inoperative wells for the period 1996-1998, leading to this action seeking and imposing a $105,590 penalty "jointly" upon both Respondents. *R. Exh. 99 at para. 15; See Also Respondent Klockenkemper's Appellate Brief (Part 2), infra, at p179, Sec. VIII.F (Good faith efforts) and p195, Sec. VIII.H ("Other matters").*

**C. STANDARD OF REVIEW**

On appeal, both the factual and legal conclusions of the Presiding Officer reviewed *de novo*. *40 CFR § 22.30(f)*. On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule. *Administrative Procedure Act, 5 USC § 557(b)*. The EAB may adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and in performing its review the EAB applies the "preponderance of the evidence" standard established by 40 CFR § 22.24(b). *In re The Bullen Companies, Inc., 9 E.A.D. 620, 632 (EAB 2001).*

The "preponderance of the evidence" standard requires that "a fact finder should believe that his factual conclusion is more likely than not." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). Section 22.24 states:

> (a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.
>
> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence. *40 CFR 22.24*

## III. ORDERS UNDER APPEAL

Respondents appeal as to all or parts of the following orders (the orders are listed in the order they are addressed in the "Argument" sections of this two-part Brief[1]):

1. **2/6/03 R. Kossek Order Granting Leave to Amend (Brief, Part 1, Sec. V)**
2. **5/3/05 R. Kossek Order Denying Motion to Dismiss Complaint (Part 1 Sec. VI)**
3. **12/27/06 M. Toney Partial Accelerated Decision on Liability (Part 1, Sec. VII)**
4. **11/29/07 M. Toney Order Altering Briefing Format at 11th Hour (Part 1, Sec. VII.D)**
5. **7/23/08 M. Toney Initial Order on Penalty (Part 2, Sec. VIII)**
6. **10/2/07 M. Toney Order Denying EJK Motion to Conform Transcripts (Part 2, Sec. IX)[2]**
7. **7/12/07 M. Toney Order Regarding Motion for Audio tapes (Part 2, Sec. IX)**
8. **8/27/07 M. Toney Order Denying Motion for Audion tapes (Part 2, Sec. IX)**
9. **5/17/06 M. Toney Order Striking Affirmative Defenses (Part 2, Sec. X)**

Respondents allege that in each order the Presiding Officers improperly granted or denied such relief in whole or part because they made related errors of procedural and substantive fact and law, failed to properly interpret, construe and apply the Federally-authorized Illinois underground injection control program law and rules, entirely failed to consider (or explain the rejection of) several of Respondents' affirmative defenses, and ignored an overwhelming number of contrary laws, facts, evidence and testimony of record.

Respondents allege that these errors and omissions detrimentally resulted in, *inter alia*, the improper assertion of SDWA jurisdiction over Mr. Klockenkemper's persona without prior notice and denial of a requested hearing to Mr. Klockenkemper on his personal liability prior to

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[1] Due to the size of the Brief and related high number of orders appealed (9), and after checking with the EAB clerk's office on the procedures, Respondent Klockenkemper's Appellate Brief is submitted in 2 volumes, with Part 1 (liability) containing the arguments on appeal as to the 2/6/03 and 5/3/05 Kossek and 12/27/06 Toney Orders, and with Part 2 (penalty) containing the arguments of both Respondents as to the 7/23/08 Toney Initial Decision on penalty as well as the other 5 orders listed above. RWS adopts the arguments in this Brief that relate in part of in whole to RWS or both Respondents as indicated herein, and RWS is also concurrently submitting its own Appellate Brief which, given the parallel nature of many issues as to each Respondent (assuming, for argument's sake only, that they are considered and are jointly liable under EPA's view), will largely adopt relevant arguments from this Brief. While each volume has a separate table of contents and authorities, part 2 is paginated and outlined in continuation of part 1's format, and a comprehensive table of contents is being submitted separately from the two volumes for convenience of the EPA and EAB in reviewing the Brief.

[2]Respondents also appeal as to various serious irregularities in the scheduling, conduct and transcription of the April 24-26, 2007, Hearing on penalty in this matter, related to the 10/2/07 Toney Order, and appeal as well her related 7/12/07, 8/27/07, and 11/29/07 orders.

imposition of same. Such errors also resulted in numerous other incorrect and unsupported findings of fact and conclusions of law and discretion by the Officers which are not supported by law, fact, and the preponderance of the evidence, on the record below.

## IV. STATUTORY AND REGULATORY FRAMEWORK

### A. Safe Drinking Water Act ("SDWA") - EPA Adopted Illinois Oil and Gas Act, 225 ILCS 725, as Federal UIC Program for Illinois

Section 1421 of the SDWA requires that state Underground Injection Control ("UIC") programs require persons to obtain permits for any underground injection. *SDWA Section 1421(b)(1)(A)*. In accordance with Section 1421 and implementing federal regulations at 40 CFR 145.21-145.34 and 146.21-146.24, Illinois promulgated and administered its own Class II UIC permit program, pursuant to the Illinois Oil & Gas Act, 225 ILCS 725, et seq. and 62 Illinois Administrative Code Sec. 240, et. seq, ("62 IAC 240") such Act and regulations having been adopted by rule by EPA as the Illinois UIC program. *See 40 CFR 147.701*.

62 IAC 240 is the implementing regulation for the Illinois Oil and Gas Act, whose requirements are incorporated by reference into the federally-approved State UIC Class II program at 40 CFR 147.701(a)(1), and as such, 62 IAC 240 et seq., represents the federal Class II UIC program's requirements applicable to injection wells and their permit holders under the SDWA in Illinois.

### B. 225 ILCS 725 and 62 Illinois Administrative Code Sec. 240 Constitute Illinois' Class II UIC Program

#### 1. Illinois Statute and Regulations Hold Permittee Expressly Responsible for SDWA Compliance

Under the Illinois SDWA, an owner (individual or corporate) becomes the permittee upon receipt of a permit, and only then becomes subject to the SDWA:

a. "Owner" is defined as the "person who has the right to drill into and produce from any pool, and to appropriate the production...";

b. "Permit" means "the Department's written authorization allowing a well to be drilled, deepened, converted, or operated by an owner";

c. "Permittee" means "the owner holding or required to hold the permit, and who is also responsible for paying assessments in accordance with Section 19.7 of this Act and, where applicable, executing and filing the bond associated with the well as principal and who is responsible for compliance with all statutory and regulatory requirements pertaining to the well". *225 ILCS 725/1*; *See Also 62 IAC 240.10.* [3]

**2. No Federal or State SDWA "Operator Liability" As Under CERCLA or RCRA, Operator of Oil Wells on Lease Not Operator of Regulated Injection Well on that lease Unless He is Also the "Permittee" for that Injection Well, Liable under SDWA only if He Operates the Injection Well without a permit**

Despite EPA's amended complaint's labeling of Mr. Klockenkemper as a regulated "operator", that term is not defined under the Illinois SDWA; the Oil and Gas Act and implementing regulations do not speak to "operators" in terms of regulatory liability, but rather speak of the operation of injection wells by the permittee/owner, or by an unpermitted person, and no one else.[4] *62 IAC 240.10*. *See e.g 225 ILCS 725/1 at definition of "Waste"* (it shall not be unlawful for the operator or owner of any well producing both oil and gas to burn such gas in flares.") . Further, the "operator" of the oil lease is not necessarily the "operator" of the injection well, depending on whether the operator of the lease applies for a permit to do so as a UIC permittee. *62 IAC 240.10 and 240.330*. The second prong of UIC liability comes into play here, applying where an oil lease "operator" also operates the injection well in order to dispose if his brine (versus trucking it off, which allows an oilfield to operate without operating the injections well. *62 IAC 240.150(a).*

[3] On June 3, 1997, 62 IAC 240.10 was amended, changing the term "person" to "*owner*", and the phrase defining a permittee as the person "*who is responsible for compliance with all statutory and regulatory requirements pertaining to the well*" was added. *See 21 Ill. Reg. 7164, 7171 at "15)"*. The 1997 regulatory amendments to 62 IAC Part 240 "to more accurately reflect the intent" of and to "ensure conformity" with the Oil and Gas Act. *Id.* This conformed the definition with 62 IAC 330(d) which reflected the statutory exercise of jurisdiction over the person named in the permit, who is responsible for compliance with its permit. *62 IAC 330(d)*.

[4] *62 IAC 240.1700* states that "The permittee for each well is responsible for paying the full assessed amount" and "The permittee remains liable for the payment of such fees...".

### 3. A "Person" Becomes Regulated Only When Permit Obtained Or When She Fails To Obtain Permit and Operates the Injection Well Anyway

Consistent with Sec. 1421 of the SDWA, Illinois Class II UIC regulations state that "no person shall drill, deepen, or convert for use as a Class II UIC well without a permit...". *62 IAC 240.310(a).* The term "person" is applied by the statute to an individual or company which becomes regulated only when he or the company applies for and obtains a UIC permit to drill/inject, whereafter the "person" becomes the "permittee" and is then subject to the requirements of the permit. *62 IAC 240.10, 240.310 and 240.330.* The only other way a "person" becomes subject to SDWA jurisdiction is if he drilled or operated without a permit after April 14, 1991. *62 IAC 240.310(f).*

### 4. A Permittee's Corporate Officer is Only Required To Submit Application For Corporate Permittee

62 IAC 240.330(d) specifically provides that:

> "The entity or person to whom the permit is issued shall be called the Permittee and shall be responsible for all regulatory requirements relative to the well."

62 IAC 240.330(a) sets forth requirements for the application for a Class II UIC, permit and establishes the relative roles and responsibilities of the person signing an application as against the person or entity named as the applicant. *62 IAC 240.330(a)* requires that applications:

> "Identify whether the owner of the right to drill and to operate the well is an individual, partnership, corporation, or other entity, and...contain the address and signature of the owner or person authorized to sign for such owner.".

62 IAC 240.330(b) states:

> "...If the owner is a corporation, the application shall be signed by an officer of the corporation."

## C. "Permittee" Expressly Responsible for 62 IAC 240.760 Testing and 240.780 Reporting Under Illinois SDWA

### 1. Mechanical Integrity Testing Expressly Required to Be Done By Permittee, Not Any "Person" - *62 IAC 240.760* (Counts I and II)

62 IAC 240.760 (Establishment of Internal Mechanical Integrity of Class II UIC wells) governs the performance of a Mechanical Integrity Test ("MIT") on a permittee's wells. *See Amended Complaint at Counts I and II.* 62 IAC 240.760(a) states "For purposes of this Section, establishment of internal mechanical integrity includes proper placement of the packer in accordance with subsection (b) and successful completion of a pressure test in accordance with subsection (g)."

62 IAC 240.760(b) contains technical requirements for the placement of the packer, 62 IAC 240.760(c) allows a "permittee" to request alternative packer placement from IDNR, and 62 IAC 240.7760(d) and (g) both require the "permittee" to contact IDNR 24 hours before setting the packer and performing the pressure test to allow an IDNR inspector to be present.

Finally, *62 IAC 240.760(f)* requires that all Class II UIC wells not pressure tested by September 1, 1990, be tested by September 1, 1995, and requires the "permittee" to test at least 20% of its wells every  years, such that all are tested every five years.

### 2. Reporting Also Expressly Required To Be Done By Permittee - *62 IAC 240.780* (Count III)

62 IAC 240.780(e) states in relevant part:

> "Annual Well Status Report. The permittee of each Class II well shall file an Annual Well Status Report on forms prescribed by the Department...by May 1 of each year...for all wells...[not approved for temporary abandonment or plugging]". (Emphasis Added).

### D. Illinois SDWA Enforcement Jurisdiction Limited to "Permittees" or "Persons" Engaged In Activity For Which A Permit Is Required under 42 USC 300h-2 and 225 ILCS 725/8a

SDWA Sec. 1423(a)(1) - [42 USC 300h-2] provides EPA jurisdiction to enforce in a State with primary authority against "any person who is subject to a requirement of an applicable underground control program in such State [who] is violating such requirement", after issuance of a notice of violation and a lack of State action. *42 USC 300h*-2 (Emphasis Added). Illinois' Class II UIC enforcement authority is provided by 225 ILCS 725/8a, which states that an action may be taken against "any permittee, or any person engaged in conduct or activities required to be permitted under this Act.". *225 Ill. Comp. Stat. 725/8a*

Similarly, 62 IAC 240.150(a) authorizes issuance of a notice of violation to "any permittee" or when "any person engaged in conduct or activities required to be permitted..[is]...in violation of any requirement. (Emphasis added). It is against this framework that Respondent appeals the following orders and findings, as discussed below.

## V. APPEAL OF 2/6/03 KOSSEK ORDER GRANTING EPA LEAVE TO AMEND TO ADD MR. KLOCKENKEMPER

### A. 2/6/03 Kossek Grant of Leave to Amend Erroneously Did Not Address Jurisdictional Arguments That Mr. Klockenkemper Was Not Permittee and Could Never Be Otherwise Liable Under Illinois SDWA for the Alleged MIT/Reporting Violations as Pleaded in Proposed Amended Complaint

On February 6, 2003, EPA was granted leave to amend the initial complaint in this matter to add Mr. Klockenkemper, over Respondent's objections. *2/6/03 Kossek Order*. Despite the jurisdictional nature of Respondent's objections, Ms. Kossek outlined, but did not discuss or rebut, Respondent's arguments that any amendment asserting direct liability under the Illinois SDWA would be futile under 40 CFR 22.14(c) / FRCP 15(a) since he was not and never could be regulated as a "Person" under the SDWA either as the "permittee" or as an unpermitted violator, with regard to the MIT violations at the six wells. *Id. at 8-10*; *See Respondent Klockenkemper's 6/27/02 Response to EPA 5/1/02 Motion to Amend*. Rather, Ms. Kossek avoided the

jurisdictional issue altogether in granting EPA's motion, basing her grant on EPA having an equitable theory of relief:

> "Without even addressing the interplay between the SDWA definition of "person" and the IAC definition of "Permittee", EPA should not be precluded, at this stage of the proceeding, from attempting to prove Mr. Klockenkemper is liable based upon standard principles of hornbook corporate law. EPA is attempting to "pierce the corporate veil". Mr. Klockenkemper will have ample opportunity to raise the corporate status and his actions as affirmative defenses...It will become a question of fact to be developed in the administrative record." *2/6/03 Kossek Order at 10.*

Respondent asserts as an initial matter that it was error for Presiding Officer Kossek to ignore her gatekeeping duties under FRCP 12(b)(1) and FRCP 12(b)(6) by failing to address the jurisdictional objections to EPA's direct liability pleading structure, thus ensuring the pleading of the amended complaint conferred jurisdiction over all parties prior to allowing the case to proceed. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577, (1999))*("Jurisdiction is the 'power to declare law,' and without it the federal courts cannot proceed...Accordingly, not only may the federal courts police subject matter jurisdiction sua sponte, they must").

An early determination on the SDWA jurisdictional issues raised by the amended complaint would have foregone the need for the extensive litigation of the same issue in relation to the Respondent's 4/15/03 Motion to Dismiss and the 12/27/06 Partial Accelerated Decision. Such decision would have materially advanced the proceeding either by upholding EPA's direct liability theory and relegating further litigation of the jurisdictional issue until appeal, or by deciding that such pleading did not comport with the Illinois SDWA jurisdictional prerequisites as to Mr. Klockenkemper, forcing EPA to correct the pleading or forego the direct liability claim if unable to do so as to Mr. Klockenkemper.

In the latter situation, assuming *arguendo* that EPA could not allege and plead facts showing that Mr. Klockenkemper was engaged in activities that required a permit or that he violated a SDWA requirement that applied to him (See 62 IAC 240.150(a) and 42 USC 300h-2) EPA would have been limited to seeking the equitable relief of piercing the corporate veil as to

Mr. Klockenkemper in its amended complaint.[5] Consequently, the Presiding Officer erred in failing to assure that the amended complaint conferred jurisdiction to herself under the Illinois SDWA, and it was error not to determine same regardless of the availability of any equitable, non-statutory remedy. *Ruhrgas AG v. Marathon Oil Co., Supra.*

### B. Grant of Leave to Amend Contemplated That EPA Would Plead Elements for "Piercing the Corporate Veil" in Forthcoming Amended Complaint, But Amended Complaint as Filed Asserts Direct Liability and Does Not Plead PCV Elements or Seek Equitable Relief

In her order, after disregarding the jurisdictional issues, Ms. Kossek explicitly stated that amendment would not be futile since derivative liability was being pursued "EPA is attempting to "pierce the corporate veil". *2/6/03 Order at 10*. However, given that an inspection of the amended complaint as filed reveals that EPA did not plead the specific elements required to pierce the corporate veil (or even state that such relief was being souhgt), the Officer was in fact referring to EPA's briefing assertions that such derivative liability was being pursued.

Ms. Kossek stated that she interpreted EPA's analysis of EPA's main case, *In Re Sunbeam Water Company, Inc*., Dkt. No. 10-97-0066-SDWA (10/28/99) to indicate that EPA would attempt to hold Mr. Klockenkemper "liable under the ordinary application of corporate law principles..." by piercing the corporate veil. *2/6/03 Kossek Order at 10*. Consequently, the order conditioned leave to file on the filing of an amended complaint that properly pleaded the equitable theory of ignoring the corporate form to prevent injustice or illegality.[6]

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[5] Respondent refers to and incorporates herein his *6/27/02 Response to EPA's 5/1/02 Motion to Amend* for the jurisdictional arguments put before Presiding Officer Kossek, which are repeated and expanded upon below in conjunction with the discussion of the 5/3/05 Kossek Order.

[6] *Kelsey Axle & Brake Division v. Presco Plastics, 187 Ill. App. 3d 393, 400-401; 543 N.E.2d 239, 243-2444 (1st Dist. 1989)*(Plaintiff seeking to pierce corporate veil has substantial burden in Illinois which requires pleading and showing of all three elements: control, unity of interest/ownership, and fraud or injustice). *Aetna Casualty & Surety Co., v RASA Management Co., Inc., 621 F. Supp. 892 (D.C. Nev 1985)*(Mere allegations that individual was sole incorporator, shareholder, director, owner and manager of corporation insufficient alone to withstand a motion to dismiss, Nevada law requires a complaint to allege: 1) influence and governance by a person alleged to be the alter ego of the corporation; 2) unity of interest and ownership such that individual and company are inseparable, and 3) facts which show that adherence

## VI. APPEAL OF 5/3/05 KOSSEK ORDER DENYING E. J. KLOCKENKEMPER MOTION TO DISMISS AMENDED COMPLAINT

### A. 5/3/05, Order Denying Respondent Klockenkemper's Motion to Dismiss is in Error Since Amended Complaint Failed to Comport With Jurisdictional Pleading Requirements of Illinois SDWA as to Respondent Klockenkemper, Did Not Plead Jurisdictional Facts or Unity/Fraud/Unjust Result Elements Required for Piercing the Corporate Veil, and Should Have Been Dismissed as to Mr. Klockenkemper

On February 20, 2003, EPA filed its amended complaint, which was identical to the initial complaint in regard to the facts alleged and most other respects, but different in a certain aspects material to jurisdiction, as discussed below. *C. Exh. 43 - Amended Complaint.*

#### 1. 7/9/01 Initial Complaint Properly Pleaded Illinois SDWA Jurisdiction as to RWS by Designating RWS as the Permittee of the Wells and Correctly Alleged Permittee RWS Was Responsible for MIT/Reporting Violations

EPA's initial complaint correctly pleaded the current state of Illinois SDWA liability at that time, alleging and holding only the permittee, RWS, responsible for failure to MIT and report. *C. Exh. 37 - 7/9/01 Complaint; 62 IAC 240.10, 240.150 and 240.330(d).* The first complaint properly pleaded RWS as being the permittee. *C. Exh. 37 at paras. 20, 22.* It correctly pleaded the legal fact that RWS was allowed and authorized to inject by way of RWS permit. *Id. at paras. 22 and 23.* It also expressly and correctly pleaded that the "permittee" of a Class II UIC well was responsible for performing MIT's and annual reporting as described at 62 IAC 240.760 and 780, and that RWS was required to test and report. *C. Exh. 37 at paras. 31, 34, 41, 42, 46, 48, 49.*

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to the corporate fiction would promote injustice or sanction fraud).

## B. Review of Amended Complaint Reveals EPA's Novel SDWA "Officer Liability", Casting any Officer of a Permitted Corporation as a Co-permittee

### 1. Amended Complaint's Jurisdictional Allegations As To Mr. Klockenkemper and Related Alterations To Initial Complaint Were Material: Amended Complaint as Pleaded Did Not Confer Jurisdiction Over Mr. Klockenkemper, Did Not Invoke Equity, and Destroyed Jurisdiction Over RWS

### 2. Amended Complaint Asserts Direct SDWA Liability Against Mr. Klockenkemper Under Jurisdiction of 42 USC 300h-2

EPA's initial substantive addition in the Amended Complaint claims that jurisdiction against Mr. Klockenkemper is based on 42 U.S.C. 300h-2(a)(1). *C. Exh. 43 at paras. 6 and 13.* As such, EPA was required to plead that either Mr. Klockenkemper was a "permittee" in violation (e.g. that he violated a Illinois SDWA UIC requirement which applied to him) or that he operated a well without, or did something which required that he first obtain, a permit, either of which would render him a "Person" regulated by the SDWA. *42 USC 300h-2, 225 ILCS 725/8a, 62 IAC 240.150(a).*

The amended complaint now alleged only that RWS was the "owner and/or operator" of the six wells (rather than the being the permittee as in para. 20 of the initial complaint), and that Mr. Klockenkemper was the "operator and/or person who conducted [RWS's] day-to-day maintenance and production operations with regard to the [six] Wells.". *Compare C. Exh. 37 at para. 20 to C. Exh. 43 at paras. 22 and 23.*

### 3. EPA Amended Complaint Alleges that Respondent Was Currently An Officer of RWS, Who Managed and Ran RWS's Day to Day Operations in 2003, But Fails to Allege That Mr. Klockenkemper Did So At The Time of Violations

The amended complaint added the following undated allegations as to Mr. Klockenkemper:

- He "is an individual who serves" various management positions in and "conducts the day to day operations of Rocky Well.". (*C. Exh. 43 - Amended Complaint at para. 17* )(EPA stated this in the present tense, and did not allege him to so "serve' in 1995-1996);

- He is or was the "operator and/or the person who conducted the majority of Rocky Well's day-to-day well maintenance and production operations" with regard to the wells at issue (*Amended Complaint at para. 23*)(again without a temporal attribution to the 1995-1996 MIT violations)

Consequently, EPA failed to connect the alleged roles to the time of the alleged violations, and cannot establish a PFC on the control element for the 1995-1996 violations as a result. *Campbell v. U. Of Akron, 2006 U.S. App. LEXIS 25876 (6th Cir. 2006)*(To establish a causal connection between claimed conduct and violation, Complainant must allege and prove a temporal proximity between the alleged conduct (exercise of protected rights) and alleged violation (adverse employment action).

**4. Amended Complaint Incorrectly Alleges that Respondent Klockenkemper was "Allowed" and "Authorized" to Inject By Way Of RWS Permit But Fails to Allege That Klockenkemper Actually Injected**

The amended complaint alleges that both Respondents were authorized to inject under RWS's permit, but does not specify if or when any injections actually occurred:

- "The State of Illinois issued permits to Respondent Rocky Well that allowed Rocky Well and Respondent Klockenkemper to place injection fluid" into the wells at issue (*C. Exh. 43 at para. 25 - Compare to C. Exh. 37 at para. 22);*

- "At all times relevant to this Amended Complaint, Respondent Rocky Well and Respondent Klockenkemper...have performed, or have been authorized to perform...injection" into the subject wells (*C. Exh. 43 at para. 26 - Compare to C. Exh. 37 at para. 23)*

**5. Amended Complaint Incorrectly Alleges that Respondent Klockenkemper's "Authorization" to Inject Under the RWS Permit Subjected Him to Requirements of SDWA**

In attempt to perfect jurisdiction, the Amended Complaint added new allegations that Mr. Klockenkemper was regulated under the SDWA because he was allowed to inject by way of RWS's permit:

- Mr. Klockenkemper's "injections" are regulated under the Federal SDWA regulations since he

was authorized by RWS to inject, as defined at 40 C.F.R. 144.3 (*C. Exh. 43 at para. 29*);

- EPA, sometime after August 23, 2001, "determined" that Mr. Klockenkemper was subject to 62 IAC 240.760 and 240.780(e) (*para. 35*).

It is of importance that EPA provides no specifics as to Klockenkemper's alleged "injections", which, if the amended complaint is taken literally, would have been continuous and ongoing "at all times relevant to the complaint". Further, EPA does not allege that he is a "permittee", and does not set forth any fact supporting its "determination" how Mr. Klockenkemper suddenly became personally subject to 62 IAC 240 and liable for the $107,000 + civil penalty when he was not so liable on July 9, 2001.

### 6. General Allegations as to Rocky Well Omit Prior Complaint's Designation of RWS as Permittee

In order for proper posturing of this case for disposition at that time in light of the statutory and legal framework discussed above, EPA's factual assertions as to Rocky Well must also be noted. These allegations are taken as true for purposes of the 12(b)(1) facial attack and 12(b)(6) motion for failure to state facts on which to grant relief:

- Rocky Well has been continuously incorporated in Nevada from 1982 to date, has been licensed to do business in Illinois since that time, and is a "person" under the SDWA (*C. Exh. 43 at para. 16 - Compare to C. Exh 37 at para. 15*);

- Rocky Well "is or was the owner and/or operator" of the six wells at issue (*C. Exh. 43 at para. 22 - Compare to C. Exh. 37 at para. 20, which stated RWS was the "permitted operator"*);

- "The State of Illinois issued permits to...Rocky Well" for the six wells at issue (*C. Exh. 43 at para. 25 - Compare to C. Exh. 37 at para. 22);*

- At all times relevant to the complaint, Rocky Well was authorized to perform injections into the six wells. (*C. Exh. 43 at para. 26 - Compare to C. Exh. 37 at para. 23);*

- Rocky Well was determined to be subject to 62 IAC 240, prior to Mr. Klockenkemper having been found subject thereto (*paras. 30-34*).

### 7. Specific Allegations of Violation In Counts I and II Delete Term "Permittee" From Original Complaint's Paragraphs 20, 31, and 39, Despite 62 IAC 240.760 and 240.780 Requiring Permittee to Comply

In addition to the above-noted alterations (especially the deletion of the term "permitted" in new para. 22), the amended complaint also deleted the statutory term "permittee" from the initial complaint in the operative paragraphs of Counts I and II, stating the requirement to MIT in the passive so as to include Mr. Klockenkemper by inference. *Compare C. Exh. 37 - Initial Complaint at paras. 20, 31 and 39* (stating the "permittee" RWS was required to MIT the wells) *to C. Exh. 43 at paras. 22, 23, 43 and 51* (stating only that the wells were required to be MIT'd).

## C. Officer Toney's Denial was in Error Since the Face of Complaint And Illinois SDWA Establish Jurisdictional Inadequacy of Amended Complaint Under FRCP 12(a)(1) and 12(b)(6) Because 62 IAC 240 Class II UIC Jurisdiction Not Pleaded or Shown as to Mr. Klockenkemper

### 1. Complaint Incorrectly Effectively Alleges Mr. Klockenkemper Was a "Co-Permittee" Since He Was "Authorized" to Inject, Where Such Status is Not Recognized By the Illinois SDWA, and Only the Person Listed on the Permit is Authorized to Inject and is Regulated under SDWA

From a regulatory perspective, and as discussed in the "statutory framework" section above, it is clear that the Illinois UIC Class II program imposes responsibility, and bestows authority to inject thereunder only on the "permittee" (*62 IAC 240.10, 240.150(a) and 240.330(d)*), and imposes liability only on the permittee or "another person" engaging in unpermitted conduct (*62 IAC 240.150(a)*). EPA agrees that RWS, and not Mr. Klockenkemper is not the permittee, and the complaint does not expicitly designate him as such. *See 5/3/05 Kossek Order at 4* ("...both parties agree that the permittee is Rocky Well Service, Inc.").

Consequently, the only remaining avenue for direct liability for EPA's complaint is to allege that Mr. Klockenkemper engaged in unpermitted conduct, yet the amended complaint states that he was "authorized to inject" by RWS permit, which then closes the remaining statutory prong of liability, since he could not then be accused of injecting without a permit. *C. Exh. 43 at paras. 25 and 26.* In order to get around this obstacle, EPA's complaint asserts liability by way of its incorrect assertion that RWS's permit also "allowed" non-permittee Mr.

Klockenkemper to inject since he was an officer of RWS, and in turn that this "authorization" and "injections" in turn somehow, by definition, subjected Mr. Klockenkemper to regulation under the SDWA MIT permit requirements in the same manner as the permittee RWS, and that he thus is liable for RWS MIT violations.[7] *C. Exh. 43 at paras. 25, 26, 29 and 35.*

Despite EPA's attempts to avoid labeling Mr. Klockenkemper as a "permittee", the combined assertions of EPA's complaint amount to alleging that, becasue he was an officer of RWS who managed its operations, he was a defacto permittee authorized to inject and thus subject to RWS's permit requirements to MIT and report. Not surprisingly, EPA's amended complaint and briefs do not cite the Illinois SDWA statutory provisions that state the an officer of a permittee, or anyone other than the Permittee, is authorized to inject in addition to or instead of the Permittee, since there is no such provision. *225 ILCS 725 et seq.* Such circular position is antithetical to the intent of the SDWA, which is to ban drilling or injection by anyone not named in a permit. *Id.*

**2. All Permits Initially Issued To Mr. Klockenkemper Were Transferred to RWS in 1987, And Mr. Klockenkemper's Name Was Redacted Therefrom and Replaced By RWS, Thus He was No Longer Authorized to Inject or Regulated as the Permittee Thereafter**

Furthermore, the public record reflects the fact that the permits cited at paragraph 25 of EPA's amended complaint were transferred to RWS in 1987, contain RWS name as 'permittee", and that Mr. Klockenkemper's name is crossed off and no longer listed as Permittee, and that the Permits do not state that he was "authorized" or "allowed" to inject. *See e.g. C. Exh 145 -*

[7]The only specific mention of officers, directors, or owners with regard to failure to comply with the Illinois SDWA is in regard to an officer who fails to prevent a permittee from continuing to inject after being ordered to cease, and in relation to the past enforcement history of other permittees they were part of, but the regulation does not impose any independent liability on them. 225 ILCS 725/8a(3); 62 IAC 240.250(b)(3) and 240.1460(a)(5) and (6). While the Illinois SDWA provides for revocation of a permittee's permit where an officer fails to abate the prohibited conduct, and for refusal to issue permits to applicants whose officers were involved in past such incidents, it does not specify any personal liability for such acts.

*11/9/70 Permit No. 01058 - Atwood #1 Well Authorization Permit (Listing RWS and indicating date of transfer to RWS as 2/10/87); R. Exh. 1 - 2/10/87 Cancellation of Bond/Notice of Transfer to RWS.*

**3. Amended Complaint's Jurisdictional Paragraphs 25, 26, 29 and 35 Are Factually and Legally Incorrect and Void As Pleaded, Thus Jurisdiction Not Present Over Mr. Klockenkemper Based On Direct Officer Liability Theory, And Respondent Not Alleged to Have Engaged in Unpermitted Conduct, Thus FRCP 12(b)(1) and 12(b)(6) Not Met**

Consequently, EPA's jurisdictional allegations in paragraphs 25, 26 and 35 are legally and factually incorrect as to Mr. Klockenkemper, who was not "authorized" to inject at any time after 1987 and this was not , and the allegations must be ignored and considered stricken. Given that loss, the amended complaint is facially fatally deficient since, even taking all the other foregoing listed allegations as to Mr. Klockenkemper as true, it does not contain the requisite jurisdictional allegations or facts allowing it to exercise jurisdiction against Mr. Klockenkemper as a "permittee" under the SDWA as promulgated at 62 IAC 240 et seq. *See In Re Strong Steel Docket Nos. RCRA-5-2001-0016 (10/27/2003), See Also Legal Environmental Assist. Foundation v. U.S. EPA, 276 F. 2d 1253 (11th Cir. 2001)*("Agency deference aside, EPA cannot rewrite legislation through interpretation and must abide by its enabling statutes and regulations until they are amended)

The only conduct alleged, besides the unsupported legal conclusions in Counts I, II and III (that he failed to submit reports or perform tests himself), is that Mr. Klockenkemper is Rocky Well's day-to-day operator, and holds various offices therein. The complaint is entirely bereft of any specific or other facts or allegations that Mr. Klockenkemper himself engaged in any unpermitted conduct which violated the SDWA as to the six wells. Given that the complaint alleges he is authorized to inject, the complaint does not allege Mr. Klockenkemper to be "any other person" engaged in unpermitted activity under 62 IAC 240.150 (Notice of Violation) or 225 ILCS 725/8 (Enforcement procedures), and this is jurisdictionally deficient and should have and must now be dismissed as to the SDWA direct liability claims against Mr. Klockenkemper.

**D. Caselaw Directly on Point Does Not Allow for Independent EPA SDWA Jurisdiction as to Non-Permittee Officer such as Mr. Klockenkemper and Requires Piercing of Corporate Veil to Find Officer Liable for Permittee's Violations**

Dismissal on jurisdictional grounds was also supported by case law holding that no independent U.S. EPA enforcement authority exists under Sec 1423 of the SDWA as to an officer, director, or sole shareholder of a Class II well permittee by way of the statute itself, since under the SDWA scheme only the permittee is liable for Class II permit violations under the SDWA. See *In Re J. Magness, Inc., Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996).*

**1. EPA Region 8 has made "Officer Liability" arguments Identical to Region 5's Here, Which were Rejected in *In Re J. Magness, Inc., Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996)***

In *Magness*, a case with remarkable similarities to the instant matter, EPA Region 8, attempted to impose liability and a civil penalty of $125,000 for alleged SDWA reporting and MIT violations on J. Magness, Inc.', and also on Jay D. Magness, the corporation's sole owner, director and shareholder. EPA based his individual liability solely on his being a "person" as defined at SDWA Sec. 1401, 42 U.S.C. 300f(12), without designating him as the permittee in the complaint. This is precisely the same allegation as made by Region V EPA in paragraph 17 of the instant amended complaint as to Mr. Klockenkemper.

**2. The ALJ in *Magness* Held that the Mere Allegation that Officer is a "Person" by Way of His Office and Fact that He Runs Closely Held Corporation Not Enough to Impose Liability Beyond Corporation to Individual Since SDWA Did Not Waive EPA Recognition of the Corporate Form and ALJ Would Have to Find Officer to be the Permittee to Do So**

In rejecting this bald over-simplified imposition of liability the ALJ in *Magness* stated that

alleging that a Respondent is a "person" is not enough because the SDWA and its legislative does history do not state that the corporate shield should be ignored:

> "...defining the word "person" in this manner , for purposes of the Act, does not confer direct personal liability on an officer, shareholder, director or employee of a corporation. The Complainant has not presented any legislative history that the definition was intended to remove the corporate shield...". (See *Magness*, at footnotes 14 and 15 and associated text).

The *Magness* ALJ found that to hold an individual liable under the SDWA for an MIT permit violation, he would have to find the individual to also be the permittee, which EPA, admitted, (as here), was a corporate entity, J. Magness, Inc, thus the corporation must be held to be the sole permittee. *Id*.

### 3. EPA Complaint Does Not Allege Either Prong of SDWA Liability as To Mr. Klockenkemper and Thus There Is No Direct SDWA Jurisdiction Over Him As Pleaded

EPA Region 5 has the same jurisdictional problem here: it admits on the record in its complaints that Rocky Well Service, Inc. is the permittee, and thus does not, and cannot, attach jurisdiction to Mr. Klockenkemper thereby. *62 IAC 240.150(a).* Since EPA Region 5 is unable to rely on its bald repetition of the definition of "person" in the SDWA to confer jurisdiction over Mr. Klockenkemper's under 62 IAC 240 or the SDWA without also alleging he was engaged in unpermitted activity violative of the SDWA which he should have had a permit for, Region 5 has no direct SDWA jurisdiction as to him, individually, for the SDWA violations or civil penalties alleged in the amended complaint. ***In Re J. Magness, Inc., Supra.*** Consequently, as stated by Ms. Kossek's 2/6/03 Order granting leave to amend, EPA is constrained to plead and pursue "standard hornbook principles" of corporate law relating to derivative liability by piercing the corporate veil. *2/6/03 Kossek Order at 10*.

## E. Amended Complaint Does Not Allege PCV Elements or Seek Equitable Relief

Based on allegation of sufficient purported facts, and where no independent State or

Federal statutory cause of action is available, courts may allow a plaintiff to assert tort-based derivative liability against a principal of a corporate environmental law violator by way of the equitable remedy of "piercing the corporate veil", in order to hold the individual liable for violations of the SDWA by the corporate permittee . *See U.S.A. v. Peter E. Jolly, et al., 2000 U.S. App. LEXIS 29907; 51 ERC (BNA 2083)(2000)*(Individual held liable under SDWA 42 U.S.C. 300h-2 by piercing of the corporate veil where individual had long history of past violations of SDWA Class II requirements at same wells.

**1. Complaint Must Allege All Three Elements Of PCV - Control, Unity of Ownership, and Fraud/Injustice, since *inter alia* FRCP 9(b) Requires Higher Specificity when Attempting to Pierce the Corporate Veil. *Bd. of Trustees of Teamsters Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002)***

Due to the reluctance of a Court to disregard the corporate form, the burden is high on a plaintiff to plead and prove facts showing that there was 1) control by an "alter ego", 2) an indistinguishable unity of interest between the individual and the corporation, and 3) that fraud would continue causing an inequitable result to occur. *See S.A.M. Electronic, Inc. v. Osaaraprasop, et al., 1998 U.S. Dist. Lexis 3214 at 3235-3237 (N.D. ILL 1998)*(Fact that complaint alleges fact that individual is president and sole shareholder cannot justify by itself piercing corporate veil, unity of interest and sham/fraud/injustice must be pleaded in complaint to withstand FRCP 12(b)(6) motion).[8] Combined with FRCP 12(b)(6), FRCP 9(b) requires pleading with specificity as to attempts to pierce the corporate veil. *Bd. of Trustees of Teamsters*

[8] See Also: *Aetna Casualty & Surety Co., v RASA Management Co., Inc., 621 F. Supp. 892 (D.C. Nev 1985)*(Mere allegations that individual was sole incorporator, shareholder, director, owner and manager of corporation insufficient alone to withstand a motion to dismiss, Nevada law requires a complaint to allege: 1) influence and governance by a person alleged to be the alter ego of the corporation; 2) unity of interest and ownership such that individual and company are inseparable, and 3) facts which show that adherence that adherence to the corporate fiction would promote injustice or sanction fraud); *Ecklund v. Nevada Wholesale Lumber Co.*, 92 Nev. 196, 198-199; 562 P.2d 479, 480 (1977)(Allegation that individual is sole employee and agent (control) insufficient to establish unity of interest/ownership and fraud/injustice under Nevada law, all three must be pleaded and proved), *Kelsey Axle & Brake Division v. Presco Plastics, 187 Ill. App. 3d 393, 400-401; 543 N.E.2d 239, 243-244 (1st Dist. 1989)*(Plaintiff seeking to pierce corporate veil has substantial burden in Illinois which requires pleading and showing of all three elements: control, unity of interest/ownership, and fraud or injustice).

*Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002)*(When a plaintiff seeks to pierce the corporate veil, its pleading is subject to FRCP 9(b)).

### 2. EPA Complaint Does Not Plead All Three Elements Since No Violative Conduct/Fraud Alleged, Despite FRCP 9(b) Requirement for Specific Pleading

An inspection of EPA's amended complaint reveals that it contradicts EPA's intimation, in seeking leave to amend from Officer Kossek, that EPA would seek the remedy of piercing the corporate veil ("PCV"). *2/6/03 Kossek Order at 10.* The complaint does not plead the required elements for piercing the corporate veil of the Nevada corporation (control, unity of interest/alter ego, and fraud/ illegal operation).

As noted above and evident from the complaint, aside from the ineffective statement that Mr. Klockenkemper has several duties for Rocky Well, the EPA Region V 's complaint does not contain a scintilla of fact, or even conclusory language, indicating it is attempting to seek to hold Mr. Klockenkemper liable by piercing the corporate veil, and the complaint does not recite or provide facts allowing even an inference of such claim. The amended complaint simply and entirely fails to allege any fact or required element of piercing the corporate veil, despite the apparent expectation of the Officer Kossek in her order granting leave to amend. *Id.*

Similarly, the complaint does not allege any facts or conclusions by which one could infer any tort-based liability from harm caused by Mr. Klockenkemper, individually. *See U.S. v. NEPACCO* (Individual's direct, knowing or wilful involvement in conduct which caused harm to environment, plus statutory provision providing for "operator" liability, basis for individual tort-based liability for corporation's violations).

### 3. Amended Complaint Defective on its Face and Does Not Confer Any Jurisdiction Over Mr. Klockenkemper Under 225 ILCS 725/8a

EPA did not plead that Respondent Klockenkemper was the permittee or that he engaged in activities required to be permitted or that he violated a SDWA permit requirement that applied to him, despite 42 USC 300h-2 and 225 ILCS 725/8a requiring a Respondent to be pleaded as

such for jurisdiction to attach. The amended complaint also fails to plead the elements required for piercing the corporate veil, despite Officer Kossek's grant of leave conditioned on EPA's pursuit of such equitable remedy, and despite the legal requirement that such elements be pleaded in order to be granted such relief from the corporate form. *Id.; 2/6/03 Kossek Order at 10; Bd. of Trustees of Teamsters Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002); Kelsey Axle & Brake Division v. Presco Plastics, Supra.*

## F. 5/3/05 Kossek Order Erroneously Ignored Defects of Complaint and Reconstructed EPA's Novel Theory of "Officer Liability"

### 1. Respondent Argued Failure to Plead Jurisdictional Elements and Failure to Plead Prima Facie Liability Case Under Illinois SDWA

On 4/15/03, Respondent Klockenkemper moved to dismiss the complaint under FRCP 12(b)(1) and 12(b)(6) for failure to plead subject matter jurisdiction over Mr. Klockenkemper and failure to state a prima facie case for direct liability over him, based on the arguments set forth in the previous sections. *Also See Respondent's 4/15/03 Motion to Dismiss and related briefs.*[9] For reasons as yet unexplained, EPA did not issue an order deciding the Motion until over two years later, on 5/3/05. This order erroneously denied Respondent's 4/15/03 Motion to Dismiss, and is in error for failing to dismiss the amended complaint on the jurisdictional grounds set forth above, and is otherwise in error as follows.

### 2. Ms. Kossek Correctly Found That Parties Agreed That RWS was the Permittee, Not Mr. Klockenkemper

At the outset, Presiding Officer Kossek found that the parties agreed that Mr. Klockenkemper was not the "permittee, but rather that RWS was. *5/3/05 Order at 4.* As noted above, this admission by EPA and finding by the Officer is crucial, since under the proper interpretation of the Illinois SDWA, EPA now had only one direct liability theory available, that

[9]EPA filed a response on 4/29/03, Respondent replied on 5/14/03, and EPA filed a Sur-response on 6/16/03, which Respondents' arguments are incorporated herein.

of showing Mr. Klockenkemper was an unpermitted violator. *225 ILCS 725/8a.*

### 3. As With Her 2/6/03 Order, Officer Kossek's 5/3/05 Order Again Errs by Failing to Discuss, Analyze and Make Findings of Law as to Respondent's Jurisdictional Objections Attacking Specific Paragraphs of Complaint and Alleged Jurisdictional Facts

Similar to her 2/6/03 Order granting EPA leave to amend, Ms. stated that Respondent's Motion to Dismiss argues that 1) the Oil and Gas Act 225 ILCS 725, as codified at 62 IAC 240, holds only the permittee liable, 2) the 62 IAC 240.10 definition of permittee does not include officers of permittees, 3) the definition must be accepted as written and EPA cannot expand the Illinois SDWA definition of permittee or expand liability by reference to the enabling federal SDWA statute, 4) given that RWS is admittedly the sole permittee, there is no regulatory basis for his liability; and 5) he is not an appropriate respondent. *2/6/03 Kossek Order at 3-4.*

Officer Kossek's incomplete summary entirely fails to mention that Respondent's Motion attacked jurisdiction by challenging the legality of specified paragraphs containing the factual and jurisdictional allegations, due to being improperly pleaded on the face of the complaint by way of FRCP 12(b)(1), as well as factually deficient under 12(b)(6). *See 4/15/03 Motion at 6-7*. The main thrust of the Motion, that the amended complaint was not properly pleaded as written since it claims that Mr. Klockenkemper was a co-permittee by way of RWS permit, when, under the Illinois SDWA regulatory scheme, he was not and never could be authorized to inject by another person's permit, but must have his own to obtain such status, is not mentioned or discussed by Ms. Toney. *62 IAC 240.310 and 330(d).*

Consequently, the issues discussed by Ms. Kossek, including the fact that Mr. Klockenkemper was not the permittee, were only a subpart of the overall facial attack on the complaint, which essentially and impermissibly designates him a permittee "by proxy". *Amended Complaint at paras. 25, 26, 29 and 35.* Thus, Ms. Kossek erred by failing to address the alleged defects of the complaint itself, such challenged paragraphs having been set forth at Section III of

the 4/15/03 Motion. *4/15/03 Motion at 6-7.*

**4. Officer Kossek Erred By Finding That SDWA Provides for Liability of an Individual Regardless Where He is Not a Permittee or Unpermitted Violator and that SDWA Allows EPA to Disregard Corporate Form To Impose Direct Liability On Officer of Corporate Violator Without Piercing Corporate Veil**

First, Ms. Kossek understates Respondent's argument; It is not merely that he is not liable because he is not the permittee, but also because he simply was not personally subject to the requirement to MIT and Report by way of RWS permit as pleaded by the amended complaint. *Order at 5; Amended Complaint at paras. 25, 26, 29, 35.* While Respondent acknowledges that non-permittees can be held liable if they operate or inject without a permit, he argues that the complaint does not allege that he did so, and thus there is no SDWA jurisdiction as a permittee or non-permittee as a result.

**a. Ms. Kossek Contradicts Her 2/6/03 Order's Characterization of *Sunbeam Water Co., SDWA-10-97-0066 (10/28/99)* as Derivative Liability "Piercing Corporate Veil" Case, Now Finding that *Sunbeam* Supports Direct SDWA Liability**

Instead of conducting a paragraph by paragraph analysis of the complaint to assure it established jurisdiction to proceed under the SDWA in light of Respondent's SDWA objections, Officer Kossek began her discussion with and essentially repeated her 2/6/03 Order's discussion favorable to EPA's past reliance on *In Re Sunbeam Water Company, Inc, Dkt. No. 10-97-0066-SDWA (10/28/99)*(Individual managing Public Water System held liable for operating PWS in violation of agreed order that he signed).

However, in her 2/6/03 Order, Ms. Kossek stated that it was "not necessary to address Congressional intent" as to the liability of a "person" under the SDWA, since as in *Sunbeam*, "EPA is attempting to pierce the corporate veil.". *2/6/03 Order at 10.* However, Ms. Kossek's 5/3/05 Order cites *Sunbeam* as standing for the proposition that an officer may be held directly

liable under the SDWA for the wrongs of the corporation. *5/3/05 Order at 5*. No further discussion or application of the case is provided by Ms. Kossek, likely because *Sunbeam* stands only for the well-established proposition that a person can be held directly liable under the SDWA when he agrees in writing to comply with the SDWA (such as what a permittee does when he applies for and receives a permit).[10] Notwithstanding, Ms. Kossek clearly was arbitrary and capricious in reversing her findings as to the Sunbeam case from the 2/6/03 Order to the 5/3/06 Order.

**b. Ms. Kossek Errs In Her Interpretation of Respondent's Reading of In *Re J. Magness, Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996),* since Respondents' do not assert that Mr. Klockenkemper is not "an individual who has violated the Act but is not a permittee"**

Ms. Kossek then misstates Respondent's proposition with regard to *In Re J. Magness, Inc., Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996)*( *Discussed Above at p20, Section VI.D, infra),* as being "that the SDWA does not provide for direct liability of an individual who has violated the Act but is not a permittee.". 5/3/05 Order at 5. That is not Respondent's position, especially because he denies he "violated the Act", and since he acknowledges the jurisdiction of 62 IAC 240.150 over non-permittees who operate without a permit, which he also is not alleged of doing.

The *Magness ALJ* simply held that to hold the president directly liable for failure to MIT

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[10]*In Re Sunbeam Water Co., Inc., Docket No., 10-97-0066-SDWA, 1999 ALJ Lexis 79 (1999)*: is an inapplicable case involving illegal operation of a PWS. In that case, a father and son team continued illegal operation of a PWS contrary to the requirements of an agreed administrative order (CAFO) that had been signed by both father and son in addition to the corporation. Thus, the *Sunbeam* case is inapplicable as support for EPA's and the Officer's interpretation of SDWA jurisdiction, it did not create an independent avenue of statutory liability beyond the permitted, and unpermitted, variety, but rather was a breach of contract between the individuals/company and EPA. By signing the CAFO in his personal capacity, Sunbeam's president agreed to be a "person subject to a requirement" of the SDWA. There is no CAFO involved here, Mr. Klockenkemper did not agree to be subject to the SDWA as if he were RWS, and Mr. Klockenkemper is not accused of illegally operating the wells or RWS. *Also See Discussion of Sunbeam at p97, Section, VII.D.2.c.iv.D, infra.*

where he did not illegally operate the well (as an unpermitted violator), would be to find him to be the permittee, and thus EPA could not assert direct liability but rather had to pierce the corporate veil in such instances (which EPA failed to do), given the absence of illegal affirmative conduct or operations (versus failure to MIT). *Id.* The ALJ specifically found the nothing in the SDWA indicated that EPA could ignore the corporate form: "The Complainant has not presented any legislative history that the definition [of person] was intended to remove the corporate shield...". *See Magness, at footnotes 14 and 15 and associated text.*

**c. Ms. Kossek Errs By Summary Rejection of *In Re J. Magness* and Misplaced Reliance on *U.S. v. Alisal Water Corp., 114 F.Supp 2d 927 (N.D. Cal. 2000)* For Erroneous Finding That SDWA Allows EPA to Ignore Corporate Form Where Illegal/Fraudulent Conduct is Not Alleged or Shown, Since *Alisal* Court <u>Refused</u> to Impose Liability Based Solely On Status as a Corporate Officer, But Rather Pierced the Corporate Veil Due to Fraud**

Ms. Kossek attempts to rebut *Magness* by finding that "more current case law does not shield individuals who violated the Act', and quotes *U.S. v. Alisal Water Corporation* , 114 F.Supp 2d 927 (N.D. Cal. 2000) for her finding that

> "Nothing in the SDWA or in cases interpreting environmental statutes suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of the corporation" . *5/3/05 Order at 5*.

However, like EPA in *Magness*, the record in this matter is bereft of any legislative history supporting this novel theory of "direct derivative" statutory liability. Quite simply, the unpermitted and deceptive conduct of the corporate officers or persons triggering liability in EPA's cited cases was not been alleged in the amended complaint by EPA as to either Rocky Well or Respondent in our case.

As discussed below in this section, *Alisal* does not stand for the proposition that EPA need not pierce the corporate veil to reach a non-permittee, non-violator officer of a permittee for the permittee's violations. *U.S. v. Alisal, 114 F.Supp.2d 927 (N.D.Cal 2000)* was a 42 USC 300g, Public Water System (PWS) case, and is wholly different from this 42 U.S.C. 300h, underground injection well case. *Id. Alisal* is entirely inapposite since Mr. Klockenkemper is

not a PWS owner or operator, and since, as previously discussed, the Illinois UIC Program does not contain a regulatory category of "operator". Furthermore *Alisal* is not helpful to EPA, and in fact supports Respondent's position, because it was a PCV case based on fraudulent conduct:

- Region 9 EPA alleged and proved 8 other allegations of individual violations beyond the bald assertion that the two owners of the several PWS's, Mr. And Mrs. Adcock, were officers, directors, and majority shareholders of the companies: EPA has not done so here. *Alisal, 114 F.Supp. 2d at 938*;

- Unlike 225 ILCS 725, 42 USC 300g-3(b) imposes liability on a "violator" of Subpart B, which expressly includes a "supplier of water" and the "owner or operator of a [PWS]" (*40 CFR 141.31(a) and 40 CFR 141.32(a) & (b)*), where "supplier of water" is defined by 42 U.S.C. 300f(5) as "any person who owns or operates a [PWS]" : Respondent Klockenkemper was neither an "owner" or "operator" of any of the six injection wells at issue, RWS was.

- The *Alisal* court specifically stated that "all the regulations at issue" were directed to the "owners or operators" of PWS, and that the term owner/operator is used in several SDWA regulations regarding PWS, but is undefined in the SDWA. *Alisal, 114 F.Supp. 2d at 937-938*: Similarly, The Class II UIC regulations do not define "operator", and here, the Class II UIC regulations are directed to "Permittees", "Owners" or "Persons" (who should have permits), rather than "operators". *62 IAC 240.10;*

- The *Alisal* court's discussion regarding CERCLA cases was in reference to how "owners" or "operators" were handled by CERCLA, in that they were liable as "violators" under CERCLA if the owned an offending facility, and, similarly, "any person" who was a SDWA "violator" illegally operating a PWS could similarly be held liable under 42 U.S.C. 300g-3(b), and thus the discussion is mere dicta since the decision turned on the express language of 42 U.S.C. 300g-3(b), not CERCLA or the SDWA regulations at issue. *Alisal, 114 F.Supp. 2d at 939*;

- Even with the EPA's allegations and proof of nine elements showing that the Adcock's were sole owners and day-to-day operators of companies owning the violating PWS's, the Alisal court expressly declined to impose liability on the Adcock's based solely upon their status in and control of the defendant corporations**,** despite their direct responsibility for the compilation, typing and submission of the required reports. (Emphasis added). *Alisal*, 114 F.Supp. 2d at 938; EPA's complaint does not allege the elements or state any facts in support of the nine *Alisal* elements as to the six wells at issue.

- Liability in *Alisal* was imposed under 42 U.S.C. 300g-3(b), based upon damning proof that the Adcocks fraudulently altered test results and documents, and submitted false attestations as to the veracity of the sampling results submitted, and thus personally and actively violated the SDWA. *Alisal*, 114 F.Supp. 2d at 937-938.

No such allegations as made in *Alisal* are set forth in the amended complaint. A reading

of the *Alisal* case and the above discussion makes it clear that the court did not hold the Adcocks liable solely because of their status in and control of the corporations, but rather because they had essentially engaged in deliberate fraud and conspiracy in causing their corporation to operate in violation of the SDWA, acts not alleged in the amended complaint as to Mr. Klockenkemper or Rocky Well in our case.

It is clear from the foregoing that not only is *Alisal* inapposite to support EPA's and Officer Kossek's position as to 42 USC 300h-2, it in fact entirely supports Mr. Klockenkemper's position that, under the text of the SDWA, including 62 IAC 240 et seq., the amended complaint must allege, and EPA must prove, something more than mere sole ownership and day-to-day management of a company, for an officer thereof to be directly liable under 42 USC 300g (which allows for same) or derivatively under 300h-2 as a "Person" under the SDWA. (e.g. Plead elements for PCV such as fraud, false statements or independently violative, deliberate personal misconduct).[11]

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[11]See e.g. *United States v. Peter E. Jolly, JAF Oil Company, Inc. and Strategic Investments, Inc., 2000 U.S. App. LEXIS 29907, 29912, 29919 (6th Cir. 2000)*. In that case, Mr. Peter Jolly, the sole director and shareholder of JAF Oil Co., Inc. and successor SI, Inc., was held derivatively liable for corporation's continued operation of 89 injection wells without conducting MI tests in violation of SDWA administrative order. *Id.* Mr. Jolly's liability was based on his testimony that he transferred JAF's assets to SI "for a dollar" and continued to operate the wells just as he had before despite knowledge of the AO (e.g. he admitted to a sham corporation), and on the record showing Mr. Jolly had history of "bad-faith" non-compliance with the AO over a seven year period, his refusal to accept service of notices and pleadings, and his admitted disregard of corporate formalities by stripping JAF of its assets and transferring them to SI to avoid liability, and the seriousness of his offenses (e.g. injecting in violation of AO). *Id.*

The Officer's and EPA's assessment of a $105,590 penalty for RWS's six inactive wells unfavorably for EPA to the penalties involved in *Jolly*. There, EPA proposed a $200,000,000 penalty for the failure to MIT Jolly's 89 wells, which actively injected for more than 7 years despite issuance of a unilateral order requiring cessation. *Id*. Notwithstanding the continued injection in spite of total failure to MIT, and numerous other abject violations, the court reduced the penalty to $500,000, or $5,617 per well for the entire duration of the violation. *Id.* Assuming a 5 year penalty period (consistent with 28 USC 2462), this worked out to $1,123 per well per year. If the reasoning were applied to RWS far less serious violations at its inactive wells, this would amount to a penalty of $6,741 per well for a five year duration, or $33,707 total for the five years. Given the logarithmic difference in the egregiousness of the relative conduct of Jolly and RWS, the assessed penalty in this matter is all the more unfair and out of proportion to the violations versus what has been assessed against others for much worse violations *Id.*

**5. FRCP 12(b)(1): Ms. Kossek Erred In Finding Amended Complaint Alleges Sufficient Facts to Invoke Statutory Jurisdiction under FRCP 12(b)(1), Since, *Inter Alia,* No Allegation made in Complaint That Non-Permittee Klockenkemper Engaged in Activities Requiring, or Operated Without, a Permit**

**a. Ms. Kossek Found Six Allegations To Be Basis for Jurisdiction, One of Which Does Not Exist in the Complaint and Three of Which are Conclusory Jurisdictional Allegations , Not Facts**

Ms. Kossek found the following "facts" to be alleged by the amended complaint (paragraph number provided by Respondent, since Ms. Kossek did not reference same in her findings):

- Respondent is a "person" under SDWA 1401(12) (para. 17);
- He "serves" as corporate officer (para. 17)**;**
- He "is or was" individual who conducted majority of RWS "day to day well maintenance and production operations with regard to the wells at issue" (para. 23);
- He "is the person who would have performed/arranged for" the MIT (not alleged in complaint);
- He is subject to IAC Title 62 (para. 35);
- He violated the SDWA and Title 62 (paras. 48, 58, 65)

*5/3/05 Order at 6.*

**b. Kossek Erred Since Complaint Does Not Allege that Respondent "is the Person who would have Performed/Arranged for" the MIT**

An inspection of the amended complaint reveals that Officer Kossek's finding is in error, since the complaint contains no such allegation of "fact" (or rather "speculative fact"). *Amended Complaint.* The complaint is entirely silent as to who was in fact responsible in 1995-1996 for performing or arranging for the missed MITs for RWS, and only alleges the incorrect legal conclusion that Mr. Klockenkemper was subject to 240.760 by way of his position as an officer of RWS. *Id.* As such, Ms. Kossek's finding (iv.) above is incorrect and must be stricken and disregarded.

### c. Three Other Alleged Facts are Actually Unproven Legal Conclusions of EPA And Are Thus Insufficient to Serve as Jurisdictional Facts

Ms. Kossek's findings that EPA alleged the "facts" that: i) Mr. Klockenkemper is a regulated "person" (para. 17); v) he is subject to 62 IAC (para. 35); and vi) he violated the SDWA (paras. 48, 58, 65), are in error, since each of these issues are not "facts" but are mere legal conclusions EPA is required to establish by pleading and proving facts in the complaint. *Lewis v. Stevenson, 2005 U.S. App. LEXIS 1993, 1999 (10th Cir. 2005)*(Mere assertion that defendant was subject to and violated federal statute not sufficient to demonstrate that the court has subject matter jurisdiction under that statute, since party seeking the exercise of jurisdiction in its favor must allege in the complaint facts essential to show jurisdiction, and mere conclusory allegations of jurisdiction are not enough). Ms. Kossek erred here since the bald, conclusory legal assertions do not serve as jurisdictional facts.[12] *Id.*

### d. Remaining Two "Facts", That Respondent Is Officer Who Oversees RWS Operations, Is Insufficient to Establish SDWA Subject Matter Jurisdiction Since, *Inter Alia*, the Complaint Fails to Allege He Did So in <u>1995-1996</u>

Given the inapplicability of findings i, iv, v, and vi (as numbered above) to establishing jurisdiction, Ms. Kossek's finding that subject matter jurisdiction was invoked by the amended complaint rests solely on the assertions in paragraphs 17 and 23 of the complaint. *Order at 6.* Given that the SDWA requires the jurisdictional allegation that a defendant was either a permittee, or a person operating without a permit (225 ILCS 725/8a), EPA's allegations that Mr. Klockenkemper was an officer of RWS (para. 17) who managed RWS day to day operations (para. 23) is clearly insufficient to subject him the SDWA. *In Re J. Magness, Supra* (Allegation

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[12] *See Also Roche v. Lincoln Property Co, 373 F.3d 610; 2004 U.S. App. LEXIS 13488 (4th Cir 2004*)(Because federal courts are courts of limited jurisdiction, there is a presumption against its existence, and the party invoking federal jurisdiction bears the burden of proof, thus when jurisdiction is challenged, courts cannot countenance bald assertions of jurisdictional facts and must look to the face of the complaint, ignoring mere conclusory allegations of jurisdiction; *Dixon v. Coburg Dairy, 2004 U.S. App. LEXIS 10233 (4th Cir 2004)*(Plaintiff must state a substantial federal claim and court may not base jurisdiction upon a complaint's bald allegation that defendant was subject to and violated the statute at issue)

that Mr. Magness managed day to day operations insufficient to establish SDWA jurisdiction without allegation that he actually and illegally operated the wells himself at the time of the violations (versus hiring a contractor, as he and Mr. Klockenkemper did)).

In addition to the absence of an allegation of wrongdoing, nowhere in the complaint is it alleged that Mr. Klockenkemper ran RWS's day to day operations in 1995-1996, but rather the complaint alleges only that he did so as of the time of issuance of the 2003 complaint ("conducts...operations", "serves as the President"), and at unspecified times in the past ("is or was the operator"). *Amended Complaint at paras. 17, 23.* Contrary to Ms. Kossek's conclusion, that "If proven, these allegations are the basis for a prima facie case", EPA's proving of these two alleged facts still does not invoke SWDA subject matter jurisdiction. *Id*. Consequently, Ms. Kossek erred in finding jurisdiction instead of dismissing the complaint as to Mr. Klockenkemper under FRCP 12(b)(1), since there are no jurisdictional facts pleaded therein.

### 6. FRCP 12(b)(6): Ms. Kossek Erred by Finding FRCP 12(b)(6) Satisfied By Finding That Complaint Alleges Facts Supporting Equitable Claim of Piercing Corporate Veil, Where Complaint Does Not Allege Required Elements or Facts

#### a. Ms. Kossek Erred Because Respondents' 4/15/03 Motion to Dismiss Did Not Challenge Merits of Any PCV Claim, But Rather Alleges That Complaint Does Not Plead The Required Elements of Such Claim or Notify of its Invocation

In her analysis of Respondent's FRCP 12(b)(6) objections, Mr. Kossek incorrectly states that Respondent claimed in his Motion that "he cannot be held derivatively liable for violations of the corporation". *Order at 8*. However, an inspection of the 4/15/03 Motion reveals that Mr. Klockenkemper did not challenge a "piercing the corporate veil" claim, but rather asserted that the amended complaint did not comport with the pleading requirements required to state such claim in the first place, and thus, the complaint was deficient under FRCP 12(b)(6). *See 4/15/03 Motion at 10-12 (Section III).*

**b. Ms. Kossek Erred In Finding that Complaint Alleged Facts Supporting Prima Facie "Bare Bones" Case of PCV Against Respondent, Since These Were Same Conclusory Allegations That Were Relied Upon to Reject Respondent's FRCP 12(b)(1) Claims, and Since FRCP 12(b)(6) requires more than the bare assertion of legal conclusions**

**i. FRCP 12(b)(6) requires that a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.** ***NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005)***

As discussed in *Section VI.E., infra*, in order to assert a PCV claim, EPA's complaint must assert three elements: 1) exclusive control of corporation by the defendant; 2) unity of ownership/interest; and 3) wrongdoing, fraud or injustice occasioned by the individual resulting in operation of "sham corporation".

**ii. In any complaint averring fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity."** ***Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 563 (6th Cir. 2003)***

**iii. When a plaintiff seeks to pierce the corporate veil on the basis of fraud, its pleading is subject to FRCP 9(b).** ***Bd. of Trustees of Teamsters Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002)***

Relevant here, a plaintiff must specifically both plead and prove all elements, including the allegation that failure to pierce the corporate veil will sanction a fraud or reward an illegal scheme committed by the officer and would promote inequitable consequences beyond the wrong underlying the claim. *Liberty Mutual Insurance Corporation, v. M&O Springfield Company*, 1998 U.S. App. LEXIS 31974, 31988-31989 (7th Cir. 1998)(Absent pleading and showing of fraud or unjust enrichment, the allegation that there is an underlying wrong, alone, is an insufficient ground to compel extraordinary remedy of piercing the corporate veil)

### c. Kossek Cited 7 "Allegations" As Pleading "Bare Bones" PCV Claim

Ms. Kossek found the following "facts" to be alleged by the amended complaint with regard to her conclusion that the complain sufficiently pleaded a PCV claim (paragraph number provided by Respondent, since Ms. Kossek did not reference same in her findings):

i. RWS is incorporated in Nevada (Amd. Compl. at para. 16);
ii. Respondent Klockenkemper is a "person" under SDWA 1401(12) (para. 17);
iii. He "served" in various corporate offices (para. 17)**;**
iv. He "is or was" individual who "would have" conducted the majority of RWS "day to day well maintenance and production operations" with regard to the wells" (para. 23);
v. He "was the individual who would have submitted annual monitoring reports for the wells and arranged for MIT on the wells (not alleged in complaint);
vi. He is subject to IAC Title 62 (para. 35);
vii. He violated the SDWA and Title 62 (paras. 48, 58, 65)

*5/3/05 Order at 9.*

Ms. Kossek found that "taking all facts pled in the amended complaint as true, Complainant has pled a 'bare bones' prima facie case. *Id.*

### d. Finding That Respondent Would Have Been Person to Submit Reports/Arrange MIT, Erroneous Because It Is Not Alleged Anywhere in Amended Complaint

As discussed in Section V.I.5.b., *infra,* the complaint does <u>not</u> state the allegation alleged at finding v, above. *Order at 8*. There simply is no allegation that Respondent was the person who would have submitted the reports and arranged the MIT. *Amended Complaint*. Even if there were, such allegation has nothing to do with exclusive control, unity of ownership, or fraudulent conduct under the corporate shield, and is not a PCV element in either Illinois or Nevada. *Liberty Mutual Insurance Corporation, v. M&O Springfield Company, Supra*.[13]

[13]*See Also Kelsey Axle & Brake Division v. Presco Plastics*, 187 Ill. App. 3d 393, 400-401; 543 N.E.2d 239, 243-2444 (1st Dist. 1989)(Plaintiff seeking to pierce corporate veil has substantial burden in Illinois which requires pleading and showing of all three elements: control, unity of interest/ownership, and fraud or injustice). *Aetna Casualty & Surety Co., v RASA Management Co., Inc*., 621 F. Supp. 892 (D.C. Nev 1985)(Mere allegations that individual was sole incorporator, shareholder, director, owner and manager of corporation insufficient alone to withstand a motion to dismiss, Nevada law requires a complaint to allege: 1) influence and governance by a person alleged to be the alter ego of the corporation;

### e. Findings ii, vi, and vii are Jurisdictional Legal Conclusions, Not Facts, And Do Not Defeat FRCP 12(b)(6) Motion

As set forth in section *VI.F.5.c., infra*, findings ii., vi, and vii, above, are jurisdictional legal conclusions, not facts. *Order at 8.* Thus, they cannot serve as jurisdictional facts supporting a complaint under attack by way of FRCP 12(b)(6). *Lewis v. Stevenson, 2005 U.S. App. LEXIS 1993, 1999 (10th Cir. 2005)*(Mere assertion that defendant was subject to and violated federal statute not sufficient to demonstrate that the court has subject matter jurisdiction under that statute, since party seeking the exercise of jurisdiction in its favor must allege in the complaint facts essential to show jurisdiction, and mere conclusory allegations of jurisdiction are not enough); *Bd. of Trustees of Teamsters Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002)(*When a plaintiff seeks to pierce the corporate veil on the basis of fraud, its pleading is subject to FRCP 9(b)*)*. Ms. Kossek erred here since the bald, conclusory legal assertions do not serve as jurisdictional facts and do not support her denial of Respondent's FRCP 12(b)(6) motion.[14] *Id.; Order at 9.*

### f. Lack of Temporal Nexus Between Allegations and 1995-1996 Violations Also Renders Allegations Insufficient

As discussed at Section *VI.B.3.b. infra*, EPA's complaint fails to tie any allegation specific to Mr. Klockenkemper's alleged roles to the 1995-1996 time period during which the violations occurred, but rather speaks in the present tense (then 2003). *Amended Complaint at paras. 17, 23.* Consequently, they do not support the inference that he held the same positions or exercised the same duties at RWS in 1995-1996, since there is no temporal proximity between his

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2) unity of interest and ownership such that individual and company are inseparable, and 3) facts which show that adherence to the corporate fiction would promote injustice or sanction fraud).

[14] Officer Kossek based her finding on *In the Matter of Wayne Vaughn, Sr., et al, Dkt. No. 9-2001-0002 (7/25/02)*. However, that was not a FRCP 12 case, but rather a case deciding an EPA FRCP 15 Motion for Leave to Amend to drop a respondent who had died, and to add CAA statutory claims. *Id.* The case has absolutely nothing to do with PCV or FRCP 12(b), and the term "corporate veil" does not appear therein.

alleged roles and the alleged violations. *Campbell v. U. Of Akron, 2006 U.S. App. LEXIS 25876 (6th Cir. 2006)*(To establish a causal connection between claimed conduct and violation, Complainant must allege and prove a temporal proximity between the alleged conduct (exercise of protected rights) and alleged violation (adverse employment action).

### g. Cumulative Defects of Amended Complaint Render Pleading Insufficient To Provide Notice That EPA Complaint Is Attempting to Pierce Corporate Veil

Officer Kossek concludes that the Amended Complaint "adequately puts Respondent on notice of its intention to pierce the corporate veil" under the notice pleading requirements of 40 CFR Part 22 and the FRCP, by way of the 7 allegations she believes were made in the complaint. *Order at 8*. However, no reading of the 7 allegations (including for sake of argument the conclusory and non-existent allegations discussed above, that Respondent RWS was a Nevada Corporation of which Mr. Klockenkemper was an officer and operations manager and whom both violated the SDWA) can be read to notify Respondent that EPA beleived there was fraudulent activity achieved by way of total control of RWS and misuse of the corporate shield, or that EPA would seek any relief but direct liability under the SDWA.

In fact, Officer Toney expressly found that EPA did not base its claim on a PCV theory, since "Complainant argues that Respondent..is directly liable...it does not argue derivative liability based on a "piercing the corporate veil theory.". *12/27/06 Initial Decision at 12*. As such, the Complaint clearly does not plead or even request the court use its equitable powers to PCV, and does not provide even minimal notice that EPA would pursue any other claim than it actually did.

## F. 5/3/05 Kossek Order Must Be Reversed and Vacated, and Mr. Klockenkemper Dismissed from this Matter

For the foregoing reasons, the 5/3/05 Kossek Order must be reversed and vacated**.**

## VII. PARTIAL ACCELERATED DECISION (12/27/06)

On December 27, 2006, Presiding Officer Marcy Toney issued a Partial Decision which held both Respondents "jointly" liable under the SDWA Illinois UIC regulations for Rocky Well Service's failure to timely conduct an MIT test on each of the six inoperative Class II injections wells. *12/27/06 Toney Partial Accelerated Decision ("12/27/06 Decision").* Ms. Toney stated that she treated the matter as a FRCP Rule 56(c) Motion for Summary Judgement. *12/27/06 Decision at 3.*

The Officer found that neither 28 U.S.C. 2462 nor laches barred EPA's penalty action, and also found that Mr. Klockenkemper was jointly liable with Rocky Well as a "person" who violated the SDWA by way of Rocky Well's violations, as defined by her interpretation of the SDWA. *Id.* Ms. Toney based her ruling on the following findings:

"1. Respondent Klockenkemper is the President, Treasurer and Secretary and Agent for Rocky Well Service Inc. *Answer para. 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 Ex 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.

Respondents have several points of error with regard to several of the Officer's findings and conclusions underlying her findings of liability, as argued below.

**A. Respondents' 7/21/06 Motion for Accelerated Decision: 1st and 2nd Jurisdictional Affirmative Defenses - Ms. Toney Erred Because First and Second Affirmative Defenses Ignored, And Complaint Should Have Been Dismissed Prior to Addressing Merits of EPA Motion Due to Lack of Subject Matter Jurisdiction**

**1. 1st Affirmative Defense: Officer Toney's Findings Fail To Defeat "Defense" That EPA Lacks SDWA Jurisdiction as to Mr. Klockenkemper Because He Was Not Found to be The Permittee or An Unpermitted Violator/Injector, And Corporate Veil Was Not Pierced, And Thus Finding of Liability Must Be Reversed**

As implied in the "Statutory Framework" section of this Brief (*Section IV, Infra*), and in his *4/15/03 Motion to Dismiss* and his *6/6/06 Answer and Amended Affirmative Defenses* (and related pleadings), Mr. Klockenkemper's first defense was that EPA has no jurisdiction over him as either a "permittee" or an "unpermitted violator" with regard to RWS's MIT violations. *6/6/06 Answer*.[15] By finding Mr. Klockenkemper personally liable based on her interpretation of the Illinois SDWA and her three findings, Officer Toney implicitly addressed this argument and found that EPA had proven that Mr. Klockenkemper was an unpermitted violator as to the six MIT and annual reporting violations under 225 ILCS 725/8a and 62 IAC 240.150. *See Respondent Klockenkemper's 8/8/06 Response to EPA 7/21/06 Motion For Accelerated*

[15]The first part of this defense, that Mr. Klockenkemper is not the "permittee" for any of the wells, and thus cannot be held liable as if he were the permittee, was stricken on 5/17/06, due to such argument being rejected in Ms. Kossek's 5/3/05 Order denying Respondent's 4/15/03 Motion to Dismiss to Amended Complaint. *See 5/3/05 Kossek Order and 5/17/06 Toney Order at 4 (striking "permittee" defense as legally insufficient, since individual still can be held liable)*. However, the fact that Mr. Klockenkemper was not the permittee is also relevant to Respondent's Second Affirmative Defense that the 1/25/02 NOV is invalid, which defense was not stricken. An inspection of the three orders reveals that the Presiding Officers appeared to implicitly agree that Mr. Klockenkemper was not the permittee and could not be found liable for a permittee's violations as such, but rather that "Whether or not [he] is liable because of his actions with respect to the wells at issue is a conclusion to be made on the basis of evidence to be presented at hearing." *5/17/06 Toney Order at 4*. The error at law here (besides the subsequent failure to allow the defense to go to trial) with both the 5/3/05 and 5/18/06 Orders is that once it is conceded RWS was the permittee, there is no way under the Illinois SDWA, short of piercing the corporate veil, that an individual could be found liable for RWS's MIT violations (versus for independent violations by the individual operating without a permit). *62 IAC 240.150(a)*. However, as noted by Ms. Toney's Partial Decision, EPA "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.". *12/27/06 Decision at 12.*

*Decision.*

**a. Findings Only Allege Respondent Was In Charge of RWS, Not That EJK Violated SDWA As A Permittee Or Unpermitted Driller/Injector**

However, Officer Toney fails to find that Mr. Klockenkemper was an unpermitted violator/operator, but rather finds that he was liable because he was "in charge" of a permitted violator. *12/27/06 Decision at 15.* Thus, she in fact did pierce the corporate veil despite the admitted lack of pursuit of such relief by EPA and without the requisite showing of intentionally wrongful conduct, fraud, or the use of the corporate form as a sham by Mr. Klockenkemper to further an ongoing illegal purpose or conduct. *12/27/06 Decision at 12, 15*; *See Respondents' 8/28/06 Response at 7-20*; *See Respondent Klockenkemper's 6/6/06 Amended Answer to Amended Complaint at 9-10*; *See Also Respondent Klockenkemper's 3/29/06 Motion to Amend Answer; Respondent's 4/28/06 Reply to EPA 4/13/06 Response to Motion to Amend; Respondents 3/14/06 Response to EPA's 2/13/06 Motion to Strike Affirmative Defenses at 4-9.*

**b. EPA Did Not Prove That Respondent Was A Regulated "Person" Under SDWA Merely By Adducing "Evidence" That Respondent Was President And Managed RWS Day to Day Affairs**

In short, and as discussed in detail above at *Sections IV, V and VI, infra,* in relation to Officer Kossek's 2/6/03 and 5/3/05 orders, and EPA's FRCP 15(c) tolling and notice arguments, just as EPA Region 8 in *In Re J. Magness*, EPA Region 5 is unable to rely on its bald repetition of the definition of "person" in the SDWA to confer jurisdiction over Mr. Klockenkemper as a "Person" under 62 IAC 240 or the SDWA, without showing he was doing something that required a UIC permit. *62 IAC 240.150.* Consequently, Region 5 has no direct SDWA jurisdiction as to him, individually, for the SDWA violations or civil penalties alleged in the amended complaint as to the permittee, Rocky Well, and Toney's finding of liability should be vacated based on this defense. *See Discussions Relating to In Re J. Magness, Inc., Supra.*

**2. 2nd Affirmative Defense - January 25, 2002, EPA Notice of Violation Failed to Perfect SDWA Jurisdiction Prior to Amended Complaint NOV Issued To Mr. Klockenkemper Fails to Correctly Allege Statutory Requirements Under *225 ILCS 725/8a, 62 IAC 240.150(a) and 42 U.S.C. 300h-2*, and Thus Action Cannot be Maintained Based Thereon**

Despite previously refusing to strike this defense (*5/18/06 Toney Order at 4-5*) Officer Toney entirely ignores Respondent's Second Affirmative Defense that the underlying 1/25/02 EPA NOV to Mr. Klockenkemper (*C. Exh. 39*) fails to comport with the Illinois SDWA requirements for NOV's and establishing jurisdiction set forth at 62 IAC 240.150 and 225 ILCS 725/8a, which are drawn from 42 USC 300h-2, and that thus EPA failed to perfect the SDWA jurisdictional prerequisite to this action as to him and cannot maintain it then or now. *See Respondents' 7/11/05 Answer at 12-13; 3/14/06 Response to 2/13/06 EPA Motion to Strike at 9-10; 6/6/06 Amended Answer at 10-11; 8/28/06 Response to EPA Motion for Accel. Dec. at 42-44.*

Respondent's second defense asserted that the January 25, 2002, NOV is jurisdictionally, legally and factually invalid as to Mr. Klockenkemper since:

1) he is not the "permittee" of the six injection wells:
2) the NOV fails to allege that he is the "permittee" of said wells:
3) the NOV fails to allege that he otherwise personally "engaged in conduct or activities required to be permitted under the [SDWA]" (e.g. unpermitted activities) as stated at 62 IAC 240.150(a);
4) the NOV's allegation that Mr. Klockenkemper was the "Operator" is undefined and ineffective to confer notice or jurisdiction under the Illinois SDWA statute.

As noted in item 1 above, the fact that Mr. Klockenkemper was not the permittee of the six wells is still germane to EPA's (lack of)jurisdiction in this matter, despite Officer Toney's 5/17/06 Order striking the "permittee" portion of the first affirmative defense.

**a. SDWA Expressly Holds Permittee Solely Responsible for Compliance With Permit/SDWA - *62 IAC 240.10***

As discussed previously, 62 IAC 240.10, clearly, specifically and in direct contravention of EPA's NOV's and amended complaint's language, states that "Permittee" means "the owner

holding...the permit...who is responsible for...compliance with all statutory and regulatory requirements pertaining to the well." *62 IAC 240.10.* Consequently, an NOV issued to a permittee must state that the respondent is a "permittee", and an NOV issued to a non-permittee must state that the Respondent violated the SDWA UIC requirements by not having a permit for the specified conduct. *Id.; 62 IAC 240.150(a).*

**b. 62 IAC 240.150(a) Prohibits EPA Action In Absence of Issuance of a proper NOV To Respondent Determining That a Violation Was Committed By the Respondent Permittee or Unpermitted Violator**

62 IAC 240.150(a) provides that after a "determination" of a violation by a "permittee" or a "person" conducting unpermitted activities, an NOV must be issued to a permittee or "any person engaged in conduct or activities required to be permitted under the Act", and that "a person cannot be held liable...in the absence" of the issuance of an NOV. (Emphasis Added). Consequently, if EPA's 1/25/02 NOV to Mr. Klockenkemper was defective, this action cannot be maintained and he must be dismissed. *62 IAC 240.150(a).*

**c. 1/25/02 NOV Does Not Contain Determination That Mr. Klockenkemper Was The Permittee or An Unpermitted Violator Since but Only Alleges Klockenkemper Is "Operator", Which Is Undefined Term Not Used In Illinois SDWA Requirements at Issue**

Contrary to 62 IAC 240.150(a), the NOV only alleges that Mr. Klockenkemper was the "operator" of the wells (which he denies), although the Illinois UIC program does not even define "operator" for purposes of responsibility for regulatory compliance. *See C. Exh 39 at para. 14; 62 IAC 240.10 (Definitions).* Thus, at the outset, NOV fails to comport with the requirement to name as the respondent either the permittee or a person operating without a permit. 62 IAC 240.150(a).

**d. EPA NOV Miscites the Applicable Requirements at 62 IAC 240.760 and 780, which do not use the Term "Operator" (as Does the 2002 NOV in Paras. 11, 12, and 13), But Rather Which Expressly Require "Permittee" to MIT and Report, thus Paras. 11, 12, and 13 of NOV Legally Defective Since No Notice From Statute That Officer of Corporate Permittee Is Personally Required to Perform MIT Where Corporation Does Not**

**i. 62 IAC 240.760 Expressly Requires "Permittee" to Conduct MI Test**

Contrary to EPA's recitation at para. 11 of the NOV of 62 IAC 240.760(e)(6), that provision does not require the "operator" to conduct the test, but rather just requires that a MIT be performed, and thus para. 11 of the NOV is legally incorrect. *C. Exh. 39 at 11; 62 IAC 240.760(e)(6).* EPA's NOV and the Officer's analysis also ignore the fact that companion regulation 62 IAC 240.760(f) specifically provides that the ***"permittee* shall conduct an internal mechanical integrity test**" on each well at issue in this complaint, and again does not use the term "operator" as stated at para. 12 of the NOV, and thus para. 12 of the NOV is legally incorrect. *C. Exh. 39 at para. 12; 12/27/06 Decision at 13.*

**ii. 62 IAC 240.780 Expressly Requires "Permittee" to Submit Reports**

Similarly, as noted by the Officer and mis-stated by EPA's NOV, 62 IAC 240.780 also requires the annual reports to be submitted by the "permittee" and does not use the term "operator", and thus para. 13 of the NOV is legally incorrect. *C. Exh. 39 at para. 13; 12/27/06 Decision at 13.*

**e. NOV Paras. 14 and 16's Allegations That Respondent Was "Operator" Insufficient to Confer SDWA 62 IAC 240.150 Jurisdiction Over Mr. Klockenkemper**

Thus, EPA's assertions at paras. 14 and 16 of the NOV, that Mr. Klockenkemper was the "operator" of the wells, does not bring him within the ambit of 62 IAC 240.760 or 240.780, since these requirements only apply to the "permittee" and not to an "operator" or a "person". *C. Exh. 39 at paras. 14, 16.* Rather, just as it did for RWS in the EPA initial complaint, EPA had

to allege that Mr. Klockenkemper was the "permittee" for the wells, and thus responsible for performing the MIT's, to obtain jurisdiction, which for obvious reasons it could and did not. *C. Exh. 37.*[16]

**f. Original EPA Complaint Correctly Cited 62 IAC 240.760 As Requiring Permittee RWS to MIT, But NOV Impermissibly Omits Term "Permittee" In Attempt to Non-Legislatively Expand Ambit of SDWA, And Is Thus Invalid**

In its effort to extend SDWA jurisdiction to an individual who is not a "permittee" and who is not operating without a permit, EPA's 1/25/02 NOV, and the Officer's analysis at page 13 of her Decision, directly contradicts the EPA's initial acknowledgment that 62 IAC 240.760(e)(6), like 240.760(f), applies to the "permittee" and not to an "operator" as EPA's 1/25/02 NOV claims:

> "31. ...240.760(e)(6)...provides that the *permittee* for each Class II UIC Well shall perform an [MIT] for each permitted well...". *See 7/9/01 Initial Complaint (C. Exh. 37 at paras. 31,39*).

Thus, the 1/25/02 NOV is invalid because it does not state the jurisdictional prerequisite that Mr. Klockenkemper is required to MIT the wells as if he were the "permittee", as stated in 62 IAC 240.760 and 240.780. The differences between the EPA's assertions in its initial complaint and the 1/25/02 NOV are evidence of EPA's attempt to reinterpret the Illinois SDWA to apply to other entities beyond that provided by the statute.

**g. Amended Complaint Also Jurisdictionally Defective Because It Fails to Allege Which Respondent Was The Permittee in Order to Bootstrap Mr. Klockenkemper's Regulation Under 62 IAC 240.760 and 240.780 by Inference, Despite State Never Naming or Issuing NOV to Mr. Klockenkemper, Personally**

Further incriminating evidence of EPA's misinterpretation of the Illinois SDWA is found in the amended complaint, which, like the 1/25/02 NOV, also conveniently deletes from the initial complaint the statutory term "permittee" from the operative paragraphs of Counts I and II,

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[16] Respondent RWS also objects to jurisdiction, since EPA failed to include a copy of the initial 9/8/00 NOV to RWS in its PEX, thus the record does not demonstrate that EPA issued the requisite NOV to secure jurisdiction under 62 IAC 240.150, as claimed in the cover letter at *C. Exh. 35*, and this matter must be dismissed as to RWS as well for lack of original jurisdiction.

leaving the requirement in the passive so as to include Mr. Klockenkemper by inference. *Compare C. Exh. 37 - Initial Complaint at paras. 31 and 39* (stating the "permittee" RWS was required to MIT the wells) *to C. Exh. 43 at paras. 43 and 51* (stating only that the wells were required to be MIT'd).

As evidenced by the record, Mr. Klockenkemper was never determined by the State of Illinois to be a "permittee" or "person conducting unpermitted activities as to these wells", as evidenced by the fact that, *inter alia*, Illinois never issued an NOV to Mr. Klockenkemper as an individual for any of the wells, but only to RWS, in compliance with the Illinois SDWA which only holds the corporate permittee liable at permitted wells. *R. Exh. 99 - Affidavit of E.J. Klockenkemper at paras. 5, 6, 7*; *See e.g C. Exhs. 1-14; See 225 ILCS 725/8a*.

**h. Notice that Respondent was an Alleged "Operator" is Insufficient Notice under the Illinois SDWA since He was not Operator and Because SDWA Places Responsibility on the Permittee, not on the Permittee's Officers, And Thus 225 ILCS 725/8a and 62 IAC 240.150(a) Prohibit This Action From Being Maintained Due to Lack of Adequate NOV/Complaint**

The 1/25/02 EPA NOV fails to determine or allege that Mr. Klockenkemper was a "permittee", and fails to determine or allege that he "engaged in an activity" for which he should have obtained a permit under the SDWA, and thus it fails to comply with 62 IAC 240.150(a). *62 IAC 240.150(a).* Consequently, since there was no valid NOV issued to Mr. Klockenkemper identifying him as either an alleged co-permittee, or as an unpermitted violator, 62 IAC 240.150(a) and 225 ILCS 725/8a prohibit this action from being maintained. *Id.*

**i. Respondent Klockenkemper Should Have Been Dismissed By Officer Kossek (2/6/03 and 5/3/05 Orders) or Officer Toney (12/27/06 Order) Due to the Lack of an Adequate NOV under 62 IAC 240.150(a)**

Presiding Officer Toney erred in her 12/27/06 order by ignoring and thereby denying Respondent's second affirmative defense, and in failing to dismiss this matter with prejudice due to the EPA's failure to establish proper notice to confer SDWA subject matter or personal

jurisdiction to EPA over Mr. Klockenkemper, personally.[17] Similarly, Officer Kossek erred in 1) allowing leave for the amended complaint to be filed despite Mr. Klockenkemper's objections to the aforenoted jurisdictional defects in the NOV and proposed Amended Complaint (*2/6/03 Kossek Order*) and 2) failing to dismiss the Amended Complaint despite the lack of adequate jurisdictional pleading in the NOV and Amended Complaint (*5/3/05 Kossek Order*).

## B. Respondents' Motion: 11th Affirmative Defense - 28 USC 2462 5 Year Statute of Limitations - Officer Erred By Determining 62 IAC 240.760(e) and (f) MIT Violations Were "Continuing", Rather Than Intermittent and "One-time" For 28 USC 2462 Purposes

### 1. Applicable Regulation -Mechanical Integrity Testing - 62 IAC 240.760(e) and (f)

Counts I alleges violation of 62 IAC 760(e)(6) for two wells, and Count II alleges violation of 62 IAC 760(f) for four wells, respectively, which regulations provide in relevant part:

> "Section 240.760: Establishment of Internal Mechanical Integrity for Class II UIC Wells:
>
> a) For purposes of this Section, establishment of internal mechanical integrity includes proper placement of the packer in accordance with subsection (b) and successful completion of a pressure test ["MIT"]...
>
> e) An internal mechanical integrity test shall be performed....
>
> 6) 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.

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[17] *See In the Matter of: American Tube Company, Inc., Docket No. EPCRA-3-99-0010 (Order of 12/3/99)*(Recognizing due process defense claiming that EPA's application of state regulations and failure to issue notice to respondent failed to provide fair notice, and issue of whether the regulations as applied by EPA in particular case provided fair notice as to what conduct is prohibited, or what conduct is required); *In The Matter of: General Motors Automotive - North America Docket No. RCRA-05-2004-0001* (Order of 6/8/05)(recognizing due process defense that EPA interpretation and application of regulation to particular facts was inconsistent with prior interpretations, was incorrect, was arbitrary and capricious, and that fair notice or opportunity to be heard was not provided as to such 'new" interpretation valid defense); *In the Matter of Freudenberg-NOK, Docket No. CWA-5-98-006 (Order of 5/14/99)*(Recognizing due process affirmative defenses that EPA interpretation of rule allegedly violated was not adopted by State and that EPA failed to give notice to Respondent of its interpretation and its intent to enforce same).

f) 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...." (Emphasis Added).

**2. Officer's Analysis Incorrect and Contrary to Facts Calling for 28 USC 2462 Bar's Application to Instant MIT Violations**

In her findings, the Officer rejected most of Respondents' Eleventh Affirmative Defense (*See 6/6/06 Answer and Amended Affirmative Defenses and Request for Hearing*) that 28 USC 2462 operated to bar EPA's July 9, 2001, initiation of a penalty action as to the Count II (September 1, 1995) testing violations against Rocky Well Service, Inc. Officer Toney also rejected Respondent Klockenkemper's related affirmative defense that the EPA's February 20, 2003, amended complaint adding him as a Respondent was time-barred as to himself as outside the 28 USC 2462 five year period against penalty actions as to both Count I (December 19, 1996) and Count II. *Decision at 6-8.*

**a. Officer Agreed That 28 USC 2462 Applies To This SDWA Penalty Action**

The Officer initially found that all parties and the court agreed that 28 USC 2462 applied to this particular action, thus agreeing with a portion of Respondent's Eleventh Affirmative Defense as it relates to Count III. (*Id. at 4, 6; See 7/21/06 Respondents' Memorandum in Support of Motion at 5-12* and *Respondents 9/18/06 Joint Reply to EPA Response to Motion for Accelerated Decision; See Also Respondent Klockenkemper's 3/29/06 Motion for Leave to Amend Answer to Add Affirmative Defenses and 4/28/06 Reply To EPA's 4/13/06, Response*.

**b. Agreed That 5 Year Bar Applies to Void Counts I and II Unless MIT Is "Continuing" Violation Tolling Statute**

As to the remaining counts, Officer Toney cited *In Re: Lazarus* and *Toussie v. United States*, for the rule that a limitations period begins to run when the violation first "accrues" and that "accrual" was central to the equitable tolling rule of "continuing violations":

"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).*" *12/27/06 Decision at 5.*

Citing *Harmon* and *Lazarus*, Officer Toney stated that "indication of the continuing nature of the statutory requirement" could be found in the language of a statute and regulations:

"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." 12/27/06 Decision at 5.*

**c. Allows Count I Against RWS As Timely, And Bars Some Annual Reporting Violations As "One-Time" under 28 USC 2462**

Officer Toney then found that the December 19, 1996, Count I violations were not barred by 28 USC 2462 on July 9, 2001, as to Rocky Well, even if they were considered one-time rather than continuing violations. *Id. at 5.* Concomitantly, apparently finding that annual reporting violations were not "continuing", Officer Toney applied 28 USC 2462 to bar the Count III annual reporting violations occurring prior to 1996 (1991, 1993, 1994 and 1995), leaving 1996, 1997, and 1998 violations pending as to both Respondents. *12/27/06 Decision at 9.*

**d. Erroneously Finds Count I and II MIT Violations II Not Time-Barred Because 28 USC 2462 Tolled By Continuing Violations Doctrine**

As to the remaining claims, Officer Toney stated that:

"None of the remaining claims in Counts II and III against [Respondents] allege violations that first occurred within five years of the filing of the complaints against either Respondent.[18] Thus, it is

[18] [Footnote 2 in Original By Ms. Toney, to which finding Respondent Klockenkemper objects] "For purposes of statute of limitations analysis, the Amended Complaint is deemed to have been filed on

necessary to examine Complainant's arguments that...Counts I and II are continuing violations which extend the period for filing of enforcement actions." *12/27/06 Decision at 6.*

Officer Toney then acknowledged that "Both counts involve failure to conduct [MIT] *by a specified date*" under 62 IAC 240.760(e)(6) and 240.760(f).[19] (Emphasis Added). She stated that Section 1423 of the SDWA, 42 U.S.C. 300h-2 (Penalty Provisions), was the starting point to in looking to whether the violations were continuing. *12/27/06 Decision at 6.* She referenced 42 U.S.C. 300h(b) (State Program Requirements) in support of her construction of the requirement to perform a single MIT "by a specified date" as a "continuing violation" for 28 USC 2462 purposes.[20] *Id.* Ms. Toney's reasoning is outlined as follows.

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May 1, 2002, the date for Motion for Leave to Amend and Proposed Amended Complaint were filed by the Complainant. *Greenfield v. Shuck*, 856 F. Supp. 705, 711 (D. Mass 1994)." Respondents point out that the *Lazarus I* court found the filing date to be the date the complaint was actually filed with the RHC and served upon Respondent and became a matter of public record, thus the actual filing date of February 20, 2003, should be used for limitations purposes, not May 1, 2002. *Lazarus I Initial Decision, TSCA Docket V-W-32-93 (1995) at 18.*

[19] Respondents posit at the outset, that, based upon the Presiding Officer's own analysis so far and the quotation above, the inquiry should have stopped here based on the plain text of 62 IAC 240.760(e) and (f), which clearly require a single activity (e.g. a discrete, one-time test) that, to use Ms. Toney's words, "must be fulfilled within a particular time frame (either by September 1, 1995 or "at least once" within 5 years of the last MIT). *62 IAC 240.760(e) and (f)*. No daily, ongoing activity, monitoring or testing is required by these rules, and there is no allegation in the EPA complaints or evidence in the record that there was any active, ongoing illegal pattern of conduct or activities by the Respondents that violated these or any other SDWA provisions. *See 7/9/06 Complaint and 2/20/03 Amended Complaint*.

[20] As discussed further below, with regard to Ms. Toney's SDWA statutory analysis for 28 USC 2462 purposes, Respondents assert as points of error: 1) Officer Toney erred by going further into the SDWA beyond the plain text of 240.760 which Respondents are alleged to have violated, which clearly require a "one-time" type of conduct (a single test) by a "specified date" and not on a continuing basis; 2) Ms. Toney erred by attempting to apply the penalty provisions of the SDWA, 42 USC 300h-2 (which allow daily accrual of penalties for a single past violation) to somehow imbue the one-time, past violation of the MIT requirement with a similar continuing "daily" character; and that 3) Ms. Toney erred by relying on an irrelevant "enabling" section of the SDWA, 42 USC 300(h)(b) (governing the federally-required basic requirements that a state program must include in its permits to qualify for federal program approval) to argue that compliance with the one-time date certain mechanical pressure testing requirements was "continuing" in the same way that the SDWA requires a state permit to require constant compliance with the permit.

### i. Erroneously Finds 42 USC 300h-2 (Allowing Daily Accrual of Penalties) Indicates That SDWA Contemplates "Continuing Violations"

With regard to the penalty provisions at 42 USC Sec. 300h-2, Officer Toney found that the SDWA language providing for a recurring penalty "for each day of violation" are "very similar in phrasing to the RCRA provisions in *Harmon* and the TSCA provisions in *Lazarus* that the EAB found to be indicative of a continuing violation.". *12/27/06 Decision at 8.* Explaining, Officer Toney states:

> " 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."

Beyond these two references, no further discussion of *Harmon* is provided by the Decision, and Officer Toney apparently relies on EPA's identical arguments in its Response to Respondents' Motion.[21] *See 8/28/06 EPA Response to Respondents' 7/21/06 Motion For Accelerated Decision at 4-5.* Despite Respondents' detailed analysis, Ms. Toney did not explain her analogy of ongoing operational violations (continuing operations despite failure to obtain a permit, failure to have comprehensive groundwater monitoring plan in place, and failure to provide for continuing insurance coverage) to the one-time failure to conduct MIT by a date certain by a properly permitted and otherwise complying regulated party. *See Respondents' 7/21/06 Motion for Accel. Dec. at 9-11.*

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[21] As discussed below, and in *Respondents 7/21/06 Memorandum in Support of Motion* and *Respondents 9/18/06 Reply to EPA's 8/28/06 Response*, EPA and Officer Toney apparently ignore caselaw acknowledging the fact that just because a statute contains daily penalty accrual provisions, such daily accrual of penalties does not render the underlying violation itself "daily" or "continuing" for statute of limitations purposes. *In Re Frontier Stone CAA Docket No. II-95-0105, at fn 11(Order Dismissing Complaint And Initial Decision - 3/10/97)(*"The same violation may be considered continuing for the purposes of applying multi-day penalties, while it is not continuing for the purposes of applying the statute of limitations."*). See also Garcia v Brockway, 526 F.3d 456; 2008 U.S. App. LEXIS 10258 (9th Cir. 2008)*(Failure to meet statutory deadline for construction requirement is a discrete violation of FHA, fact that violations and effects of, and harm from, failure remain do not cause failure to comply to be a continuing violation).

### ii. Found 42 USC Sec. 300h(b) (State Program Enabling/Approval Provisions Setting Minimum Requirements) to Impose Continuing Obligation On SDWA Regulated Party

With regard to 42 USC Sec. 300h(b)s' state program enabling provisions, Officer Toney found significant the fact that, in order to be approved, a state program must, *inter alia*, 1) "set minimum requirements for effective programs to prevent underground injection which endangers [a USDW]" (*300h(b)(1)*); 2) "prohibit...any underground injection...which is not authorized by a permit (*300h(b)(1)(A)*); and 3) require a permit applicant to prove that the injection will not endanger [USDW] (*300h(b)(1)(B)*). *Decision at 6*. Attempting to transfer the ongoing requirements that a state program must meet to the MIT requirement, in order to render the MIT regulations ongoing requirements, Officer Toney posits:

> "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. *Decision at 6.*

As discussed in Respondents' briefs below and again herein, Ms. Toney's and EPA's identical arguments (*See EPA 8/28/06 Response to 7/21/06 Motion at 5-6*) ignore, *inter alia*, the facts of record that: 1) RWS (and, according to paragraph 25 of the Amended Complaint, Mr. Klockenkemper), did in fact have a valid permit for each well; and the EPA complaints do not allege that Respondents; 2) performed unauthorized injection, or 3) any injection that endangered a USDW. *See 2/20/03 EPA Amended Complaint*. Thus, these arguments are wholly irrelevant to the violations at issue, are unsupportive of EPA's and Ms. Toney's position on the statute of limitations issue, and must be rejected.[22]

[22] In fact, in her 7/23/08 Initial Decision, Officer Toney specifically found that the record in this matter contained no evidence of actual harm and no well-specific evidence that there was any injection or threat from any of the six Rocky Well wells to any USDW, but rather that, in her opinion, all the evidence showed was a potential for regulated entities' failures to MIT to harm the UIC program. *7/23/08 Initial Decision at 9.*

### iii. Found 40 CFR 144.51 Requirement For A Permit to Perform Injection And For Continual Maintenance of MI At Operating Well to Render MIT Requirement Continuing

Next, as did EPA, Officer Toney again erroneously cites to similar state program minimum requirement language in an enabling federal regulation located at 40 CFR 144.51(a) and (q) (requiring a state permit for injections and continuing maintenance of MI while injecting under such permit) for support that the state MIT requirement is also continuing. *12/27/06 Decision at 6-7*. Officer Toney stated:

> "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." *Decision at 6-7*.

Respondents allege error occurred since, beyond the fact that the two regulations on their face require distinctly different acts (one continuing and one not), both EPA and the Officer also ignore that fact that there are no allegations, or evidence, in the record that unpermitted injections occurred, that a USDW was threatened, or that MI was not maintained at any of the six inoperative wells.[23] *See Amended Complaint (Compl. Exh. 43) at paras. 48 and 58.* Thus, 40 CFR 144 is irrelevant. In sum, the Presiding Officer appears to lump failure to MIT (62 IAC 240.760), with failure to maintain MI (40 CFR 144.51), and infers, erroneously, that failure to MIT means that MI has not been maintained, despite the fact that EPA does not allege failure to maintain MI or that Rocky Well actually ran the wells after a failure of MI. *Decision at p6-7*

[23] Similarly, the complaint and record does not reflect that any of the six RWS was ever found or even alleged to be lacking MI, or that RWS was ever issued a cessation notice by the state or EPA for lack of MI. Thus, failure to maintain MI while injecting, or lack of MI (versus lack of an MIT) is not part of this case, and, in any event, neither the requirement for continuous maintenance of MI, nor the ongoing existence of a past violation of the singular MI testing violations, confer continuing violation status on such violations for limitations purposes. *See In Re Frontier, Garcia, Supra.*

### iv. Found 62 IAC 760(e) and (f) (MIT Once In Five Years or Obtain Temporary Abandonment) to Render MIT Violation A Continuing Course of Conduct

Finally, Ms. Toney turned to the actual language of the regulations at issue, mis-characterizing them as "the same type of "use authorization" that the EAB examined in Lazarus.". 12/27/06 *Decision at 7*. Pointing to these regulations' language requiring an MIT to be performed one each five years "unless" temporary abandonment/future use status is approved, Ms. Toney found that they thusly required a "continuing course of conduct rather than a discrete act". *Id.* She found that consequently, since RWS did not either MIT, or obtain such waiver status, its failure to do one of the two became a continuing violation of RWS permit. *Id.* In turn Ms. Toney found that this "conduct" was a continuing violation for limitations purposes until the "violating behavior has ceased" (apparently the continuing affirmative conduct is not MIT'g or not obtaining a waiver, which "conduct" ceases when the MIT is performed or TA status granted):

> "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.[24] 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. *Id.*

### v. Found 62 IAC 240.760(h) (Requirement to Shut In Wells If No MI Performed) To Render MIT Violation Continuing

Ms. Toney then cites to another regulation not at issue or alleged to have been violated in this matter to support her finding that the requirement to MIT is "continuous" for limitations

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[24] [Footnote 3 in Decision]: "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 11 well)."

purposes, since it is allegedly a prerequisite to "continued operation". *Decision at 7-8. See 62 IAC 240.760(h).* Specifically, Ms. Toney quoted the regulation and found that:

> "Finally, the Illinois UIC regulations make it clear that the successful completion of ail internal mechanical integrity test is a prerequisite to continued operation of an underground injection well:
>
> > 'Any Class 11 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 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. *(Emphasis Added By Ms. Toney). Decision at 7-8.*

However, EPA's complaint does not allege violations of 240.760(h) for failure to shut in, or any failure to pass MIT, nor has EPA issued any NOV for same, and the unrebutted record indicates that RWS did in fact pass MIT both prior to and after the 1995-1996 due dates at some wells, or else shut in/capped its inoperable wells as required.[25] Thus, there is no alleged or actual violation of 240.760(h) that might somehow render the MIT requirement to be continuous, and this regulation does not support Ms. Toney's conclusion either.

### vi. Found Rocky Well Matter "Similar to Harmon" For Finding that MIT Obligations Continuing

Ms. Toney concludes that this case (failure to test), is similar to Harmon (failure to obtain permit/ongoing hazardous waste disposal without permit case):

> "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

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[25] *See e.g. R. Exh. 180 - Declaration of John Morgan at 2-3, and at Section II.A. and II.B.1 of Attachment B to Morgan Report* (Listing documents from record indicating prior inoperable and shut-in status of wells, as well as evidencing successful MIT's)(*e.g. Morgan Doc. 28 (C. Exh. 70.a - 1/8/97* Inspection Report stating Atwood #1 inactive*); Morgan Doc. 33 (R. Exh. 77b - 3/23/92* Inspection Report stating Harrell #1 shut-in circa 1992*); Morgan Doc. 39 (C. Exh. 73 - 1/29/98* Report stating Twenhafel #2 inactive*); Morgan Doc. 39.5 (R.Exh.83b - 4/18/90* OG-22 IDNR Inspection Report indicating Wohlwend #6 inactive and that well was capped in 1990*; Morgan Docs. 40-44 (R.Exhs. 85a-85e, especially 85.b* - Inspection Reports stating Wohlwend still "shut in" as of 1997*); Morgan Doc. 46 (C. Exh. 75 - 12/4/98* Report indicating Zander #2 Inactive).

> 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. *Decision at 8.*

Ignoring the fact that *Harmon Electronics Inc., Docket No. RCRA-VII-91-H-0037 (12/12/94)*("*Harmon I*") and *In re Harmon Electronics Inc*, 7 E.A.D. 1 (EAB 1997)("*Harmon II*") cut against her analysis, since they dealt with a continuing pattern of unpermitted disposal, not a failure to test a non-injecting well or a well that had previously passed MIT, Ms. Toney thusly concludes that the "MIT regulations impose continuing obligations on the owners and the operators of the wells...".[26] *Decision at 8.*

### vii. Found that Accrual of Cause of Action for Violation Was May 14, 2001, Not Day After Violation

Given the conclusion that the MIT requirement "imposes ongoing obligations on the owners and operators of the wells", the Officer theorized, in her view, as to when the MIT violations ceased for purposes of accrual of EPA's cause of action. Even while acknowledging that there was no injunctive relief to be had, Ms. Toney cites *Lazarus* for the rule that the date of accrual is the date the ongoing pattern of conduct that causes the violations ceases, and cited March 14, 2001, as the date EPA's right of action arose:

> "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.[27] 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, [Sic] 2001, and against Mr. Klockenkemper on May 1, 2002, 1 conclude that under the continuing violations theory the allegations of Counts I and Ill are not barred by the five year limitations

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[26] As discussed below, Respondents also allege error in that, *inter alia*, Officer Toney attempts to equate a regulated entity's ongoing general obligation to comply with its permit under the SDWA, and the entity's ongoing injunctive obligation to remedy the pre-existing, one-time failure/violation by conducting the required MI test, with an entity's one-time failure to meet a specific SDWA obligation to meet a specified testing deadline. In doing so, Ms. Toney attempts to avail EPA of the continuing violation exception as it applies to allowing injunctive causes of action more than 5 years after the onset of the violation, where such doctrine does not now extend to avoiding the bar on actions to collect penalties.

[27] [Footnote 4 in Decision] "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.

period in 28 U.S.C. § 2462 as to either Respondent."[28] *Decision at 8* (Emphasis By Ms. Toney)

Respondents allege as error, *inter alia*, that the Officer mis-applied the doctrine of continuing violations for actions seeking injunctive relief to an action for penalty, and that the May 14, 2001, accrual date is incorrect.[29]

#### e. Correctly Found Count III Annual Reporting Claims Including and Prior to May 1, 1996, to Be Barred By 28 USC 2462

Officer Toney then held that despite EPA's "relation-back" arguments, the pre-1997 Annual Reporting violations (e.g 1991, 1993, 1994, 1995 and 1996) were time-barred as to Mr. Klockenkemper, and that the pre-1996 ( e.g 1991, 1993-1995) were barred as to Rock Well. *Decision at 9.*

### 3. Respondents' 28 USC 2462 Counter-Arguments - Failure to MIT is One Time Violation, Not Continuing, Thus 28 USC 2462 Barred Action As to Mr. Klockenkemper For All But 1997 and 1998 Annual Reporting Violations, And As To RWS For Count II and all but 1996-1998 Annual Reporting Violations

#### a. Text of Illinois SDWA Statute and Regulations Plainly State And Require One Time Action, Penalty Policy Bars Consideration of Other Violations Older Than 5 Years

At the outset, Respondents continue to cite Ms. Toney's interpretation as obvious error since it mis-classifies a discrete omission of a one-time statutory compliance requirement, failure to MIT by a date certain, as a continuing pattern of affirmative violative conduct or acts that

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[28] [Was Footnote 5 in Decision] "Because I conclude that Counts I and 11 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."

[29] *See 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994)(Since CAA does not specify a limitations period, five-year general statute of limitations found at 28 U.S.C. §§ 2462 applies to CAA administrative actions); *United States v. Walsh*, 8 F.3d 659, 662 (9th Cir. 1993)(*cert. denied*, 511 U.S. 1081)(28 U.S.C. §§ 2462 bars administrative actions for penalties for violations over 5 years old under the CAA); *cf. United States v. Telluride Co.*, 146 F.3d 1241 (10th Cir. 1998) (Enforcement suits for injunctive relief under CWA not barred because statute of limitations, while applicable to penalties, does not cover claims for equitable relief). Respondents note that even assuming, *arguendo*, that the date of filing of the 2/20/03 Amended Complaint was 5/1/02, such date is still beyond 28 USC 2462 as to Mr. Klockenkemper as to both Counts I and II.

"cease" when action is taken and the test is done. *See Garcia v Brockway, 526 F.3d 456; 2008 U.S. App. LEXIS 10258 (9th Cir. 2008)*(Failing to properly design/construct accessible building is a discrete violation of FHA occurring on date certificate of completion is issued, fact that violations and effects of, and harm from, failure remain do not cause failure to comply to be a continuing violation or toll the limitations period; tolling requires a continuing pattern of repeated statutory violations, one of which occurs within the limitations period).

Simply put and as discussed at length in *Respondents' 7/21/06 Memorandum in Support of Motion for Accelerated Decision* and *Respondents' 9/18/06 Reply to EPA's Response* thereto, (which arguments are incorporated herein), the failure to conduct a one-time test by the deadline is not a continuing series of acts or violations, but is a single omission that triggers the limitations period the following day.

Officer Toney correctly began the first stage of analysis of whether a violation is continuing or one-time by looking at the plain language of the statute at issue. *Center for Biological Diversity v. United States Fish and Wildlife Service, 2006 U.S. App. LEXIS 16198 (11th Cir. 2006)*(Plain language of statute requiring act "not later than" a date certain indicates that requirement was fixed, rather than continuing, and no tolling occurred). However, Ms. Toney simply misreads what is plainly required by the regulations, since in our case, the Illinois SDWA UIC MIT requirements clearly require a single test to be performed by a date certain in one of two ways; 1) either MIT <u>a least once</u> within five years of the date of the last successful MIT (*62 IAC 240.760(e)(6)* - Count I); or, 2) if no prior MIT occurred, MIT <u>by September 1, 1995</u> (*62 IAC 240.760(f)* - Count II)(emphasis added).

Hence, the plain text of the regulations combined with the facts of our case indicate the date certain for the MITs at issue in Count I was December 19, 1996, and for Count II September 1, 1995. Similarly, a date certain (May 1 of the following year) is set for submission of the annual report for each well for the preceding calendar reporting year. *62 IAC 240.780(e).* The Illinois MIT regulations are worded to require compliance "no later than" the dates set forth

above, and thus the statutory language here is quite similar to that found to indicate a non-continuing requirement in *Biological Diversity*, cited above.[30]

62 IAC 240.760(e)(6)'s imposition of a five year term during which each MIT must be repeated in is also consistent with the five year limit imposed on government penalty actions by 28 USC 2462, inferring that EPA must bring its penalty action within the five-year deadline, even if EPA chooses to wait more than five years to bring its action for injunctive relief, as it did here. Similarly, EPA's Proposed UIC Penalty Policy prohibits EPA from considering violations which occurred more than 5 years prior to the EPA's discovery of the violation at issue as part of a history of non-compliance. *C. Exh. 47 at 5*.

### b. Failure to Meet Testing Requirements By Date Certain Not Continuing Violation Per *In Re Frontier Stone* and *In Re Lazarus*

As argued in the briefs to Officer Toney, Respondents believe *Frontier Stone* should be followed here, due to: 1) the similarity of the CAA equipment testing requirements to the instant statutory scheme requiring MIT of UIC well equipment; 2) the fact that EPA put forth very similar arguments in *Frontier Stone* as it did in its briefs and pleadings here; and 3) due to the fact that *Frontier Stone* ALJ Pearlstein set forth an expanded discussion clarifying the distinctions between continuing and one-time violations as they apply to injunctive versus penalty actions, and case law related thereto. *In Re Frontier Stone CAA Docket No. II-95-0105 (Order Dismissing Complaint And Initial Decision - 3/10/97) at p4.* Respondents note and object that the Presiding Officer failed to even mention, let alone distinguish, *Frontier Stone*.

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[30]As stated by the *Biological Diversity* court: "[T]he Center contends that, under the continuing violation doctrine, the passage of each day creates an additional cause of action, which triggers anew the running of the six-year limitations period. We disagree. Nothing in the language of the Act supports the position of the Center. To the contrary, the Act counsels in favor of a single violation that accrues on the day following the deadline. *See Toussie v. United States*, 397 U.S. 112, 120, 90 S. Ct. 858, 863, 25 L. Ed. 2d 156 (1970), *superseded by statute, 50 U.S.C. App. §§ 462(d)*(The language "not later than" creates not an ongoing violation but a fixed point in time at which the violation for the failure of the Secretary to act arises.)

### i. *Frontier Stone, CAA Docket No. II-95-0105 (3/20/97)* Held that EPA's Right to Sue For Penalty, and Running of Statute of Limitations, Accrues on Day After Testing Deadline Missed, Not Day Test is finally Performed

In *Frontier Stone*, EPA filed a May 18, 1995, CAA administrative penalty action alleging that Frontier failed to comply with a one-time production equipment testing requirement within 180 days of the start up of several rock crushers, the last of which went into operation on October 18, 1989, and which should thus have been tested by April 18, 1990.[31] *Frontier, at 1 and 4 (Citing 40 CFR 60.8(a))*.

Like Rocky Well, at the time of the alleged violations Frontier had a valid operating permit issued by the federally-authorized New York state CAA program. *Id. at 2.* As in our case, the lack of testing and the dates of required compliance were not in dispute in *Frontier*, rather the debate was whether the admitted failure to test by April 19, 1990, was a continuing violation or one-time. *Frontier Stone at 3.*

After examining the text of the regulation at issue, the nature of the requirement and violation, and related case law, ALJ Pearlstein held that while a violation of testing requirements continues to exist, it is one-time, and not continuing for limitations periods, and that it accrues the day after the deadline is missed. *Id. at 5.* In doing so, the ALJ rejected many of the same arguments used by EPA and the Presiding Officer to support their findings that the MIT violations were ongoing patterns of conduct:

> "The plain language of the regulation at issue here, and the language of 28 U.S.C. §§2462, indicate that the failure to conduct timely performance tests is not a continuing violation, at least for the purpose of applying the statute of limitations...The regulation requires a test to be done by a certain deadline. The nature of such a violation is not continuing after the deadline has passed. Applying the plain meaning of §2462, the violation "first accrues" on the 181st day after initial startup.

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[31] 40 CFR 60.8(a) states: "Performance Tests. (a) Within 60 days after achieving the maximum production rate at which the affected facility will be operated, but not later than 180 days after initial startup of such facility and at such other times as may be required by the Administrator under section 114 of the Act, the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such test(s)."

> During the ensuing five years, if a facility does not conduct the performance tests, it remains in violation and subject to a civil penalty. But it would be a fallacy to construe each day the test is not done as a new violation...The statute of limitations simply requires that a proceeding to enforce a civil penalty be commenced within five years of the date of violation. Complainant misunderstands the nature of this violation in its statement that a party that does not conduct the testing within 180 days "remains in violation until such time as the performance testing is done." Even after the tests are done late, the party is still a violator...Once the tests are not done within 180 days after startup, there is then a continuing failure to conduct the tests, until they are done. That does not mean the violation is continuing, however. The violation was complete and first accrued on the expiration of 180 days after startup. It is but an exercise in semantics to debate whether that also means the violation itself is "continuing." Regardless of that debate, a straightforward application of the statute of limitations in 28 U.S.C. §§2462 to a violation of 40 CFR §§60.8 (a) compels the conclusion that the statute begins to run 181 days after initial startup of the facility." *Id. at 5*.

Intrinsic to the ALJ's reasoning was that the violation alleged, a single failure to test by a date certain, was inherently different than the singular failure of an operating facility to obtain a permit, which is deemed continuing as long as the facility is operating without one.[32] *Id. at 6.* Unlike the Respondent in *Harmon Electronics, Inc., Docket No. RCRA-VIII-91-H-0037 (12/12/94)*, Frontier Stone did not operate its facility without a permit, a fact which ALJ Pearlstein found to be quite distinguishable from operating equipment without the required tests:

> "Complainant cites the Initial Decision in *In re Harmon Electronics Inc*., Docket No. RCRA-VII-91-H-0037 (December 12, 1994). In that decision the ALJ stated that the violations at issue were inherently distinguishable from those in the cases of *Toussie v. U.S.*, 397 U.S. 112 (1970), and *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987). The violations in *Harmon* all stemmed from the ongoing operation of the respondent's landfill without a permit. The ALJ described them as follows: 'The offense here was not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA by treating, storing and disposing of hazardous waste without a permit'
>
> Respondent's violation here is more akin to that in *Toussie*-- the failure to register for the military draft within the prescribed time period, five days from the person's eighteenth birthday. Frontier failed to conduct performance tests and file the report of the tests within the prescribed time period, 180 days from initial startup. After conducting the tests and filing the report, nothing

[32] ALJ Pearlstein stated further: "The same violation may be considered continuing for the purposes of applying multi-day penalties, while it is not continuing for the purposes of applying the statute of limitations." *Id. at fn 11.* ALJ Pearlstein also noted that the PCB transformer registration and PCB/combustible material storage proximity violations in *Lazarus* were considered continuing operational violations, since they existed and were still patent on the date of the inspection leading to the allegations. *Id* at p6-7.

further is required of the facility. This is a far cry from the ongoing operation of a facility without a permit. " *Frontier at 4-5.*

ALJ Pearlstein also noted the similarity of the failure to test to the one-time TSCA Pre-manufacture Notice violations (e.g a "use registration") at issue in *3M v. Browner*, and to the one-time TSCA quarterly inspection and reporting violations at issue in *In re Lazarus, Inc., Docket No. TSCA-V-C--32-93 (5/25/95).*[33] *Frontier at 6.* In its Response, EPA cited only to a case involving a leaking UST, whereas here there is no allegation that any RWS well was leaking to a USDW.[34]

Thus, as in *Frontier*, the MIT violations alleged in Counts I and II are one-time, rather than continuing, and are not tolled by any exception, thus accruing on December 20, 1996, and September 2, 1995, respectively, and with their bar dates running on December 19, 2001, and September 1, 2000, respectively. On closer inspection, neither *Lazarus I or II* or *Harmon* support the Officer's finding either.

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[33] Such position is supported by both *Lazarus* decisions cited by the parties (Respondents' Memorandum cited to the Initial Decision below, while the Presiding Officer cites to the 1997 EAB decision on appeal). On appeal, the *Lazarus* EAB noted that EPA did not appeal the Presiding Officer's finding that a recurring quarterly inspection requirement was not a continuing violation for 28 USC 2462 purposes. *Lazarus at 380, fn 106* ("Count III alleges a failure to inspect and a failure to maintain records of an inspection for the fourth quarter of 1991. Count IV makes identical allegations with respect to the third quarter of 1991. Count VI alleges failures to inspect and maintain records of inspections for all quarters beginning in the third quarter of 1981 through the first quarter of 1991. The Presiding Officer held that the allegations of Count VI pertaining to 1981 through the second quarter of 1988 were barred by the statute of limitations. The statute of limitations holding was not appealed."). Thus, EPA conceded on appeal in *Lazarus II* that a violation of the recurring quarterly inspection requirement is not continuing even thought the operator is still obligated in the future to inspect once every three months. *Id.*

[34] In support, EPA cited a RCRA case which dealt with leaking underground storage tanks, where each day of leaking is an obvious continuing violation until remediated. *See In Re: Norman Mayes, Docket No. RCRA-UST-04-2002-0001; RCRA (9006) Appeal No. 04-01; 2005 EPA App. Lexis 5 (3/5/05).*

**i. *In Re Lazarus, TSCA Docket V-W-32-93 (1995)("Lazarus I") and In Re Lazarus, 7 E.A.D, 1 (EAB 1997)("Lazarus II")* Support Finding of One-Time Violation Despite RWS's Ongoing Duty to MIT Once Every 5 Years, Where Lazarus I Held Statute Not Tolled As To Inspections That Were Required Once Every Three Months Despite Continuing Nature of Obligation, and EPA Did Not Appeal Finding**

In the TSCA case *Lazarus II*, the EAB upheld the *Lazarus I* presiding officer's finding that tolling of the statute of limitations was allowable as to the registration and marking penalty count because the TSCA PCB "use authorization" (registration and marking of presence of PCBs) was a defacto statutory permit (permit by rule) that attached and issued only when Lazarus: 1) registered its operational PCB Transformers with the local fire department; and 2) marked the door behind which the PCB Transformers were located with the appropriate permanent marking notifying of the presence of PCBs.[35] *Lazarus II at 370, 373-374.*

In allowing the tolling on these counts, the EAB relied in the fact that congressional and regulatory records indicated that the TSCA PCB registration and marking requirements were pre-permit criteria intended to protect the environment by allowing a responding fire department to be aware of the general and specific presence of PCB's at a facility on or threatened by a fire, and to be able to protect themselves (and the surrounding populace) accordingly. *Id. at 371-376*

Thus, the Officer's reliance on *Lazarus II* to find that the post-permit, MIT requirement was continuing is at odds with the underpinnings of *Lazarus I and II*, given that RWS had obtained and held valid permits (e.g. had "registered" the wells by applying for permits) at the time of the alleged MIT violations, and given that the record establishes that the regulating authorities knew of and had authorized of the use of RWS wells (by way of inspections and RWS's applications and permits, such permits being listed in para. 25 of the amended complaint).

[35] On June 16, 1993, EPA brought a twelve-count administrative enforcement action proposing a total penalty of $117,000 pursuant to TSCA section 16(a) against Lazarus, alleging violations of the PCB regulations corresponding to the lack of registration, marking and quarterly inspections discovered during the course of an inspection (which occurred 13 months before filing). *Lazarus II at 324.*

EPA's and the Officer's position is further undercut by the portion of *Lazarus I* not appealed by EPA applying 28 USC 2462 to bar the penalty action for the operator's failure to conduct quarterly inspections of the transformers and submit annual reports. *In re Lazarus, Inc.*, Docket No. TSCA-V-C--32-93 (5/25/95)(*Lazarus I)*. In *Lazarus I*, the ALJ found that "The...provision...involved here...[is]... section [40 CFR 761.] 30(a) (1) (ix) , which requires that transformers in use or stored for reuse be inspected at least once every three months for leaks...". (Emphasis Added). *Lazarus I at 17-18.* Emphasizing the fact that a discrete act was called for within a set time period, the ALJ found:

> "In short, I find that...While the obligation to make quarterly inspections is made by rule a continuing one, the failure to inspect in any quarterly time period is not the kind of violation that is by nature continuing but is complete upon termination of the quarterly period... The EPA should not be allowed to avoid the consequences of the lack of inspection being barred by the Statute of Limitations...". *Lazarus I at 20.*

The subject regulatory language in Lazarus is nearly identical to that quoted by the Officer from 62 IAC 240.760(e)(6), which requires an MIT "at lease once every 5 years". *Compare 40 C.F.R. 761.30(a) (1) (ix) to 62 IAC 240.760(e)(6).* The violations at issue in our case are of regulations almost identical to those found to be on-going and recurring, but non-continuing, due to the "at least once every" language. *Id.*

Consequently, the TSCA registration underpinnings of *Lazarus* allowing tolling (failure to obtain a permit by rule and failure to demarcate the location of PCBs to allow notice to responders of the existence of a contaminant of special concern at a facility) are not present in the instant case, and *Lazarus* cuts against a finding of continuing violation where RWS did so register, obtained permits for its wells according to the SDWA, and thus was not an unpermitted operator as Lazarus was.[36]

[36]The Lazarus EAB stated: "The RCRA requirements in *Harmon* that were found to be continuing in nature were distinguished from obligations in other cases that were complete upon certain dates. *Harmon*, slip op. at 42, 46, 48. *See Toussie*, 397 U.S. at 119 (obligation to register for the military draft arises at a specific time and is not continuing)*; Del Percio*, 870 F.2d at 1097 (regulations that required submission of plans and schedules by a date certain were not found to be inherently continuing in nature).

Finally, given that the *Lazarus* cases stand for the affixing of the date of accrual of the one-time recurring quarterly inspection violations at the end of each 3 month period, Presiding Officer is remiss in citing *Lazarus's* finding relating to the registration/marking violations in support of her finding that the date of accrual for EPA's right to sue for penalty for the MIT violations was the date the MIT was performed, rather than the correct date of the day after the 5 year retest period expires. *12/27/06 Decision at 5, 8.*

**c. Officer Toney's Accrual Argument Contradicted By EPA Admission That First Accrual Occurred On Day After MIT Was Due**

Consistent with *Frontier Stone* and *Lazarus*, EPA concedes in its briefing on the 12/27/06 Decision that EPA could sue as early as the next day after the deadline, thus there is no dispute between the parties below as to the dates of first accrual being September 2, 1995 and December 20, 1996, for penalty actions for the Count I and II MIT violations. *See EPA 8/28/06 Response to 7/21/06 Motion for Accel. Dec. at 2* ("the September 1, 1995, date...represents the first (but not the last) date of Respondent's violation of this provision...").[37] Contrary to the Officer's finding, EPA admits that the date of first accrual is fixed by the end of each 5 year SDWA MIT period, and thus effectively concedes that 28 USC 2462 began to run the day after the MIT was due. *Id.*

**d. *Harmon* cases Misapplied By Officer Toney Since Violations Was Failure to Obtain Permit/Illegal Operation Case, and Cited holdings of *Harmon I* were not Overruled by *Harmon II***

As with *Lazarus*, Respondents and the ALJ in *Frontier Stone* cited to portions of the 1994 Initial Decision in *Harmon I* which were not overturned by the 1997 EAB *Harmon II* decision cited by the Presiding Officer in her Initial Decision, and which, by reverse inference, cut against finding the MIT violations as "continuing". *See In re Harmon Electronics Inc., Docket No. RCRA-VII-91-H-0037 (12/12/94)*("*Harmon I*") and *In re Harmon Electronics Inc*, 7 E.A.D. 1 (EAB 1997)("*Harmon II*"). Given that the *Harmon I and II* findings are applicable to the ongoing failure to register and obtain RCRA permits, as well as the ongoing operation in absence

[37] Respondents note that EPA's September 1, 1995, accrual date is technically incorrect by one day, since day 1 of the violation and the 5 year 28 U.S.C. 2462 period would begin on the next day.

thereof, Officer Toney mis-applies *Harmon II* here to what clearly is a one-time violation by a properly-permitted regulated party not accused of injecting without a permit.

In *Harmon I*, EPA filed its complaint on September 30, 1991, alleging violations including dumping of solvents out the back door that EPA admitted began in 1980-1982, but which continued to at least 1987. *Harmon I at 20-21.* The ALJ held the violations to be continuing since there was ongoing active unpermitted disposal of hazardous waste up until at least the August 8, 1988, filing of Harmon's permit application: "Therefore, the complaint was timely filed in 1991, as all the violations continued at least until August 1988, when respondent filed its hazardous waste generator notification" (e.g. the Part A application authorizing the on-going disposal by rule)". *Id. at 31.*

Consequently, the attempt to construe *Harmon* as rendering the alleged MIT violations as "continuing" in the same vein that illegal hazardous waste disposal or failure to report thepresence of PCB's represents a continuing threat to the environment, must fail.[38] See Also *Newell Recycling Company v United States Environmental Protection Agency, 231 F.3d 204 (5th Cir. 2000)*(Finding that pre-1990 PCB disposal violations continued until 1995 clean-up of PCB's, saving EPA's 1995 complaint from 28 USC 2462). Unlike ongoing unpermitted waste handling, RWS's failure to run a single test once prior to the due dates gives rise to a right of action that accrued the day after the deadline was missed, and which does not reoccur each day so as to become a "continuing violation". *Frontier Stone, Supra.*

[38] In addition to the Presiding Officer's finding of a lack of actual or potential harm to a USDW, EPA's complaint acknowledges that MIT was demonstrated or not required for the wells in 1990-91 (prior to the alleged 1995 and 1996 failures), and that the wells were again MIT'd afterward at the next five year deadline. *Compl. Exh. 43 - Amended Complaint at paras. 45, 55, and 56.* EPA does not contest the fact that the unplugged wells were again MIT'd since the filing of the complaint to comply with the latest round of 5 year MIT's, and yearly reporting data (showing constant pressure indicating positive MI), which indicates that in fact MI has been maintained in recent years, which when combined with successful pre-1995/1996 MIT's, rebut EPA's requested inferences that MI was not "maintained" (versus "established" once every five years). Thus, the argument that the "establishment" violations somehow became "maintenance" or ongoing "operational" violations, or that they presented an "imminent" threat to drinking water, (violations which are not alleged in the complaints), cannot be maintained to avoid the tolling statute.

**e. EPA 28 USC 2462 Counter-Defense: FRCP 15 Relation Back Inapplicable Because EPA Claims Lack of Prior Knowledge As To Mr. Klockenkemper's Role In RWS, Not Mistake As To Name or Identity, And in any Event EPA had Knowledge Before Filing of Initial Complaint, Thus FRCP 15 Criteria Not Met**

Given her conclusion that MIT violations are continuing, Ms. Toney did not address EPA's FRCP 15 based relation back arguments. *12/27/06 Decision at 8, fn5; See EPA 8/28/06 Response to Respondents 7/21/06 Motion for Accel. Dec. at 14-18.* In the event the EAB finds 28 USC 2462 to bar Counts I and II, Respondents review their arguments that the FRCP 15 criteria for relation back are not met and thus cannot save the complaint. *See Respondents' 9/18/06 Reply To EPA 8/28/06 Response to 7/21/06 Motion for Accel. Dec. at 10-13.*

**i. Relation Back Not Available To EPA Because Mistake In Timely Filing Original Complaint Not Cured By Relation Back Of Untimely Amended Complaint, No Indicia of Mistaken Identity Here, FRCP 15 Criteria Not Met**

In the event 28 U.S.C. 2462 bars its claims, EPA attempts to invoke the equitable relief of relation back due to mistaken identity. *EPA 8/26/06 Response at 14-18. See FRCP 15(c).* However, as shown by its own analysis, EPA cannot meet three of the four elements required before the court can even consider same, let alone grant any relief from otherwise applicable 28 USC 2462. *Schiavone v Fortune*, 477 U.S. 21 (1986).

**ii. EPA "Mistake" Like That Of Barred Plaintiff In *Schiavone v. Fortune, 477 U.S. 21 (1986)* Since EPA Had Actual And Constructive Knowledge of Klockenkemper and His Roles In RWS Prior to Time of July 9, 2001, Filing**

In *Schiavone*, cited by EPA in support, Plaintiffs mistakenly sued Fortune Magazine rather than its publisher, Time, Inc. despite that fact that Time was clearly listed as the owner of the "Fortune" Trademark in the magazine (Fortune was actually a division of Time). By the time Plaintiffs amended to name Time and re-served summons, the 28 USC 2462 filing deadline had passed. *477 U.S. at 14-15.* The court noted that:

"This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs. An examination of the magazine's masthead clearly would have revealed the corporate entity responsible for the publication." *Id.*

### A. IDNR May 19, 1999, Referral Specifically Identified Mr. Klockenkemper's Roles and Offices, Lack of Knowledge Not 15(c) Mistake as to Name, Identity or Misnomer

EPA, like the Plaintiff in *Schiavone,* cannot avail itself of the mistake exception since the record clearly reveals that IDNR's May 19, 1999, referral specifically named and described Mr. Klockenkemper's role as RWS's principal, president, treasurer and secretary, and referenced an enclosure for further information. *See C. Exh. 33 - 5/19/99 IDNR Referral of RWS to EPA at p2, top.* The enclosures to the referral included a corporate information sheet wherein Mr. Klockenkemper's roles as the sole corporate officer are specifically listed by IDNR for EPA. *C. Exh. 33, at 13th page of Attachments.*

EPA has proffered no evidence to explain "Complainant's mistake in not naming him initially" (*8/28/06 EPA Response to Motion for Accel. Dec. at 17*), or the details of how and when it "realized its error in not initially naming Edward Klockenkemper". *Id. at 19.* EPA merely claims that it had no knowledge as to the Mr. Klockenkemper's role in RWS until after the initial complaint was filed. *See 10/3/06 EPA Response to Motion to Compel at 6; See Also Respondents' 9/18/06 Motion to Compel Production of Attachments to C. Exh. 33 (5/19/99 IDNR Referral); and Respondents' 10/18/06 Reply.*

Given that FRCP 15(c) requires a showing of a mistake as to name or identity, EPA has failed to carry its FRCP 15(c) showing as to the nature of the EPA's "mistake", which seems to alleged lack of knowledge as to Mr. Klockenkemper's role in RWS. Given that some showing of the nature of the claimed mistake is required, EPA has failed to demonstrate any mistake cognizable by FRCP 15(c).

Assuming EPA claims lack of knowledge, FRCP 15(c) relation back is unavailable for this type of (non-misnomer) mistake, as shown by the fact that the great majority of circuits hold that not knowing the identity of a defendant at the time of initial filing is not a "mistake" concerning the defendant's identity for purposes of FRCP 15(c)(3). *See Wilson v. United States, 23 F.3d 559, 563 (1st Cir. 1994); Barrow v. Wethersfield Police Dept., 66 F.3d 466, 469 (2d Cir. 1995),*

*amended by 74 F.3d 1366 (2d Cir. 1996); W. Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir. 1989); Jacobsen v Osborne, 133 F.3d 315, 320 (5th Cir. 1998); Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993); Powers v. Graff, 148 F.3d 1223, 1226-27 (11th Cir. 1998).*

As in *Schiavone*, and the afore-cited cases, lack of proper or timely investigation as to the proper defendants prior to expiration of the limitations period cannot be cured by a later FRCP 15(c) amendment[39]. Contrary to Seventh Circuit "mistake" caselaw, EPA has shown no indicia that:

a. it intended to name Mr. Klockenkemper on July 9, 2001;
b. that it failed to do so due to a clerical or procedural mistake;
c. that the original complaint adequately identified Respondent and his alleged actions; or
d. that this situation is one involving misnomer or mislabeling.

EPA cannot dispute the fact that the original July 9, 2001, complaint does not once mention Respondent Klockenkemper or even infer his alleged role as a violator once in the text thereof, and thus under Seventh Circuit FRCP 15(c) analysis, it would appear that EPA cannot avail itself of relation back. *C. Exh. 37 - 7/9/01 Complaint*.

Under 7th Circuit analysis, EPA's claims that it did not name Respondent Klockenkemper due to a "misplaced respect for the corporate status of Rocky Well..." , or because it "misunderstood the extent of" Respondent's "participation" in Rocky Well's activities (implying EPA knew of Respondent Klockenkemper's role), actually deprive it of eligibility for relation back relief, since prosecutorial discretion or a lack of correct understanding of what a corporate president does are not bases for a finding of a FRCP 15(c) "mistake". See *EPA 10/3/06 Response to Respondents' 9/18/06 Motion to Compel at 6. See Eison v. McCoy, Supra.*; *Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993).*

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[39] *See Eison v. McCoy, et al. 146 F.3d 468 (7th Cir. 1998*)(FRCP 15(c) relation back does not apply where lack of information as to identity or role of new defendant at time of original filing was basis for failure to name, Plaintiff must have intended to sue at time of original filing but failed due to mistake or oversight).

Similarly, EPA's admission that "Shortly after filing the initial complaint in July 2001...Complainant determined that E.J. Klockenkemper was the individual who made the business and operational decisions", also automatically precludes relation back to that untimely complaint, since EPA by its own story could not have intended to sue Mr. Klockenkemper at the time it was filed (a fact collaborated by the complaint's lack of any reference to him in the complaint personally or even passingly in a corporate function, and EPA's failure to show he personally caused the violations at any of the six wells).[40] *EPA 10/3/06 Response to 9/18/6 Motion to Compel at 6.*

This is so since lack of knowledge or later gained knowledge is not sufficient to allow relation back without a showing of mistake as to name or ongoing fraud. *See Eison, Supra and cases cited above.* Relatedly, EPA cannot fulfill the *Schaivone/FRCP 15* notice requirement because it did not even mention Mr. Klockenkemper in the first complaint or infer he might be personally liable as a SDWA "person" or "permittee".

Second, EPA's claim that it lacked knowledge as to Mr. Klockenkemper prior to filing of the Amended Complaint is patently false as demonstrated by EPA's own evidence. To wit, the May 19, 1999, IDNR referral specifically refers to Rocky Well's president: "The principal in this corporation has a history of being litigious, unresponsive to the Department and uncooperative...". *Compl. Exh. 33 at 2.* The body of the referral also states that, in addition to the NOV's attached to the referral, there was also a "listing of available corporate information is attached" to the referral which mentions Mr. Klockenkemper by name and lists his roles within RWS (which attachment EPA for some reason failed to provide in the January 30, 2006, PEX in this matter). *Id. at p2, and attachments thereto at p13.* (Emphasis Added).

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[40] This omission is crucial, since, as EPA admits, the amended complaint is nearly identical to the first complaint other than the addition of respondent Klockenkemper's name, his designation as an "operator", and the deletion of reference to RWS as the "permittee", and itself is by definition insufficient as to him since it specifies no wrongful conduct by him. Contrary to EPA's assertion, Mr. Klockenkemper's acknowledgment of his role in Rocky Well's oil operations does not automatically make him liable for violations at any one injection well, short of a specific showing by EPA that he misused Rocky Well as a corporate entity, or somehow personally operated the injection (versus production) wells at the time of violation. See e.g. *EPA 9/18/06 Reply to Respondents' 8/28/06 Response to EPA 7/21/06 Motion for Accelerated Decision at 13.*

### B. EPA September 8, 2000 NOV was Addressed to RWS c/o "President" Klockenkemper

Additionally, EPA's 9/8/00 NOV to RWS lists Mr. Klockenkemper in the address heading as RWS's "President", and contains the salutation "Dear. Mr. Klockenkemper". *C. Exh. 34 - 9/8/00 EPA NOV.* These two exhibits, alone, give imputed and actual knowledge of Mr. Klockenkemper's roles to EPA sufficient to have at least been further investigated during the pre-filing investigation it claims to have engaged in.[41]

Thus, EPA had sufficient notice of Rocky Well's simple, close corporate structure and Mr. Klockenkemper's offices, well before the July 9, 2001, complaint, as evidenced by the May 19, 1999, referral and September 8, 2000, NOV to RWS, and other documents (see below). Even in the highly unlikely event EPA truly did not know of Mr. Klockenkemper, at least by way of the May 1999 IDNR referral and supporting documentation attached thereto, a simple pre-July 1991, corporate records checks and/or Dun & Bradstreet run (as done after filing of the 2003 complaint) would have revealed his corporate roles, which were a matter of public record. (*see e.g. C. Exh. 60.1.a - 5/21/02 RWS Corporate Records from Nevada Secretary of State showing Mr. Klockenkemper's multiple offices*; C. *Exh. 60.1.b - undated printout from Nevada Sec, State showing multiple roles of Mr. Klockenkemper; C. Exh. 60.1.d. at p9 - 2/23/83 Illinois Annual Report for RWS disclosing multiple offices of Mr. Klockenkemper and listing Mr. Klockenkemper and J.J. Klockenkemper as Directors of RWS*; *C. Exh. 60.1.g - 9/27/05 D & B Report*).

### iii. Second, Third and Fourth Parts FRCP 15(c) Test Not Met By EPA

Given the foregoing, as the Plaintiff could not in *Schiavone,* EPA cannot meet the four prong 15(c) test:

> "Central to the resolution of this issue is the language of Rule 15(c)...Relation back is dependent upon four factors, all of which must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will

[41] EPA claims that when it received the May 19, 1999, IDNR referral, it "did not have enough information to proceed immediately with an enforcement case. Subsequently, U.S. EPA gathered additional information in this matter...and...Once it had it enough information to proceed with this case, on September 8, 2000...EPA issued a...[NOV] to Rocky Well Service, Inc. *8/28/06 EPA Response to Motion for Accel. Dec. at 18-19.*

not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period [120 days of filing]. We are not concerned here with the first factor, but we are concerned with the satisfaction of the remaining three. *Schiavone, Supra.*

As to the first element, and as in *Schiavone*, the claim against Mr. Klockenkemper arose out of the same conduct as that alleged against RWS, but Respondents' assert that there was a new claim added by way of EPA's amended complaint's unprecedented attempt to construe him as an "operator", "permittee" and "authorized" to inject by way of RWS permit. *See EPA 8/28/06 Response at p15; See 2/20/03 Amended Complaint at paras. 25 and 26.*

### A. Second Prong - Original Suit Not Timely Instituted, Notice Untimely For Counts II and III

With regard to the second prong, the Supreme Court's interpretation of this requirement is that the first suit must be instituted, and that notice thereof be given, within the applicable time period for service of the complaint. *Schiavone at 15.* Discarding EPA's argument that penalty actions should be tolled as if they were actions for injunctive relief, EPA cannot meet the second prong as to Count II or the pre-1996 annual reporting violations of Count III since the initial complaint was not timely filed. *Id.* The 7th Circuit, and Illinois, both require that the initial complaint be timely filed within the limitations period to afford relation back relief:

"Accordingly, even though it was based on the same conduct as that set forth in the original complaint, [the] amended complaint may not relate back to the date the original complaint was filed. The prior complaint, having been itself filed after the expiration of the one-year statute of limitations for the claims which it contained, was a nullity. That complaint cannot then act as a life-line for a later complaint...Illinois law on relation back is not more forgiving. Under Illinois law, relation back is allowed only when two requirements are met: (1) the original complaint was timely filed, and (2) the amended complaint grew out of the same transaction or occurrence set forth in the original pleading. See 735 ILCS 5/2-616(b); Digby v. Chicago Park Dist., 240 Ill. App. 3d 88, 608 N.E.2d 116, 118, 181 Ill. Dec. 43 (Ill.App.Ct. 1992).".

*Henderson v. Bolanda, 253 F.3d 928; 2001 U.S. App. LEXIS 9321, 9330 (7th Cir 2001)*

Consequently, EPA's FRCP 15(c) attempted relation back as to the Count II MIT or the Count III pre-1996 annual reporting violations cannot succeed, since the first complaint was untimely as to these violations as to Rocky Well, and derivatively, as to Mr. Klockenkemper. The alleged Count II MIT and Count III post-1996 annual reporting violations must be dismissed as to both Rocky Well and as to Mr. Klockenkemper, with prejudice.

Additionally, the U.S. Supreme Court in *Schiavone* required that the suit be filed, and notice be given to the party to be substituted, within the service period. *Id. at 16.* Despite the pre-suit notices, the first time Mr. Klockenkemper actually "knew" was being sued was shortly after February 20, 2003, when the amended complaint was filed and he later received it. *Schiavone at 15-16.*

Consequently, the requirement that original suit be filed and notice to Mr. Klockenkemper be given prior to the December 19, 2001, bar date, let alone within 120 days of July 9, 2001, was not met (even by the 1/25/02 NOV), and the second prong of notice within the FRCP 4m service period, is not met. This remains the case even if the January 25, 2002, NOV, is used as the notice date for Mr. Klockenkemper.

### B. Third and Fourth Prong - No Notice to Mr. Klockenkemper Until February 20, 2003, Outside of 120 Day FRCP 4m Period

With regard to the third prong, EPA cannot state that Mr. Klockenkemper had any way of knowing prior to February 20, 2003, that EPA would actually file suit to attempt to hold him personally liable as if he were a SDWA permittee, and nothing in the record available to Mr. Klockenkemper preceding the July 9, 2001, complaint has been cited by EPA to support such alleged notice. In fact, the total absence of any favorable precedent for EPA's action, and the fact that the sole case where EPA Region 8 attempted to do precisely what Region 5 attempts here was rejected by the ALJ in *In Re J. Magness, Dkt. No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996),* is further reason that EPA cannot meet the third prong since Mr. Klockenkemper would have no reason to think he would be sued based on case law at the time.[42]

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[42] This case is discussed in *Respondent's 4/15/03 Memo in Support of Motion to Dismiss at 9-10* (a copy of the case is appended thereto at Att. 1), as well as in *Respondents' 8/28/06 Response to EPA's 7/21/06 Motion for Accelerated Decision.* In *Magness*, a case with remarkable similarities to the instant matter, EPA Region 8, in a state without primary authority, attempted to impose liability and a civil penalty of $125,000 for alleged SDWA reporting and testing violations on J. Magness, Inc., and Jay D. Magness, its sole owner, director and shareholder, individually, based on his allegedly being a "person" as defined at SDWA Sec. 1401, 42 U.S.C. 300f(12), because he was the sole officer of J. Magness and was allegedly involved in the day to day operation of the injection well at issue (which well was actually "operating"). This is precisely the same allegation as made by Region 5 EPA in paragraphs 17 and 23 of the amended complaint as to Mr. Klockenkemper, except that EPA alleges only that he supervised "maintenance and production" activities, rather than performed injection. *Amended Complaint at paras. 17 and 23.* The ALJ in *Magness* stated:

This applies even if "identity of interests" had been established by piercing the corporate veil (which it has not) and even if the January 25, 2002, NOV to Mr. Klockenkemper is used as the notice required by FRCP 15(c), rather than the date of service of notice of the institution of this action (as required by the Supreme Court).[43] *EPA 8/28/06 Response at 15-16.* The mere fact that Mr. Klockenkemper knew EPA was pursuing Rocky Well in July 2001, does nothing to prove that Mr. Klockenkemper knew or should have known he would be pursued as if he were the permittee but for a "mistake" within 120 days of July 9, 2001, let alone nearly 2 years thereafter. *Id. at 16.*

**f. EPA's Unclean Hands (Lack of Investigative Diligence/Untimely Filing) And Underpinnings of 28 USC 2462 Preclude FRCP 15(c) Equitable Tolling Relief**

Equity and the basis for 28 USC 2462 further brook for denial of EPA's claims. A primary purpose of 28 USC 2462 is to prevent defendants from having to defend against stale claims and to be able to rely on the passing of time to extinguish such claims. *Order of R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944)(*The major purpose of statutes of limitations is to promote fairness and justice by preventing surprises through the pursuance or revival of claims that have been allowed to loiter until evidence has been lost, memories have faded, and witnesses have disappeared).

Furthermore, tolling of a statute of limitations is an equitable remedy, and this EPA must have "clean hands" with regard to the failure to timely name either Respondent. Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing

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> "...defining the word "person" in this manner , for purposes of the Act, does not confer direct personal liability on an officer, shareholder, director or employee of a corporation. The Complainant has not presented any legislative history that the definition was intended to remove the corporate shield...". (See *Magness*, at footnotes 14 and 15 and associated text).

Thus, Mr. Klockenkemper cannot be said to have notice of any case law indicating that he could be sued as if he were the "permittee" without piercing of the corporate veil

[43] Respondents again note that the *Lazarus I* court found the filing date for 28 USC 2462 purposes to be the date the complaint was actually filed with the RHC and served upon Respondent and became a matter of public record, thus the actual filing date of February 20, 2003, should be used for limitations and FRCP 15(c) purposes. *Lazarus I Initial Decision, TSCA Docket V-W-32-93 (1995) at 18*

on the existence of his claim. *Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th Cir. 2000)*. This doctrine focuses on a plaintiff's excusable ignorance and lack of prejudice to the defendant. *Leong v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003).*

Unclean hands may be an equitable defense as well as being assertable as a defense to a claim for equitable relief. *Scheiber v. Dolby Labs, Inc., 293 F.3d 1014; 2002 U.S. App. LEXIS 11878 (th Cir 2002)*(*Citing Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 794 and n. 92 (5th Cir. 1999)*. An equitable remedy, such as tolling of limitations or laches, cannot be used to reward a party's inequities or to defeat justice. *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993 (1945)* (Unclean hands closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief).

EPA has unclean hands in that, by its own account, it created the need to claim FRCP 15(c) relief by failing to timely and diligently investigate and file its complaint by September 1, 2000, when such delinquency was avoidable given the time allowed by the May 19, 1999 referral. As such, EPA cannot now seek equitable relief from 28 USC 2462 by way of FRCP 15. To wit, EPA's claims from September 1, 1995, and December 19, 1996 (Counts II and I, respectively) were made known to EPA by IDNR's referral by at least May 19, 1999, yet EPA did not even issue its first 9/08/00 NOV to RWS for over 15 months, and after the September 1, 2000, deadline for the Count II wells. *See C. Exhs. 33 and 34.*

While EPA states it had to conduct a pre-filing investigation (see above), which is not reflected in the record, it does not claim that either Respondent did anything to impede such investigation or hide their roles, and it fails to explain otherwise why it missed the September 1, 2000 filing deadline for Count II claims despite knowing of the cut off since at least May 1999. Compounding its errors, EPA claims in its *8/28/06 Response to the Motion for Accel. Dec*. that it "realized its error in not initially naming Edward Klockenkemper's in this matter...Not too long" after the filing of the 7/9/01 complaint. *Id. at 19.*

Yet, despite its newly acquired knowledge and its prior knowledge of the 12/19/96 violations, EPA fails to explain why it again missed the second impending 12/19/01 deadline for

the Count I claims as to Mr. Klockenkemper, electing instead to take its time in issuing the 1/25/02 NOV, and then, 4 months later, its 5/1/02 motion for leave to amend.

Given the only evidence of investigations provided by EPA in the record post-dates the issuance of its 5/1/02 Motion for Leave to Amend and the 1/25/02 NOV, (e.g. *C. Exh. 60.1.a - 5/21/02 Nevada Secretary of State printout, and C. Exh. 60.13 - Mr. Arkell's initial investagative report dated 6/17/03*), it is clear that EPA has failed to demonstrate diligence with regard to attempting to investigate the May 1999 referral to meet either of the 2000 or 2001 limitations deadlines. Thus, EPA has not demonstrated "excusable ignorance" as to why it did not meet the deadlines or did not "realize" who Mr. Klockenkemper was in timely fashion. *Leong v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003).*

**g. Prejudice To Respondents From Delays Bars Equitable FRCP 15(c) Relief**

**i. Mr. Klockenkemper's Memory Faded Due to Age of Violations And His Advanced Age**

Secondly, in Respondents' case, the prejudice to Respondents is patent, based, *inter alia*, on the fact that the hearing on the violations did not occur until over a decade after the violations, and the fact that Respondent Klockenkemper is of advanced age with the concomitant loss of memory that usually accompanies such circumstance. *See 7/23/08 Initial Decision at 22, finding 12, and at 24, finding 27.* Remembering events from over ten years ago is difficult for anyone, let alone for a near-octogenarian[44], and even EPA acknowledged Mr. Klockenkemper's difficulties in making specific recollections as to the evidence (some of which was from the 1980's) during the hearing:

> PRESIDING OFFICER TONEY: As I said, I believe he testified as to general dates as to the first two Exhibits 161 and 152. Mr. Klockenkemper, you testified that you took the photos in Exhibit 152, correct?
>
> THE WITNESS: Yes, I took the photographs.
>
> PRESIDING OFFICER TONEY: Do you recall when you took those photographs?

[44] EPA's investigator reported Mr. Klockenkemper's birth date as March 12, 1931. *C. Exh. 60 - Arkell Report, at p8 of Narrative.*

THE WITNESS: I believe sometime in the -- again, I would have to look at the back. But I believe sometime in the early 1990s, something like that, or maybe a little after 1988 when the -- when the real destruction on the Logan Harrell lease started with the new surface owner.

MS. McAULIFFE: Ms. Toney, we're now talking about, perhaps, a decade.

*4/26/07 Hearing Transcript at 108-109 (As Revised 10/30/07).*

The Presiding Officer also acknowledged that Mr. Klockenkemper was having trouble recalling whether certain RWS documents were included in the exhibits to the Respondents' Declarations. *4/26/07 Tr.* at 128.

**ii. Availability To Defense of RWS's and Other's Business Records Compromised By Passage of Time and 3 Year Record Retention Requirement In Illinois (*805 ILCS 410)***

Mr. Klockenkemper also testified that he could not produce a full set of business records relating to this matter due to the age of the violations, including records that would have contained information beneficial to Respondents' defenses (e.g. good faith attempts to access/MIT wells, work and monies spent on compliance attempts):

Q. [McAuliffe] Mr. Klockenkemper, how do you organize the business records for your corporation?

A. Well, we just have whatever we have for income and expenses. And then we add the records like that. I mean, that's all I can tell you about.

Q. Are the records organized by well or lease or in any form such as that?

A. Well, we do -- we organize it as far as expenses on the wells and on the leases, yes.

Q. Would the records tell me how many times you, Rocky Wells, or a contractor had been on a particular site?

A. Some of -- some of them would.

Q. And did you provide this entire record to the Court?

A. I couldn't -- I don't think I could give the entire -- I mean, you're going quite a ways back. So I don't believe I could give you an entire record.

*4/26/07 Tr. at 95*

In Illinois, a business such as Rocky Well is not required to keep records longer than 3 years, and, given that RWS had no notice of this action until 2000, RWS had no reason to keep records from the years preceding and during the years of violations, which all could be destroyed

by 1999.[45] *805 ILCS 410.* Similarly, Mr. Klockenkemper had no inkling that EPA would actually pursue him until at the earliest May 1, 2002, well after the 28 USC 2462 statute had run, thus preventing him from attempting to preserve evidence as to his personal liability, and/or to conduct his affairs with knowledge of EPA's expansion of the SDWA to an officer of a permittee. Additionally, the delays deprived Respondents of the ability to timely preserve the records of other companies and contractors RWS did business with by way of subpoena or request, in order to defend themselves in this matter.

As a result, Rocky Well and Mr. Klockenkemper have been severely prejudiced by the passage of time, and associated fading of memories and loss or destruction of its own and other businesses records potentially helpful to its defense, caused by the governments' delays in prosecuting this 1995-1996 case. Combining the foregoing, EPA has not demonstrated a right to equitable tolling relief and has unclean hands, and thus EPA may not avail itself of the equitable relief of tolling of the statute of limitations by way of FRCP 15(c) or otherwise, and for the same reasons has exposed itself to Respondents' related fourth affirmative defense of laches (see below).

Respondents thus assert that the EAB should find EPA's Count II claims one-time violations time-barred by 28 USC 2462 as to both Respondents, and Count I one-time violations time-barred as against Mr. Klockenkemper.

**h. In Alternative, Respondents Request Remand And Hearing on 28 USC 2462 Issues If EAB Declines to Apply Bar**

In the event that EAB declines to so find that 28 USC 2462 is applicable as requested due to equitable tolling or other avoidance, Respondents move for remand to allow a hearing as to the disputed factual issues underlying EPA's equitable tolling or other avoidance claims (e.g. time of

[45] *Fidelity National Title Insurance Company v. Intercounty National Title Insurance Company, 412 F.3d 745; 2005 U.S. App. LEXIS 11561 (7th Cir. 2005)*("There is nothing wrong with a policy of destroying documents after the point is reached at which there is no good business reason to retain them. *Cf. Arthur Andersen LLP v. United States*, 161 L. Ed. 2d 1008, 125 S. Ct. 2129, 2005 WL 1262915, at *5 (U.S. 2005). Without such a policy a firm or an individual could drown in paper. There is no legal duty to be a pack rat").

initial knowledge of violations/claim/RWS, due diligence investigating referral and RWS/Mr. Klockenkemper, reasons for years of delays between 5/19/99 referral, 7/9/01 Complaint, and 2/20/03 amendment), which hearing and further discovery was denied to Respondents by the 12/27/06 summary Decision.

### C. 4th Affirmative Defense Rejected: Laches

#### 1. Relevant Summary of Officer's Laches Findings Reveals Errors of Brevity and Content

After finding that the violations were "continuing" for 28 USC 2462 purposes, Officer Toney next rejected Respondents' related defense that EPA's claims should be barred based upon laches due to the age of the violations, the delay in the filings, the length of the various delays by EPA in investigating and prosecuting the matter, and the prejudice to Respondents caused by the delayed prosecution.[46] *12/27/06 Decision at 9-10; See 7/21/06 Respondents' Joint Motion For Partial Accelerated Decision at 12-13.*

Officer Toney, characterizing the instant matter as "an environmental action", cited *Park County Resource Counsel v. U.S. Dept. of Agriculture, 817 F.2d 609, 617 (10th Cir 1987)* for the proposition that she was under an obligation to invoke laches "sparingly...because 'ordinarily the plaintiff will not be the only victim of alleged environmental damage.' ". *12/27/06 Decision at 9.* The entirety of Officer Toney's consideration and rejection of this defense comprises one-paragraph:

> "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. Klockenkemper 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. 9, 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 parties are in agreement that all six wells at

[46] Respondents' "unclean hands" arguments with regard to EPA's attempt to invoke equitable tolling by way of FRCP 15(c) to avoid Respondents' 28 USC 2462 defense above are equally applicable to this defense, and are incorporated herein in regards to such laches defense.

issue have either been integrity tested in accordance with the Illinois regulations, or plugged. Respondents' Joint Motion at 3-4. *Id.*

**2. Laches Resulting From EPA Delays In This Matter, And Equity, Demand That Entire Action Be Dismissed With Prejudice**

The major purpose of statutes of limitations and laches is to promote fairness and justice by preventing surprises through the pursuance or revival of claims that have been allowed to loiter until evidence has been lost, memories have faded, and witnesses have disappeared. *Order of R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944).* Unclean hands may be an equitable defense as well as being assertable as a defense to a claim for equitable relief.[47] *Scheiber v. Dolby Labs, Inc., 293 F.3d 1014; 2002 U.S. App. LEXIS 11878 (th Cir 2002)(Citing Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 794 and n. 92 (5th Cir. 1999)*. An equitable remedy, such as tolling of limitations, cannot be used to reward a party's inequities or to defeat justice. *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814, 89 L. Ed. 1381, 65 S. Ct. 993 (1945)* (unclean hands closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief)

**a. Officer's "Delay" Timeline Incomplete, Understates Delays and Misinterprets "Unreasonable Delay"**

As an initial point of error, Respondents assert that the Officer fails to consider and mention several delays, and their resulting prejudice to RWS and Mr. Klockenkemper, especially in that they, *inter alia,* delayed Respondents' requests for and ability to prepare for hearing on the 1995-1996 violations until 2001 and 2003, respectively. Ms. Toney also cited inapplicable caselaw when she found the following timeline as not rising to level of "unreasonable delay" allowing laches in this matter:

[47]Respondent notes with regard to Officer Toney's comment that equitable defenses such as laches can be asserted only as to equitable actions, that the "continuing violations" doctrine the Officer used to preserve EPA's legal penalty claims against 28 USC 2462, is also equitable relief, and thus her finding as to the inapplicability of relief by way of the equitable doctrine of laches is inconsistent with the Officer's equitable tolling of 28 USC 2462's legal bar to this action.

5/19/99 - IDNR Referral
9/8/00 - RWS NOV
7/9/01 - Complaint
1/25/02 - EJK NOV
5/1/02 - Motion to Amend
*12/27/06 Decision at 9.*

Officer Toney did not apply or even discuss the single administrative case she cited for the "unreasonable delay" standard used by the Officer, or her apparent finding that laches does not apply to this action because the action is "equitable". *Id., citing In re Crown Central Petroleum Corp. No. CWA-08-2000-06 1/8/02) slip op. at 55.*

**b. *In Re Crown, No. CWA-08-2000-06 (1/8/02),* Unreasonableness Standard Exceeded Here Since *Crown* Hearing Occurred Within 3 Years of Violation, Rather Than 11 Years**

With regard to reasonableness of delay, *In Re Crown* involved a March 25, 1998, EPA CWA SPCC compliance inspection that revealed a lack of proper SPCC plan implementation (lack of secondary confinement, resulting in a release of oil and threatening to release more) where Respondent claimed laches due to the CAA complaint not being filed until March 30, 2000, *In Re Crown at 55.* In *Crown,* a hearing was afforded by EPA to Respondent by May 15, 2001, less than three years from the violations and little more than a year after the complaint. *Id. at 2.* In our case, while the complaint's filing against RWS within two years would comport with *Crown* in such regard, that is not the only delay alleged, and RWS is not the only Respondent claiming laches as was Crown. *Id.*

Given that RWS requested a hearing in August 2001 (*See 8/27/01 Answer of RWS*), the major delay being claimed here is not the 2 years in *Crown*, but rather the 2 years EPA sat on the 1999 referral, and the additional 2 years EPA delayed prior to adding Mr. Klockenkemper, causing the hearing to be delayed nearly 6 years from when requested by RWS, and over 11 years from the date of the RWS violations. These clearly are not the 2-3 year time frame found reasonable in *Crown.*

Had EPA joined Mr. Klockenkemper in the initial complaint or even shortly thereafter (as in prior to the remaining 12/19/01 bar date), he too would have had his day in court far, far sooner than in the instant case, such as in *Crown*. Thus, the Officer's reliance on *Crown* was inappropriate since the delays here are far more egregious and prejudicial than in *Crown*, and thus the reasonableness measurement of *Crown* (2-3 years) is insufficient here. EPA's admitted and avoidable failures to properly investigate the referral vis a vis Mr. Klockenkemper and failure to pursue him by July 1, 2001, has thus prejudiced both RWS and Mr. Klockenkemper by delaying their rights to a prompt hearing and causing further staleness of evidence and memories as to the 1995-1996 violations.

**c. Error Occurred In Not Beginning Timeline At Time Of 1995-1996 RWS Violations**

Ms. Toney's error occurs in part due to her shortening and oversimplification of the timeline for this matter, which should begin with the dates of the alleged violations as done in *Crown*, and should include the dates of EPA's alleged "investigations". Ms. Toney's approach thus ignores the nearly 3 years that the federally-approved Illinois UIC program sat on this matter prior to referring it, as well as the fact that EPAs' RJO's office did nothing on this matter between June 17, 2003, and May 18, 2005, due to no fault or action of Respondents. *See Index of Record (Docket)* at 2. Respondents propose the following timeline as more representative:

| **Date** | **Action** | **Delay(yrs from initial violation /from referral)** | **Comment** |
|---|---|---|---|
| 9/1/95 | Count II MIT violations | | |
| 12/19/96 | Count I MIT violations | | |
| 5/19/99 | C. Exh. 33 - IDNR Referral | 3.5/0 | Referral States/Shows EJK Sole Officer of RWS |
| 9/8/00 | C. Exh. 34 - RWS NOV | 5.08/1.5 | Untimely as to Count II |
| 7/9/01 | Initial Complaint - RWS | 5.80/2.2 | Untimely as to Count II |
| 1/11/02 | EPA Motion to Stay Proceeding 90 Days | 6.5/2.7 | Stayed To Proceedings to March 13, 2003 |

| | | | |
|---|---|---|---|
| 1/25/02 | C. Exh. 40 - EJK NOV | 6.5/2.7 | Untimely as to Counts I and II<br>Defective Under 62 IAC 240.150(a) |
| 3/13/02 | C. Exh. 41 - EPA Notice of Intent to Sue EJK | 6.6/2.8 | |
| 5/1/02 | Motion to Amend to Add EJK | 6.7/3 | |
| 5/21/02 | C. Exh. 60.1.a - Nevada Secretary of State Corporate Information for RWS | 6.7/3 | First Indicia Of Any EPA Investigation Into RWS<br>Shows EJK Sole Officer of RWS |
| 6/2002 [4/14/06 ] | C. Exh 60 - Arkell Report | 6.8/3 | States at p1, paragraph 1, of "Introduction" that initial investigative information was first provided to EPA June 2002, updated 2003 and 2006.<br>Most attachments generated 2005-2006 |
| 2/20/03 | Amended Complaint | 7.5/3.5 | |
| 4/15/03 | EJK Motion to Dismiss Amended Complaint | 7.6/3.6 | |
| 6/16/03 | Completion of Briefing on M/Dismiss | 7.7/3.8 | |
| 6/17/03 | *C. Exh. 60.13 - Mr. Arkell's initial investigative report* to EPA | 7.7/3.8 | First EPA investigative interviews conducted in May 2003 |
| 5/3/05 | RJO Kossek's Order Denying EJK Motion to Dismiss | 9.6/6 | Per Docket, **no activity on case by EPA RJO for 2 years** - from 6/16/03 (close of briefing) to 5/3/05 Order |
| 4/24-26/07 | Hearing | 11.5/8.0 | Over a Decade Later, 8 years from referral |

### d. 11 Year Delay Between Violation and Hearing Unreasonable, Unexplained and Prejudicial, Not Due to Excusable Ignorance

Adopting Respondents' arguments from the discussion of EPA's unclean hands and lack of diligence in connection with FRCP 15 relation back (above) Respondents assert that the delays depicted above, totaling nearly 12 years from violation to hearing, are not reasonable on their face. Neither has EPA validly and credibly explained the delays or lack of diligence, especially considering the fact that the record contains no indicia of any EPA investigation whatsoever until May of 2002, three full years after the IDNR referral.

To wit, EPA did not even issue its first September 8, 2000 NOV to RWS for over 15 months after the May 19, 1999, referral, thus missing the September 1, 2000, filing deadline for the Count II wells. *See C. Exhs. 33 and 34.* Next, while EPA states it had to conduct a pre-filing investigation (see above), which is not reflected in the record, it fails to explain otherwise why it missed the September 1, 2000 filing deadline for Count II claims despite knowing of the cut off since at least May 1999.

Compounding its errors, EPA claims in its *8/28/06 Response to Respondents' 7/21/06 Motion for Accelerated Decision* that it "realized its error in not initially naming Edward Klockenkemper's in this matter...Not too long" after the filing of the July 9, 2001, complaint. *Id. at 19.* Yet, despite its "newly acquired" knowledge of Mr. Klockenkemper and its prior knowledge of the December 1996 violations, EPA fails to explain why it again missed the second impending December 2001 deadline for the Count I claims as to Mr. Klockenkemper, electing instead to take its time in belatedly issuing the January 25, 2002 NOV, and then, 4 months later, its May 1, 2001 motion for leave to amend.

EPA also offers no explanation whatsoever as to why EPA's RJO took 2 years to decide Respondent Klockenkemper's Motion to Dismiss. *See Docket and Table Above.* As with EPA's failure to closely read the referral and/or timely conduct investigations, and timely file its complaints, RWS had no part or fault in the extremley long delay from 2003-2005, while the Complainant, EPA, is also directly responsible for the presence of an adjudicator in these matters.

Given the notice of Mr. Klockenkemper's role in the IDNR referral, and the fact that the only evidence of investigations by EPA in the record in this matter post-dates the issuance of its May 2002 Motion for Leave to Amend and the January 2002 NOV, (e.g. *C. Exh. 60.1.a - 5/21/02 Nevada Secretary of State printout, and C. Exh. 60.13 - Mr. Arkell's initial investagative report dated 6/17/03*), it is clear that EPA's claimed explanation, that the delay was attributable to the need for investigation, is not credible, since the investigation did not begin until May 2002, at earliest. This fact is supported by Mr. Arkell's confirmation that he did not begin his investigation of Mr. Klockenkemper until May 2002, and that he gathered the documents included in C. Exhs. 60.1.a-60.1.e during the 2002 phase of his investigation. *4/25/07 Tr. H at 115-119 (Arkell).*

EPA has simply failed to demonstrate diligence with regard to attempting to investigate the May 1999 referral and Mr. Klockenkemper to meet either of the 2000 or 2001 limitations deadlines. EPA has yet to explain why it delayed filing of an action against Mr. Klockenkemper over 7 years after the date of the latest alleged MIT violations (December 19, 1996). Thus, EPA has not demonstrated "excusable ignorance" as to why it did not meet the 28 U.S.C. 2462 deadlines, or did not "realize" who Mr. Klockenkemper was in timely fashion prior to December 19, 2001. *Leong v. Potter, 347 F.3d 1117, 1123 (9th Cir. 2003).*

**e. Laches Appropriate Because No Equitable Relief Remains, No Ongoing Harm Shown By EPA, And Application Serves Purpose of Laches and 28 USC 2462**

At the time of the Partial Decision and to date, there was no injunctive relief to be had, and thus the leeriness of applying laches do to the existence of harm beyond to the Plaintiff need not deter such application here. *See Park County Resource Counsel v. U.S. Dept. of Agriculture*, 817 F.2d 609, 617 (10th Cir 1987). In fact, allowing EPA to delay prosecutions such as this one for over a decade would likely do more harm than good, especially in the event the operator, unlike RWS, was actually injecting into un-MIT'd wells, which did in fact lack MI.

Respondents note that laches is appropriate here since there was no harm demonstrated to a USDW by EPA, but (allegedly) only "programmatic harm" as found by the Presiding Officer's Initial Decision. *7/23/08 Initial Decision at 9.* The sheer amount of time between the violations, EPA's receipt of the referral, EPA's filing and refiling, and the resultant holding of the hearing 12 years after the violations is itself sufficient prejudice to Respondents to allow equitable relief here, and sufficient basis to state that enough is enough.

Considering the equities of this matter, given the fact that the 28 USC 2462 deadlines were missed by EPA and the extreme prejudice (prosecution after running of statute of limitations, lack of timely hearing, loss of evidence and memory) that has resulted to Respondents from EPA's dilatory and inappropriate prosecution of this matter, laches should attach to bar prosecution of all Counts as to RWS and Mr. Klockenkemper.

Such bar would serve the major purpose of statutes of limitations and laches by promoting fairness and justice by ameliorating the surprise, prejudice and cost, to Respondents

caused by EPA's pursuance of claims that have been allowed to loiter and idle until evidence was lost, memories faded, and witnesses have disappeared. *Order of R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944). Scheiber v. Dolby Labs, Inc., 293 F.3d 1014; 2002 U.S. App. LEXIS 11878 (th Cir 2002)(Citing Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 794 and n. 92 (5th Cir. 1999).*

**f. Officer Should Have Granted Respondent's Motion Denying Liability**

## D. EPA 7/21/06 MOTION ON LIABILITY: MOTION GRANTED AND ROCKY WELL SERVICE AND MR. KLOCKENKEMPER WERE ERRONEOUSLY HELD "JOINTLY" LIABLE

### 1. Standard of Review for Statutory Interpretation Relating To Jurisdiction Not Followed By Officer Toney

Subject matter jurisdiction is a court's statutory or constitutional power to adjudicate the case, and federal courts have limited subject matter jurisdiction and may only hear cases when empowered to do so by the Constitution and by act of Congress. *Radil v. Sanborn Western Camps, Inc., 384 F.3d 1220 (10th Cir 2004)*(A court must be satisfied that jurisdiction exists before proceeding to the merits of a case, and Plaintiff may be required to establish jurisdiction at an evidentiary hearing held prior to trial)

Where statutory jurisdiction turns on interpretation of statutory language, both parties are entitled to adduce evidence as to their competing interpretations and have an interpretation made by the trier of fact, thus statutorily-based jurisdictional affirmative defenses should not be dismissed prior to discovery, presentation and hearing of evidence on the jurisdictional interpretation issue *Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525; 78 S. Ct. 893 (1958)(*Error to strike affirmative defense based on differing statutory interpretations of whether, under a state statute, defendant was a "person" and "owner").

Affirmative defenses alleging overly broad governmental interpretations of environmental regulations (or alleging that fair notice of such interpretation was not provided) should not be stricken prior to development on the record and hearing. *In the Matter Of: Strong Steel Products, LLC., Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, MM-5-2001-0006 (Order*

-*10/27/2003 at p13)*. In such cases, each party may submit its interpretation of EPA's regulations, and the court will independently interpret the relevant regulations and apply them to the findings of fact, based upon a fully developed record in the matter. *Id.* at p22. The plain language of the regulation is looked to, and any ambiguities are resolved under principles of statutory and regulatory construction and interpretations set forth in applicable case precedent. *Id. See Also In Re Nibco, Inc., Docket No. RCRA-VI-209-H (Order of 5/29/96)*(Allowing defense to proceed arguing that enforcement action is barred because State determined that Respondent was operating in compliance with the State program, and because EPA may not rely on a state-authorization provision of a statute (here RCRA § 3009) to micro-manage a state program and second-guess state interpretations and rulings with which it may disagree.). Respondents assert that Ms. Toney erred in failing to properly apply the statutory interpretation standard, resulting in an improper finding of liability.

**2. Summary of Decision Granting EPA's Motion for Accelerated Decision**

Addressing Complainant's 7/21/06 Motion for Accelerated Decision, the Officer found RWS and Mr. Klockenkemper (personally and jointly) liable for Rocky Well's MIT violations as a "person". *12/27/06 Decision at 12-15; See Contra Respondents' 8/28/06 Responses to Complainant's 7/21/06 Motion for Accelerated Decision; See Also Respondent's 4/15/03 Motion to Dismiss Amended Complaint and Memorandum in Support, and Respondent's 5/14/03 Reply To EPA's 4/29/03 Response.*

**a. RWS Erroneously Found Liable Under Illinois SDWA As A "Person" Without Finding That RWS Was The "Permittee", Thus RWS Liability Not Established By Decision**

With regard to RWS, Officer Toney found RWS to be a "person" under 42 USC 300f(4)(c)(12) and 62 IAC 240.10, citing RWS's Answer to Amended Complaint at para. 16. *12/27/06 Decision at 10. See Amended Complaint at para. 16.* Notably, Officer Toney failed to find that RWS was the "Permittee" or "owner" even though such jurisdictional allegation is required and is found at paragraphs 25 and 26 of the Amended Complaint. *Id. See 62 IAC 240.150(a).*

Both Respondents object to such omission as error, since RWS is regulated exclusively as a "Permittee" and "Owner" under the Illinois SDWA, and not merely as a "Person" (thus the finding does not go far enough), and since, according to paras. 25 and 26 of the Amended Complaint, it is RWS's Permit that allowed EPA to find that Mr. Klockenkemper was also "allowed...to place injection fluid...into each of the wells... " and that he was "authorized to perform...injection" into the wells by way of RWS permit, thus attempting to make him subject to a requirement of the state UIC program consistent with 62 IAC 240.150.[48] *Amended Complaint at paras. 25 and 26.* Officer Toney also fails to find that RWS was an unpermitted violator, and thus her findings do not adequately establish EPA's jurisdiction over RWS as required by the SDWA.

**b. RWS's Affirmative Defenses Rejected, IDNR Amended Director's Decisions Withdrawing Count III Violations Ignored**

After concluding that RWS failed to comply with the MIT and Annual Reporting requirements as a "person", Ms. Toney dismissed RWS's affirmative defenses as relating only to penalty, rather than liability. *12/27/06 Decision at 11.* Respondents both object to the Presiding Officer's treatment and rejection of the 2004 IDNR Amended Director's Decisions that withdrew the underlying IDNR NOV's for Count III. *Id.; See R. Exhs. 96, 112-116; See Respondents' 7/21/06 Memorandum in Support of Motion for Accel. Dec. at 44.* Respondents assert that, given EPA's testimony that the state NOV's and Director's Decisions were an underlying basis for EPA's Count III, the cancellation of same extinguishes jurisdiction, or, in the alternative, that they raised material issues of fact as to the Respondents' liability for the Count III violations. *4/26/07 Tr. H. at 5-6 (Perenchio).*

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[48] As noted in the "statutory framework" section above, 225 ILCS 725/1 and 62 IAC 240.10 Define "Permit", "Permittee" and "Owner" such that the permittee, RWS, is the only person responsible for permit compliance: " "**Permit**" means "the Department's written authorization allowing a well to be drilled, deepened, converted, or operated by an owner"..."; "**Permittee**" means the owner holding or required to hold the permit, and who is also responsible for paying assessments in accordance with Section 19.7 of this Act and, where applicable, executing and filing the bond associated with the well as principal and who is responsible for compliance with all statutory and regulatory requirements pertaining to the well..."; " "**Owner**" means the person who has the right to drill into and produce from any pool, and to appropriate the production either for the person or for the person and another, or others..." (emphasis added).

### c. EJK Found To Be "Person" Under SDWA, But Not as a Permittee Or Unpermitted Violator, And SDWA Erroneously Found To Do Away With Corporate Form To Allow Corporate Permittee Officer Liability

As with RWS, EPA and Officer Toney characterize Mr. Klockenkemper as a "person" under the SDWA, but carefully avoid mention of his permit status (e.g. that he is not the permittee) and they do not allege or find that he should have had UIC permits for the six wells. *12/27/06 Decision at 12*. Ms. Toney summarizes EPA's arguments as follows:

> "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.[49] *Decision at 12.*

[49] Respondents challenge all three of the EPA's arguments set forth by the Presiding Officer, and incorporate here their arguments made in their 8/28/06 Response to EPA's 7/21/06 Motion and Memorandum in Support of EPA's 7/21/06 Motion for Accelerated Decision at 7-21; and the arguments set forth in the Respondent's briefs for his 4/15/03 Motion to Dismiss. In summary: 1) Under the Illinois SDWA, Mr. Klockenkemper is not a "person violating a SDWA requirement" since the MIT requirement did not attach to him; 2) the determination of the whether the state program regulations are adequate and as stringent as the federal requirements was made on March 3, 1984, when the state program was approved under 42 U.S.C. 300h-4 (*See 40 CFR 147.701, and Amended Complaint at paras. 9-12*), and EPA Region 5 SDWA enforcement staff are not the appropriate officials to challenge, ensure the adequacy of, or rewrite the state regulations, but rather must enforce them as written; 3) Under the Illinois SDWA, RWS, not Mr. Klockenkemper, is the permitted "permittee and owner" of the wells at issue, and thus neither the federal or state regulations apply to him.

### i. Toney Erroneously Finds Legislative Intent of Federal SDWA Is To Ignore Corporate Form of A Permittee When Enforcing SDWA Per 42 USC 300h-2's Inclusion of "Officers" as "Persons" Under Federal SDWA

Officer Toney first looked to the SDWA, quoting 42 USC 300h-2, but emphasizing the "any person" phrase. *Id. at 12.* Ignoring the qualifying "who is subject to a requirement of an applicable injection control program...[and]...is violating such requirement" part of 300h-2, Ms. Toney then quotes the all-encompassing federal SDWA definition of "person" for the novel, and unprecedented, proposition that the legislature's inclusion of "officers...of any corporation..." as "persons", indicates Congress's intent that EPA ignore the corporate form of RWS when enforcing the SDWA:

> "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." *Id. at 12.*

Respondents assert as error the Presiding Officer's reading of such provision as allowing EPA to avoid "piercing the corporate veil" by asserting direct liability on corporate officers as if the officer was himself a SDWA permittee or a "person" who should have had a permit, and in any event, given the ignorance of the phrase "who is otherwise liable", such construction creates a third category of liability that does not exist on the face of the statutes at issue.[50] *Id.*

### ii. Officer Toney Erroneously Finds That Illinois SWDA Also Allows For Direct "Officer Liability" By Way of Definition of "Person", Despite Illinois SDWA Only Providing For Revocation of Permit For Permittees Whose Officers Cause Permittee to Violate Administrative Cessation Orders

Next, Ms. Toney turns to the Illinois Oil and Gas Act, 225 ILCS 725, which was adopted by Illinois and EPA as the federal SDWA in Illinois, for language defining what she believes a SDWA regulated "person" to be:

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[50]Respondents challenge this misreading reformulating the SDWA as erroneous at law, since the SDWA does not state anywhere that the corporate form should be ignored, and, *inter alia*, since it creates a third prong of SDWA liability not contemplated by the liability and permitting provisions of 62 IAC 240 or 225 ILCS 725, which only hold 1) permittees and 2) unpermitted injectors/operators, liable, but not of the officers or directors of either.

> "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, govermental 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." (Emphasis in Original) *Decision at 12-13*.

While Officer Toney correctly determined that there are two prongs of SDWA liability under the Illinois SDWA: 1) Permittees; 2) Persons engaged in unpermitted activities for which they should have a permit (e.g unpermitted owners or permittees), she failed to follow her own reading of the SDWA. *Decision at 12-13. 225 ILCS 725/8a.*

### A. Officer Toney Ignores 225 ILCS 725/8a Jurisdictional Requirement That a "Person" Be "Engaged in Conduct or Activities Required to be Permitted"

However, Officer Toney entirely ignores the very language she quotes that requires a "person" to be "engaged in conduct or activities required to be permitted", and fails to discuss this jurisdictional requirement *Id.* As such, Ms. Toney's statutory analysis is fatally incomplete.

### B. Officer Toney Ignores Illinois SDWA Provisions Providing For Permit Revocation as only Penalty for Corporate Officer's Misconduct (*225 ILCS 725/8a(3)*)

Officer Toney's assumed legislative intent also fails to address the fact that the Illinois UIC program provides the sanction of revocation of a corporation's permit in the instance where an officer/director of a corporate permittee (with more than a 5% interest in the permittee) has failed to cause the permittee to comply with a final administrative order.[51] Given that the

[51]225 ILCS 725/8a provides: "If the Department finds that a person or permittee has failed to comply with a final administrative order, the Department may immediately order the cessation of operations

legislature specifically provided sanctions against the permittee, and not against the officer/director who failed to act to cause the permittee to comply, the officer/director cannot be said to be intended by the legislature to be liable under the SDWA as if he was the permittee, or else they would have expressly said so, having contemplated and dealt with, in a relatively severe manner, an officer's managerial failure. *225 ILCS 725/8a(3)***.**

### iii. Officer Admits That 62 IAC 240.780 Requires Reporting By "Permittee", Not "Person", But Erroneously Attempts to Infer That Any "Person", and Not Just Permittee, Is Responsible For MIT

Officer Toney then looked at the implementing regulations of the Illinois SDWA for further instances were the word "person" is used in conjunction with the instant MIT and Annual Reporting violations . *Decision at 13; 62 IAC Part 240 (Oil and Gas Rules).* At the outset, Officer Toney acknowledged that the Count III violation's underlying regulation (62 IAC 240.780(e)) states that the "permittee" (not "any person") is required to submit the reports. *Decision at 13.*

However, ignoring the inconsistency with the above-cited reporting provision (240.780) and internal inconsistency (240.760(e)(6)), Officer Toney attempts to infer that the passive voice of a portion of the MIT regulation at issue (240.760(e) - "[MIT] shall be performed"), in conjunction with the enforcement provision 62 IAC 240.150 applying the SDWA to "any person engaged in conduct or activities required to be permitted" (defined further as "any natural person" at 240.10) " allows the inference that a "natural person" such as Mr. Klockenkemper may be held liable as a matter of law for a permittee's failure to MIT as a "person":

> The Illinois UIC regulations Respondent Klockenkemper is alleged to have violated at times refer to the "permittee" (see 62 LkC § 240.780(e) which provides that the *"permittee of* each Class Il 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

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or the portions thereof relevant to the final administrative order... The Department shall refuse to issue a permit or permits, and shall revoke any permit or permits previously issued if...(3) an officer, director, partner, or person with an interest in the applicant exceeding 5% failed to abate a violation of the Act specified in a final administrative decision of the Department

> "any permittee, or *any person* engaged in conduct or activities required to be permitted under the Act." 62 LAC § 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. *Decision at 13*. (Emphasis added by Ms. Toney)

The totality of Officer Toney's statements here effectively acknowledges that the determination of whether Mr. Klockenkemper can be held liable for the RWS MIT violations turns on whether he himself was a permittee or was a person engaged in any conduct which required a SDWA permit. *Id.* However, it is at this point that Officer Toney's analysis goes fully awry, since she again errs by directing the remaining inquiry into caselaw discussing whether a corporate officer can be a "person" liable for a permittee's violations, without a first stating it is necessary, at this point, to determine whether the "person" 1) was a permittee who violated RWS permit; or 2) was somehow engaged in conduct that required a permit, such inquiry being required for SDWA liability by *62 IAC 240.150 and 225 ILCS 725/8a.*

**iv. Officer Cites Unsupportive "Continuing Illegal Operation" Caselaw to Support Mr. Klockenkemper's "Officer Liability" As a "Person" Under SDWA Without Piercing Corporate Veil**

Rather than engage in an analysis of the two SDWA liability prongs (was Mr. Klockenkemper a permittee or did he engage in conduct requiring a permit, the answer to both of which is clearly "No," thus ending the inquiry short of piercing the corporate veil), Ms. Toney incorrectly moves directly to non-SDWA caselaw holding that a corporate officer may be held liable where the officer directly participated in or caused the unpermitted operations or waste disposal practices of his company (a line of "continuing violation" illegal operation cases which ALJ Pearlman rejected as inapplicable to a failure to test in *Frontier Stone*.) *Decision at 13.*

### A. *In re Roger Antkiewicz & Pest Elimination Products of America, Inc., 8 E.A.D. 218, 230 (EAB 1999)*: Inapplicable Failure to Obtain FIFRA Distribution Permit/Violation of Cessation Order/Illegal Pesticide Sales Case

Officer Toney first cites, without discussion, to a FIFRA case where the owner/president was held liable because he was personally involved in the decisions to import, repackage, relabel and resell a regulated pesticide to the public:

> "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)." Decision at 13.*

Unmentioned by Officer Toney is that, unlike Mr. Klockenkemper, Mr. Antkiewicz had knowingly failed to cause his company to register and obtain a FIFIRA permit to conduct activities with the pesticide at issue, where he knew the ongoing handling and sales of the pesticide was violating a cessation of operations order, and where he misled both customers and the inspectors as to the ongoing illegal conduct. *In Re Antkiewicz* at 222-229, 230.

In *Antkiewicz* evidence showed that the company, "PEPA", under the hands-on direction and instruction of its president, Mr. Antkiewicz, imported, repackaged, relabeled and periodically delivered heavy-duty pesticides inside pressurized spray tanks to its customers, and PEPA was held to therefore be "distributing" a pesticide it had "produced" (i.e., repackaged and relabeled) at its facilities. *Antkiewicz at 222-229, 230.* As such, its repackaging and relabeling facilities were required to register to be permitted under FIFRA to engage in this affirmative conduct. *Id. See 7 U.S.C. §§ 136e(a), 136j(a)(2)(L).* Under FIFRA, like SDWA, both permittees who violated a permit, as well as those who engaged in an unpermitted activity under FIFRA (importation, repackaging, distribution without a permit) could be liable "persons". *FIFRA §§ 7(a), 12(a)(2)(L); 7 U.S.C. §§ 136e(a), 136j(a)(2)(L).*

Mr. Antkiewicz was found personally jointly liable for a $7,000 penalty (reduced from the proposed penalty of $29,500) due to the facts that he knew of and directly participated in the ongoing importation, handling and distribution of the dangerous controlled pesticides (including

ordering the substitution of one pesticide for another, and making sales calls to help distribute the pesticide). He knew that his company was supposed to register the activities, he did not cause his company to obtain the registration permit, he was not forthright with EPA inspectors and customers regarding the pesticides, and he did not cause the illegal activity to cease, or obtain a permit despite his knowledge that his company did not have a permit for it, and most importantly, despite having received a stop order from EPA. *Antkiewicz at 222-229, 230.*

Respondent is not accused of being a "person" engaged in any ongoing illegal conduct or with operating RWS or himself without a permit, or of promoting or directing an ongoing illegal unpermitted operation. There is no ban, cessation or stop order issued to RWS in the record, let alone one that RWS is accused of violating. *See Amended Complaint.* RWS's singular inability to obtain timely MITs on six inactive wells, is a "far cry from the ongoing operation of a facility without a permit", and totally unlike the illegal unabated introduction of a hazardous pesticide into commerce in the face of a stop order. *Frontier Stone, Supra at 4-5.* Thus *Antkiewicz* is inapplicable to find Mr. Klockenkemper to be a "person" who engaged in and fomented unpermitted activity under the SDWA, as did Mr. Antkiewicz under FIFRA.

### B. *United States v. Pollution Abatement Services of Oswego, Inc., 763 F. 2d 133, 135 (2d Cir. 1985)*: Inapplicable CERCLA Illegal Unpermitted Landfill Cleanup Case

Next, Officer Toney cites, without analysis, to another illegal operation CERCLA case to find that "there is no reason to shield from civil liability those corporate officers who are personally involved in or directly responsible for statutorily proscribed activity.":

> "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). Decision at 13.*

*Pollution Abatement, 763 F. 2d 133 (2d Cir. 1985)* was a CERCLA case, where under CERCLA, the term "any person" is expressly limited to 4 potentially-responsible party categories, and, like the SDWA, CERCLA does not impose general liability on an individual defendant as a "any person", but rather only as a "generator", "arranger-transporter", "owner/operator" or "acceptor" of hazardous wastes *See 42 U.S.C. Sec. 9607 (CERCLA 107)*. Thus, like the Illinois SDWA, under CERCLA a "person" can only be held liable if he also is engaged in a violative activity, and not merely because he was an officer of a company that fit within one of the categories. *Id.* CERCLA, unlike the SDWA, also provides strict joint and several liability, thus any contact with a regulated substance resulting in the substance having to be cleaned up by EPA renders a "person" who handled a hazardous waste liable for all costs of the cleanup. *Id.*

The defendants in that case, who were actively operating an illegal unpermitted hazardous waste landfill for over 15 years in the face of numerous NOV's and stop and cease operation orders, were held liable as "persons" who fell withing one of the four potentially responsible categories of liability (e.g as a "person" who engaged in the generation, acceptance, or transport of a regulated substance), and not merely because they were "persons" as defined in CERCLA. *United States v. Pollution Abatement Services of Oswego, Inc., 763 F. 2d 133, 135 (2d Cir. 1985)*. Unlike those defendants, Mr. Klockenkemper was not found to have "engaged" in any ongoing illegal activity in violation of the SDWA.

### C. *In re Safe & Sure Products, Inc. and Lester J. Workman, 8 E.A,D. 517 (EAB 1999)*: Unsupportive Illegal FIFRA Distribution Case Where Corporate Veil Was Pierced, Hearing Was Required On Personal Liability

The third case cited, again without analysis, is another FIFRA matter, *In re Safe & Sure Products, Inc. and Lester J. Workman, 8 E.A,D. 517 (EAB 1999)*:

> "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)." *Id. at 13.*

Therefore, Officer Toney's lack of discussion "shields" the fact that the *Workman* Presiding Officer actually pierced the corporate veil of sole proprietorship Safe & Sure, Inc. to find Mr. Workman liable. Evidencing the fact that a tribunal must respect the corporate form unless abused by the beneficiaries thereof, even then it must apply the traditional piercing analysis prior to doing so. *Workman* at 524. Also unnoted by Ms. Toney is the fact that, unlike Ms. Toney, the Presiding Officer in *Workman* refused to grant an EPA motion for accelerated decision as to Mr. Workman's personal liability under FIFRA and under the PCV theory, to allow him a full and fair hearing on the issue:

> "(15) The Region moved for a partial accelerated decision on Mr. Workman's liability for Count 1 and Safe & Sure's liability for Counts 2–85, arguing that the record contained no evidence that refuted these charges. Tr. at 11–12. The Presiding Officer denied the motion in the spirit of giving [Mr. Workman] the full and fair opportunity to defend against these charges." Tr. at 14." *Workman at 523, footnote 15.*

Another distinction ignored by the Officer is that, like Mr. Antkiewicz, Mr. Workman continued for years to engage in the illegal unregistered unpermitted commerce of controlled hazardous pesticides all the while refusing to obtain a permit for such activities, and despite notice, numerous stop and cease orders, court actions, and attempts by EPA to help him come into compliance. *Workman at 522-523.*

Unlike the EPA's hoped for inference, Workman was not held liable merely because he was a "person" who was the sole officer and ran the violator company, but rather because his company had no permit and he himself engaged in the specifically prohibited conduct without a permit (e.g. was a person who directly handled and arranged for handling and selling of pesticides without a permit). *Id. at 524.* Thus, this case cuts against the Officer's findings that Mr. Klockenkemper can be held liable independent of the two pronged Illinois SDWA liability scheme, and indicates error by the Officer in failing to dismiss, denying further discovery and/or denying a hearing on the statutory interpretation/liability issue. *Id.*

### D. *In Re Sunbeam Water Co., Inc., Docket No., 10-97-0066-SDWA, 1999 ALJ Lexis 79 (1999)*: Inapplicable Illegal Operation Of PWS In Violation of Stop Order Case

Finally, as did EPA, and Officer Kossek before her, Officer Toney cites to *In Re Sunbeam Water Co., Inc., Docket No., 10-97-0066-SDWA, 1999 ALJ Lexis 79 (1999),* attempting to equate a father-son team's continued illegal operation contrary to the requirements of an administrative order, to Mr. Klockenkemper's status as RWS officer. *12/27/06 Decision at 13; See EPA 7/21/06 Memorandum in Support at 43.* As with the other cases reviewed above and cited by EPA (see discussion below), the *Sunbeam* case is inapplicable as support for EPA's and the Officer's interpretation of SDWA jurisdiction, since they do not create an independent avenue of statutory liability beyond the permitted, and unpermitted, variety.

First, *Sunbeam* involved violations of a CAFO (e.g. a contract between the individuals, the company, and EPA), and there is no CAFO involved here. *Id.* Second, Sunbeam's president was alleged and proven to have knowingly operated the PWS and "refused" to cause the corporation to comply with the SDWA administrative order, but no such allegation as to Mr. Klockenkemper is contained in the amended complaint as to any illegal operation.

Third, individual SDWA liability was not alleged against the Sunbeam president in the administrative complaint as in our case, but rather was sought only after he personally signed a consent order, after notice of violation, after refusal to comply, and after adjudicative procedure, and public comment. Thus, his liability was effectively based upon a contract or contempt theory for his intentional violation of an agreed order, rather than direct individual liability under the SDWA as a "person" for whatever violations led to the CAFO in the first place. By signing the CAFO in his personal capacity, Sunbeam's President agreed to be a "person subject to a requirement" of the SDWA.

In the instant scenario, unlike in the *Sunbeam* case, EPA and the Presiding Officer "short circuit" the constitutionally and legally required notice and hearing requirements of the SDWA, and instead impose direct SDWA liability on an individual officer, without being troubled by such constitutionally-mandated procedures such as the right to present a liability defense to a fact-finder by way of testimony at trial or hearing. *Tull v. United States, 481 U.S. 412; 107 S. Ct. 1831 (1987)*(Where defendant contended he was not liable because EPA lacked CWA jurisdiction

since the property in question did not constitute a "wetlands", and where the parties disputed the interpretation of the term as applied to the facts of the case, defendant had a Seventh Amendment right to a jury trial to determine his liability, which was violated by trial court denying same and allowing only a bench trial as to whether EPA had jurisdiction based on its interpretation of "wetlands").

### 3. Respondents' Arguments in Opposition to Granting of EPA Motion on Liability Ignored: "Facts" Found By Officer to Establish Personal Liability For EPA Insufficient For SDWA Liability

After citing the afore-cited cases for her framework for personal liability under the SDWA, Officer Toney made the following findings of fact she believed established that Mr. Klockenkemper was personally liable within that framework:

> "1. Respondent Klockenkemper is the President, Treasurer and Secretary and Agent for Rocky Well Service Inc. Answer para. 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 Ex 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.[52]"

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[52][footnote 8 in Decision]: "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.

Officer Toney then summarily dismissed Respondents' many well pleaded arguments as being rebuttal to EPA's arguments but not raising any genuine issues of material fact that should be heard at hearing, and thus liability could be decided summarily without hearing from or cross-examining witnesses or taking and weighing of further evidence as to liability:

> "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. [C. Exh. 60.14a-60.14g]. 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. *12/27/06 Decision at 14.* (Emphasis Added).

**4. Finding One: Irrelevant and Incorrect Application of Illinois SDWA- Corporate Role Of Mr. Klockenkemper is Not SDWA Liability Criteria: Under 225 ILCS 725/8a First Inquiry Should Be Whether He Was Permittee**

With regard to the first finding, it is a matter of public record that Mr. Klockenkemper holds those offices. *See C. Exh. 60.1.a - Nevada Secretary of State Summary*. Even so, Respondents assert that such fact is irrelevant as to whether Mr. Klockenkemper himself engaged in any prohibited conduct or conduct that required a permit, apart from RWS violations. *225 ILCS 725/8a; 62 IAC 240.150.* Rather, the first finding should be whether Mr. Klockenkemper was the permittee or not, and if not, the second inquiry should be whether he personally participated in or conducted any illegal injection operations at the wells which contributed to the MIT violations. *Id.*

**5. Finding Two: Incorrectly Reached And Incorrect Application of Illinois SDWA - Officer Toney Erred In Weighing Testimonial Evidence and Making Findings of Material Fact Adverse to Non-Movant Klockenkemper Based on Issues Involving Witness Credibility and Weight**

A major error occurred here where Officer Toney expressly stated that she was affording "cumulative evidentiary weight" and "probative value" to various written witness declarations in making her findings of material fact as to Mr. Klockenkemper's involvement and liability, despite Respondent's identification of significant discrepancies (which involve the six wells at issue) between the declarants' reported June 2003 statements to a government investigator (Mr. Arkell) and the 2005 declarations, as well as other numerous potential indicia of irrelevance, lack of credibility, presence of bias, and unreliability of the declarations relied on by the Officer for finding 2. *Decision at 14; See Respondents' 8/28/06 Response to EPA 7/21/06 Motion at 22-32; See R. Exh. 98 - Affidavit of E.J. Klockenkemper In Rebuttal To EPA Motion For Accelerated Decision.*.

**a. Officer Toney Violated Rule That Court May Not Weigh Disputed Testimonial Evidence, Make Credibility Determinations, or Draw Inferences From Facts Contrary to Non-Movant on Summary Judgement**

It is well settled that court on summary judgement may not weigh evidence, make credibility determinations, or draw inferences from facts adverse to the non-moving party:

> "On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Betaco, Inc. v. Cessna Aircraft Co., 32 F.3d 1126, 1138 (7th Cir. 1994); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1041 (7th Cir. 1993).* Rather, "the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994).*
>
> "Summary judgment is not appropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, 477 U.S. at 248.* We must look therefore at the evidence as a jury might, construing the record in the light most favorable to the nonmovant and avoiding the temptation to decide which party's version of the facts is more likely true. *Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999).* As we have said many times, summary judgment cannot be used to resolve swearing contests between litigants. *Weeks v. Samsung Heavy Indus., 126 F.3d 926, 933 (7th Cir.1997); Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406, 410 (7th Cir. 1997); Wohl v. Spectrum Mfg., 94 F.3d 353, 358 (7th Cir. 1996); Jackson v. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)."*

*Payne v. Pauley, 337 F.3d 767; 2003 U.S. App. LEXIS 13807 (7th Cir 2003).*

**b. Officer Denied Respondent Klockenkemper's Constitutional Right to Hear From And Cross Examine Witnesses And Right to Trial On Jurisdictional Statutory Interpretation Issue**

Thus, Finding 2, based entirely on the statements of declarants whose credibility and admissibility is put at issue by non-movant, and which admittedly contain hearsay, speculative assertions based on belief rather than fact, inflammatory statements and various discrepancies (*See Decision at 14*), was improper as Officer Toney impermissibly weighed testimonial evidence, made credibility determinations and made inferences against non-movant Mr. Klockenkemper, which should have only been determined after a hearing where the declarants testified. *Id.*

By denying Mr. Klockenkemper a hearing on the liability issue, where the statutory interpretation allowing EPA jurisdiction was disputed on the record and where one party's version was nonetheless accepted and liability assessed summarily based on dubious declarations of witnesses not subject to cross examination, Presiding Officer Toney violated Mr. Klockenkemper's Seventh Amendment right to trial on the SDWA liability issue. *Tull v. United States, 481 U.S. 412; 107 S. Ct. 1831 (1987)*(Where defendant contended he was not liable because EPA lacked CWA jurisdiction since, under his statutory interpretation, the property in question did not constitute a "wetlands", and where the parties disputed the interpretation of the term as applied to the facts of the case, defendant had a Seventh Amendment right to a jury trial to determine his liability, which was violated by trial court denying same and allowing only a bench trial as to whether EPA had jurisdiction based on its interpretation of "wetlands").

**c. Declarations Do Not Contain Material Facts - No Illegal Conduct Shown Therein, Or By Non-Well Specific Finding 2, Thus Finding Does Not Support SDWA Liability For Mr. Klockenkemper And 40 CFR 22.14 Burden of Proof Not Met By EPA**

With regard to findings 2(a)-(e) specifically, and without waiving objection thereto, Respondent Klockenkemper asserts that, collectively, the findings fail to show or prove that any

illegal operations or activity was going on, despite the Illinois SDWA requirement that the "person" be "engaged in conduct or activities required to be permitted under the Act." *225 ILCS 725/8a; 62 LAC § 240. 150(a).* Furthermore, the findings are not well specific, so one is unable to determine from their face that the "wells" allegedly addressed by the declarations are actually one of the six at issue, or even that they deal with any of the six injection wells.

In finding 2, the Officer did not cite any evidence that: 1) any of the alleged work allegedly done by or under Mr. Klockenkemper's direction was violative of the SDWA UIC regulations at issue or of the SDWA in general; 2) Mr. Klockenkemper required a SDWA UIC permit for any of the alleged work activities; 3) Mr. Klockenkemper himself ever illegally injected into any of the wells without a permit; 4) any illegal injection ever occurred by either Respondent, and 5) that any of the seven declarations actually specifically tie anything Mr. Klockenkemper allegedly did to any of the six injection wells at the times of violation or otherwise.

Unlike each of the prior cases cited by the Presiding Officer, where the officer or "person" himself was actively violating the statute without a permit and failed to have his company obtain one, Mr. Klockenkemper did cause proper permits to be in place and is not alleged to have himself injected without a permit, so the findings in number 2 establish nothing, and yet the assessment of SDWA liability cannot stand without such finding.

Thus, given that Mr. Klockenkemper is not the permittee, and given that EPA has failed to show he was personally engaged in activities that would have required a UIC permit under the SDWA, finding number 2 does not support personal liability as Mr. Klockenkemper either the "permittee" or as "any person" engaged in activities that require a permit. *225 ILCS 725/8a.; 62 IAC 240.150(a).* Mere "involvement" in a company's day to day activities does not, itself, impute liability for a permittee's inability to test all of its wells by the deadline. *In Re Magness, Supra.*

Given that the declarations do not allege or prove any illegal injection or establish that any activity required a permit, or even that any activity described was connected to any of the six wells or in violation of any SDWA UIC requirement, EPA presented nothing to prove its prima facie case under 225 ILCS 725, or to rebut Respondent Klockenkemper's sworn statements that he did not inject without a permit, did not commit illegal operations, and attempted in good faith

to cause RWS to comply with the UIC requirements. *See R. Exh. 98 - 8/23/06 - Affidavit of E.J. Klockenkemper at paras. 8, 10, and 11.*

Consequently, EPA failed to meet its 40 CFR 22.14 burdens, and the Presiding Officer erred in granting EPA's Motion for Accelerated Decision and in denying Respondent's request for dismissal of Mr. Klockenkemper. *See Respondent E.J. Klockenkemper's 8/28/06 Response in Opposition to July 21, 2006 EPA Motion for Partial Accelerated Decision as to Liability at 42.*

**d. Officer Erred As A Matter of Law In Relying on Disputed, Irrelevant, Unreliable, Hearsay, Inconsistent and Inadmissible Declarations At Summary Judgment Without Allowing Opportunity for Hearing**

With specific regard to the second finding, as well as to the Officer's abbreviated discussion of Respondents' objections to the seven declarations made in his *8/28/06 Response to EPA's 7/21/06 Motion*, Ms. Toney fails to note that Mr. Klockenkemper directly opposed the seven statements in his affidavit in support of the Motion, as did RWS. *See R. Exh. 98 - 8/23/06 - Affidavit of E.J. Klockenkemper; See R. Exh. 99 - Affidavit of RWS .*

Further, the Presiding Officer committed clear error by relying, over Respondents' objections, on written statements of alleged witnesses where the party against whom the statements were proffered cannot cross-examine or impeach same under oath, and where such reliance is had without a chance to evaluate the credibility, motives and memory of each testator under oath. *Allen v Chicago Transit Authority, 317 F.3d 696; 2003 U.S. App. LEXIS 262 (7th Cir. 2003)*(Summary judgement reversed where inconsistencies and contradictions between witnesses' prior statements required presentation of witnesses to jury for evaluation and findings of credibility and truth).

Where inconsistencies are shown on the record, and where the truth of a witnesses statements is challenged or is based upon hearsay, a party is entitled to have a jury find whether the statements were lies and to hear from the alleged originators of the hearsay statements. *Allen v. CTA, Supra, citing Perfetti v. First National Bank, 950 F.2d 449, 456 (7th Cir. 1991).* When a witness contradicts himself on material matters, and contradicts documentary evidence likely to

be accurate (such as time sheets, inspection reports, or police reports) the witness's credibility becomes an issue for the jury; it cannot be resolved in a summary judgment proceeding. *Allen v. CTA, Supra, citing Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570, 575 (7th Cir. 1987).*

Respondents challenged and renew their challenges as to the 7 declarations used in the second finding as not being based on personal knowledge, containing significant hearsay, and being irrelevant, unreliable and internally and externally inconsistent, as set forth in their *8/28/06 Response to EPA's 7/21/06 Motion at 24-32,* which Response Respondent Klockenkemper incorporates herein and summarize below as part of the finding by finding (e.g. 2(a) - 2(e)) discussion and objections to each of the declarations which Officer Toney relied on for finding 2 and to which she collectively afforded "cumulative evidentiary weight" to.[53]

### 6. Finding 2(a): "He personally performed work at the wells" - Unsupported By Single Witness as to One Wellfield

#### a. *C. Exh. 60.14.a (10/16/05-Paul G. Flood-Zander #2)*

Mr. Flood's statement is replete with lack of contemporaneity, second-hand knowledge, hearsay, and irrelevant statements, which render it inadmissible to support EPA's contentions.

#### i. Events Flood Allegedly Observed Occurred In 2004-2005, Not 1995-1996, And Not Tied to Zander #2

First, lack of contemporaneity to the time of the violations (1995-1996), and lack of first hand knowledge of what RWS or Mr. Klockenkemper was doing at that time at any of the Zander wells, is exemplified by Mr. Flood's admission that he did not own the land on which the

[53] Officer Toney's reliance on the declarations here is in direct conflict with her refusal at hearing on penalty to allow EPA to rely on a similar sworn and notarized declaration by IDNR inspector Rich Sussen, where Respondents raised the same objection as to a lack of cross examination: "And as one of the primary witnesses, we object to not being able to cross-examine him of course. And we believe there is prejudice involved with that for us not to be able to discuss the assertions set forth in the Affidavit." *4/25/07 Tr. at 204-205 (Gomez).*

Zander wellheads are located until "about 3 years ago" (e.g. 2002). *Compl. Exh. 60.14.a* at para. 2. Thus, it is not surprising that the alleged events Mr. Flood alleges to have observed first hand occurred in 2004 and 2005, and not circa 1995-1996. *Id.* at paras. 9, 10, 11, 12, and 13.

Flood specifically states the date he saw Mr. Klockenkemper was on July 29, 2005. *Id at para. 9.* Consequently, Flood's testimony is not probative of what Mr. Klockenkemper was doing at the Zander well in 1995-1996. The alleged acts that EPA's memorandum cites from the Flood statement, that Mr. Klockenkemper was working near the Zander wells and was digging pits in the past three years, have nothing to do with the December 19, 1996, alleged MIT or other reporting violations, or to any actions of Mr. Klockenkemper at that time. *7/21/06 EPA Memorandum* at 47.

Further, the fact that the pits were allegedly 10' x 12' x 20' sheds doubt on the Flood statement's and EPA Memorandum's inferred assertions that Mr. Klockenkemper actually dug them himself. *C. Exh. 60.14.a - Flood at para. 9.* Finally, Flood only states that he saw Mr. Klockenkemper working "near the wells" digging a pit, and that he drove over a field to get to the wells, not that he saw Respondent actually performing maintenance and operational activities working on the well at issue in 1995-1996, as EPA wishes to infer. *Id. at paras. 9, 12.*

**ii. Flood Recollections Based Largely On Hearsay From Others**

Furthermore, Mr. Flood's recollections were also admittedly based in large part on Dale Heitman's and Art Joergen's hearsay statements to him. *Compl. Exh. 60.14.a at para. 6* ("Heitman...told me that the Zander wells were not in operation"), *para. 8* ("Joergens...told me that it had not been plugged "), and *para. 12* ("Joergens told me there was some underground piping...).

**iii. Flood Directs Statements At Zander Wellfield, Not "the Wells" Or Zander #2**

The Flood statement's assertions as to 2004-2005 alleged events at the Zander lease offer no support for Officer Toney's apparent inference from her blanket statement that he "personally" performed work at the "wells" , that Mr. Klockenkemper worked on or operated the Zander #2 injection well at the time of the violation, and does not mention any other well than those on

Zander, thus it does not support the asserted finding as to all six of the wells, let alone Zander #2.

**b. Officer Toney's Sole Reliance on Flood Statement Error: Finding 2(a) must be Vacated as Improper, Unsupported And Inapplicable to Zander #2 or other 5 Wells**

Mr. Flood's attestations as to any pre-2002 events are irrelevant, purely inadmissible hearsay and speculation not based on first hand knowledge, in contravention of FRCP 56(e) and FRE 602. Given the above, and the fact that Officer Toney admittedly improperly assigned significant weight to this "evidence" over Mr. Klockenkemper's objections and assertions that it deserved no weight (indicating that the issue should have been determined at trial, and EPA forced to present its witnesses for cross examination), Ms. Toney's treatment of and reliance on the Flood statement to find he worked on "the wells" was clear error since it does not even prove Mr. Klockenkemper worked on the Zander #2 well, and finding 2(a) must be vacated as improper, unsupported, and not a basis for assessing liability. *FRCP 56(e) and FRE 602; Payne v. Pauley, 337 F.3d 767; 2003 U.S. App. LEXIS 13807 (7th Cir 2003).*

**7. Finding 2(b): "He also hired others to perform maintenance and operational activities at the wells" Unsupported by C. Exh. 60.14.d (Pierce - Atwood #1), 60.14.e, (Huelsing - Huelsing #1) 60.14.f" (Heitman - Atwood #1/Huelsing #1)**

**a. *C. Exh 60.14.d - 10/18/05 Donald G. Pierce Declaration (Atwood #1)***

**i. Pierce Admits No First Hand Knowledge As To And No Contact With Mr. Klockenkemper From 1985 to 2005**

Like Flood's, Pierce's statement suffers from a lack of an express or even inferred temporal connection of the events alleged therein to the alleged September 1, 1995, MIT violations or annual reporting violations for Atwood #1. *Id*. Contrary to FRCP 56(e) and FRE 602, Pierce admits that he "did not have any contact with Edward Klockenkemper for more than 20 years until the summer of 2005", and thus he has no first hand knowledge of what RWS or Mr.

Klockenkemper did between 1985-2005. *Compl. Exh. 60.14.d at para 10.* Consequently, he admits no first hand knowledge of anything Rocky Well or Respondent did or did not do as to the alleged 1995 MIT or reporting violations at Atwood #1.

Pierce does not specify any activities that occurred in relation to the Atwood #1 in 1995-1996, let alone any "maintenance and operational activities". *C. Exh. 60.14.d; See EPA Memorandum at 46.* Rather, Pierce cites alleged events that allegedly occurred in: "1971 to 1972" (para. 5 - well inoperable); "in the 1970's (paras. 6 & 7 - 1970's missing pipe incident and 1970's pit near Atwood #1); "three years ago" (para. 7 - reseeding of salt scar); "more than 20 years ago" (para. 8 - 1970's Pierce's request for fence around pit, Klockenkemper "belligerent", "rude" and "confrontational", observed that well was capped); "2001" (para. 9 - recalls Klockenkemper hiring "about" two men to paint oil tanks "many years ago"), and "2005" (para. 10 - No contact between Pierce and Klockenkemper from 1985 and 2005, when "[Klockenkemper] and three younger men" removed old piping, junk from surface of Atwood #1 site, and Pierce and Respondent allegedly had another confrontation). *Compl Exh. 60.14.d. at paras. 5, 6, 7, 8, 9, 10.* Pierce's use of the phrase, "It is my understanding" also indicates a lack of first hand knowledge as to any activities at Atwood #1 at the time at issue.

### ii. Pierce Admits to Several Confrontations And Arguments With Mr. Klockenkemper in 1970's, 1980's and 2005, Indicating Potential Bias

Pierce states he had several confrontations and arguments with Mr. Klockenkemper in the 1970's, early 1980's, and 2005. *Id. at paras. 6, 8, and 10.* This includes one in the 1970's where Respondent allegedly accused Pierce of stealing his well pipe, and where the police were called to his farm by Mr. Klockenkemper to investigate. *C. Exh. 14.d at paras. 6, 8 and 10.* Consequently, there also appears to be motive for this declarant to be biased against Respondents and potentially sway his testimony, which should have been allowed to be brought out on cross exam, thus Officer Toney erred in denying cross for this reason as well.

**iii. Pierce Attests Atwood #1 Well Was Not Operated After 1971 And Was Capped, Thus Not Supportive of Finding That Maintenance and Operational Activities Were Conducted By Hired Workers At Atwood #1 Well Or Other 5 Wells**

What the Pierce statement does do is tend to establish in non-movant's favor that the Atwood #1 well was inactive after 1971. *Id. at para. 5.* Contrary to EPA's suggested inference that there was illegal operation connected to the MIT violations at Atwood #1, the Pierce statement attests that the Atwood #1 well was not operated after 1971 and was capped. *Id. at paras. 5, 8.* Given the inoperable status of Atwood #1, EPA's requested inference that the MIT somehow rendered operation of Atwood #1 illegal is not supported, since, according to Pierce, the well was not in operation at the time of violation.[54] *Id.* Rather, the inference must be drawn in non-movant's favor that there were not any "maintenance and operational activities" or injections at Atwood #1 well either before, at or after the time of the violations. *FRCP 56, Payne Supra, Allen, Supra.*

In any event, the Pierce statement simply cannot lend a basis for the court to find that Klockenkemper "hired others to perform maintenance and operational activities" at Atwood #1 or any other of the five injections wells at issue. The declaration in fact illustrates both the lack of direct, or even indirect, evidence tending to prove EPA's assertion that Mr. Klockenkemper hired persons to work on or operate Atwood #1 at a time relevant to the violations. *EPA 7/21/06 Memorandum at 46-47.* Pierce's statement should have been given no probative value or weight in favor of EPA in this matter. *Payne, Allen, Supra.* .

**b. *C. Exh. 60.14.e - (Undated) Vincent J. Huelsing - (Huelsing #1)***

**i. V. Huelsing Declaration Defective: Not Dated As Required By 28 USC 1746 And Contains Unfilled Blanks Which Would Have Materially Related to Huelsing #1 If Filled In**

In addition to lack of first hand knowledge and lack of temporal relevance, Respondent again objects that, contrary to the requirements of 28 USC 1746, Mr. Huelsing failed to date the allegedly sworn document presented at *Compl. Exh. 60.14.e* (*Id. at p4 thereof*), and neither his

[54]This assertion is supported by several IDNR inspection reports, as well as RWS's affidavit. *See R. Exh. 99 - 8/06 Affidavit of RWS by E.J. Klockenkemper; C. Exhs. 70, 70.a., 7(b).*

initials nor a date appear on any of the 4 pages of his alleged sworn statement. *Id.* Thus, at the outset, EPA's proffer of the document as "sworn" is not entirely true, since the date it was sworn is not provided, and thus it does not comport with the rule. *28 USC 1746.*

Second, Respondent again objects that the document is materially incomplete, containing blanks with missing text at paragraphs 2 and 12, with regard to "ownership" of the Huelsing #1 lease "surface rights" and "production" of oil from the non-producing #1 injection well. *C. Exh. 60.14.e at paras. 2 and 12.* The omission is material since Mr. Huelsing's four page statement otherwise entirely fails mention Huelsing #1 by name, let alone connect that particular well to any activity of Rocky Well or Mr. Klockenkemper, or to any of Mr. Huelsing's alleged observations. Given that Mr. Arkell drafted the document (allegedly based on his 2003 notes, which were not produced to Respondents) and then proffered the statement to the declarant for finalization, such omission suggests that Mr. Huelsing did not agree with the desired attestation or else he would have filled it in. Such rejected proffer also may allow an inference that Arkell or EPA may have attempted to slant Mr. Huelsing's testimony in a manner favorable to EPA's case when the declarant could not so testify, casting further shadow on the impartiality of the EPA's investigation and the accuracy of Mr. Arkell's notes.

### ii. Huelsing Had No First Hand Knowledge Of Mr. Klockenkemper's Alleged Hiring of Workers For Operations or Maintenance By RWS Workers At Huelsing #1 Around 1995-1996

Any alleged "maintenance and operational" activity by Rocky Well or Respondent attributed in his statement to Mr. Klockenkemper was either before 1992, or in 2005, and Mr. Huelsing's statements cannot be temporally, or in any other manner, attributed by EPA or this court to proving liability or penalty for the December 19, 1996, alleged MIT violation at Huelsing #1. As such, Mr. Huelsing's statement does not established that he has first hand knowledge at to what Mr. Klockenkemper did at the wells circa 1995-1996, and in fact essentially admits he has none, since by his account the wells were inactive at that time . *FRCP 56 and FRE 602.*

### iii. Huelsing did not Observe 'Men Hired By Mr. Klockenkemper' At Huelsing #1 In 1995-1996 And States All Huelsing Lease Wells Were Inactive From 1992-2005

Mr. Huelsing states that none of the Huelsing wells were active in the thirteen years prior to 2005 (e.g. since 1992), which would cover the time of the alleged MIT violation and most if not all of the reporting violations for Huelsing #1.[55] *Compl. Exh. 60.14.e at para. 9.* Like Flood and Pierce, the only mention of contact with Respondents and hiring of men where a time frame is specified is related to alleged 2005 work at the Huelsing oil wells (without specifying which well), and there is no specific mention of Mr. Huelsing having observed RWS, Mr. Klockenkemper or any hired hands working in 1995-1996 at Huelsing # 1 or at any other Huelsing well. *C. Exh. 14.e. at paras. 5, 7.*

Further, it appears that most of Mr. Huelsing's alleged observations regarding the Huelsing well field are not fixed in time, but, like his failure to specify well numbers, are generic, broad-brushed and rambling. *Id.* at paragraphs 1 ("many years ago"); 4 ("At least one of the Huelsing wells was productive for many years"); and 6 ("a saltwater leak from one of the Huelsing wells a number of years ago...").

### iv. Statement Directed At Subpart C Production Wells, Not Huelsing #1 Injection Wells, And Is Thus Non-Specific, Immaterial And Irrelevant As To Proving Whether Klockenkemper Hired Workers To Perform Operations At The Huelsing #1 Injection Well, Or Any Other Injection Well

Third, it appears that the totality of Mr. Huelsing's statement (other than para. 13's purely speculative "belief" that Respondent was (in 2005, supposedly) injecting brine from another field to "one injection well") is directed at production wells (.e.g Subpart C oil wells), and not to a separately regulated injection well such as Huelsing #1. *Id.* As discussed in *Respondents 8/28/06*

[55]Two of EPA's attempted attributions occurred in 2005, and the third is undated, entirely conclusory, based on part on hearsay, and again is not specifically connected to Huelsing #1 or the alleged December 19, 1996, MIT or reporting violations. *EPA 7/21/06 Memorandum* at p45 .

*Response*, production rights to withdraw oil granted by a landowner are independent of the right to drill an injection well, which is granted by the State. *62 IAC 240.330(a); 8/28/06 Respondents Response at 14-15*. Further, the "operator" of the oil lease is not necessarily the "operator" of the injection well, depending on whether the operator of the lease applies for a permit to do so as a UIC permittee. *62 IAC 240.10 and 240.330*. The second prong of UIC liability comes into play here, applying where the oil lease operator operates the injection well (versus trucking off the brine) without a permit.

Thus, the lack of specificity, especially with regard to the failure to specifically attribute any action or even hearsay statement to Mr. Klockenkemper in connection with Huelsing #1 injections or operations around 1995-1996, renders the testimony immaterial, irrelevant and not probative as to Mr. Klockenkemper's role proximate to the time of the MIT violation. Thus, the testimony does not tend to make it more likely than not that Mr. Klockenkemper was engaged in conduct which required a permit at the time of the 1995-1996 violations, or that he committed any other UIC violation at the Huelsing #1 injection well which might somehow make him personally liable under the SDWA, and thus it is not admissible under FRCP 56(e) and FRE 602 either at trial or upon motion for summary judgement.

### v. Inconsistencies Between Alleged 2003 Statements To Federal Investigator And 2005 Declaration, Including Omission of Adverse, 2003 Statements from the 2005 Declaration, Required Explanation By Huelsing/Arkell And Indicate Possible EPA Bias

With regard to inconsistencies with prior statements, Mr. Huelsing's proffered undated statement differs materially from Mr. Arkell's June 2003 memorandum's rendition of Mr. Huelsing's alleged June 2003 statement to Mr. Arkell. *Arkell Report - Compl. Exh 60.13 at 11-12*. As set forth in the following table, Mr. Arkell's version of the statements made to Arkell and attributed to Mr. Huelsing in 2003 does not jive with those supposedly supplied by Mr. Huelsing in his November 2005 statement (The italics and quotations were added):

| | **Mr. Arkell - 2003** | **Mr. V.J. Huelsing-2005 Declaration (C. 60.14.e)** |
|---|---|---|
| **1** | "All four of these relatives originally signed a gas and oil lease with Melvin and Pat Niemeyer who then signed *the production rights for Huelsing #1* to Edward Klockenkemper." *Compl. Exh. 60.13. at p11, para.1* | "All four of these relatives originally signed a gas and oil lease with Melvin and Pat Niemeyer for the eight Huelsing wells. The Niemeyer's transferred *the production rights for the production wells* to Edward Klockenkemper many years ago." *60.14.e at para. 2* |
| **2** | "He said that *the well* was productive for many years..." *Id.* | "*At least one of the Huelsing wells* was productive for many years..." *Id.* |
| **3** | Vincent Huelsing said *the oil well* does not appear to have been operational..." *Id. at para. 2.* | "*None of the Huelsing oil wells* appeared to have been operational.." *Id. at para. 9.* |
| **4** | "...he has seen *it* working on several occasions for a day or two..." *Id.* | "...there have been periodic occasions when I have seen *one of the wells* working for a day or two..." *Id. at para. 9.* |

Especially glaring is the lack of attribution to "Huelsing #1 in the 2005 Declaration where Arkell's 2003 report summary attempts to relate that Mr. Huelsing had fingered Huelsing #1 in 2003. Such substantive change leads to the potential that Mr. Huelsing either materially altered his initial 2003 statement with regard to the Huelsing #1 well, since in 2005 Mr. Huelsing referred only to "production wells", or else the possibility that Mr. Huelsing never mentioned Huelsing #1 in the first instance. *Compare C. Exh. 60.13. at p11, para.1 to C. Exh. H at para. 2.*

In the latter possibility, Mr. Huelsing's refusal to mix an injection well with a production well would be reasonable, since there are no "production rights" or lease rights to be granted for an injection well such as Huelsing #1, since it does not produce oil. *See e.g. EPA Fact Sheet - C. Exh. 86 at 1; 4/26/07 H. Tr. at 237 (Morgan)(*"...brine that is produced with the oil...is separated from the loose oil and contained and...many times it's put back in the injection wells...It's just a salt water disposal well. It's just for disposal, it's not going to reproduce [Oil]".); *See Also C. Exh. 84 at 2-3, and figure 2.*

Mr. Arkell's apparent misattribution, and the fact the Mr. Huelsing did not fill in the blank (since he likely knew there is no such thing as a <u>production</u> lease for the Huelsing #1 saltwater <u>injection</u> well) raises the issue of bias on the part of Mr. Arkell in obtaining the statements. Such potentiality also implicates dirty hands/arbitrary and capriciousness enforcement (Seventh

Affirmative Defense), as well as selective enforcement/prosecutorial misconduct (Twelfth Affirmative Defense).

In any event, setting aside for the moment Mr. Arkell's 2003 summary's misattribution, Mr. Huelsing's statement discussing oil production wells, by regulatory definition and construction, (Subpart C, rather than D) does not and cannot include Huelsing #1 injection well, and is not relevant to any operations occurring at the time of the MIT violation at the inoperative Huelsing #1 injection well, and thus is inadmissible or of no probative value. *FRE 602*.

Due to the EPA's foundation of a large portion of their liability case on the alleged witnesses statements, the foregoing subtle yet material differences between the 2003 Arkell attribution and actual 2005 statement, as well as Mr. Huelsing's apparent refusal to fill in the "blank" specifying the EPA's desired well name, highlight the unreliability of the statement, and by implication Mr. Arkell's report, as to proving anything EPA has alleged related to Huelsing #1. Such facts precluded Ms. Toney's reliance thereon in absence of cross examination.

### vi. Indicia of Potential Bias of Declarant Present - Declarant Accused Respondent of Committing Fraud On Huelsing Family

Mr. Huelsing also inflammatorily accuses Mr. Klockenkemper of various offenses allegedly committed against the Huelsing family and of other improprieties, for the most part based on pure hearsay. The nature of such irrelevant, superfluous, speculative hearsay material indicates the high potential for bias and the increased possibility that the declarant in not testifying truthfully or accurately, rendering the declaration highly unreliable, in addition to immaterial. *C. Exh. 60.14.e at paras 4, 5, 8, 11, 13.*

Mr. Huelsing's hearsay, speculative, inflammatory, accusations are numerous, do not specify Huelsing #1 or the 1995-1996 time period at issue, consist of opinion, and are thus irrelevant to whether Mr. Klockenkemper was involved with the Huelsing #1 injection well circa 1995-1996:

1. "A pumper who had worked for Edward Klockenkemper...<u>told me</u> that the royalties were not matching the production from the well. <u>I believe</u> that Edward Klockenkemper may have been

selling it to several oil companies in a scheme to cheat my family out of proper royalties. I have never received royalty checks regarding any oil production at the Huelsing wells." *C. Exh. 60.14.e at para. 4;*

2. "In about September 2005...Klockenkemper , dug a hole next to one of the Huelsing wells...dry since it was drilled in ...1965... He became "very belligerent, swore at me, and would not tell me the purpose of the hole." *Id. at para. 5*;
3. "During...mid August 2005 to mid November 2005 there has been frequent activity by Edward Klockenkemper and his oil men/pumpers at several of the Huelsing wells...". *Id. at para. 7*;
4. "One...of the pumpers who works for Edward Klockenkemper...told me that Edward Klockenkemper is moving assets from [RWS] to his own personal financial accounts.". *Id. at para. 8*;
5. "I have been upset with Klockenkemper's practice of...driving vehicles over corn...I have called the Sheriff...". *Id. at para. 10*;
6. "Klockenkemper tried to run me down with a vehicle several years ago...I avoid...Klockenkemper and have only spoken to him twice in the last several years...He has a son that...has...a personality even more belligerent than his father...". *Id. at para. 11*;
7. "Several years ago, I filed a lawsuit against Edward Klockenkemper...in an attempt to get him removed from the Huelsing's wells lease...Kevin Rhymer (phonetic) paid Klockenkemper $10,000 for the rights to drill a new well at the site... Klockenkemper must produce about _____ barrels of oil by January 2006 or he will lose the lease for non production.".[56] *Id. at para. 12* (Blank in Original)*;*
8. "I believe that Edward Klockenkemper was able to copy the signatures of my parents, aunt and uncle onto a separate lease for the one injection well...The injection well was drilled...about 20 years ago. I filed lawsuit regarding this but dropped the case because of...legal advice I received that there was a good chance the contract would be ruled...valid...I also believe that...Klockenkemper is injecting saltwater into this well...". *Id. at para. 13.*

None of the other remaining statements in Mr. Huelsing's Declaration tie anything Mr. Klockenkemper is alleged to have done to the Huelsing #1 well around the 1996 time of violations. Rather, Mr. Huelsing appears to have several admitted reasons to have a bias against Mr. Klockenkemper, and, potentially at least, a punitive interest in seeing EPA prevail on this matter, such that EPA should have been forced to call this witness so the reliability, lack of temporal and violation-specificity, and credibility issues could have been explored at hearing.

[56] This statement indicates that another entity besides Respondents was operating the Huelsing lease at sometime in the past, and thus it is also possible that any workers seen by Mr. Huelsing or the other Huelsing #1 "witnesses" may have been hired by Mr. Rhymer, rather that RWS.

When further burdened by the numerous hearsay, inflammatory and conclusory statements contained therein, the statement's usefulness to EPA is minimal, especially when compared to its lack of probativeness and the confusion it creates, contrary to *FRE 403*. As such, Mr. Huelsing's written statement should not have been given any weight as support for EPA's Motion as to Huelsing #1 or any other well. At best for EPA, the discrepancies between the 2003 Arkell memo and the 2005 Huelsing statement, indicates that Mr. Huelsing, and Mr. Arkell, should have been heard from under oath at hearing prior to any finding for EPA on its Motion in regard to Huelsing #1 based on the Huelsing statements.

**c. *C. Exh. 60.14.f - 11/21/05 Dale L. Heitman - (Huelsing #1/Zander #2)***

The November 21, 2005, Heitman statement suffers the same hearsay, temporal and specificity problems of Mr. Huelsing's and previous statements, and does nothing to tend to support the finding proposed by the Officer in relation to the alleged December 19, 2006, MIT or reporting violations at Huelsing #1 or Zander #2 injection wells.

**i. Declaration Lacks Temporal Relevance Since it Describes Alleged Observations From Pre-1989 and Post 2005**

First, like the Huelsing statement, the Heitman statement does not specifically mention any observations as to "maintenance and operational activities" at either the Huelsing #1 or Zander #2 injection wells during the time of the violations. Temporally, Heitman's statement relates only to events which almost all (allegedly) occurred prior to 1989 or in or after 2005, or for which he did not specify a date or year. *See Compl. Exh. 60.d*:

1. "I worked for Edward Klockenkemper...during the early 1970s to the late 1980s.". *Id. at para. 1*;
2. "My brother and I were both fired...in the late 1980's...". *Id. at para. 2*;
3. "I was with Edward Klockenkemper when we installed piping...". *Id. at para. 5.*

The absence of a temporal contemporaneity, alone, renders the document unfit for the finding as to the 1995-1996 violations, and highlights the lack of probativeness and irrelevance of Mr. Heitman's statements.

### ii. Heitman Declaration Directed At Oil Wells, Not Injection Wells, Thus Not Relevant To MIT Violations

In addition to temporal irrelevance, the Heitman statement is directed at production wells, and does not attribute any action of Respondent, or statement made therein, to the alleged December 19, 1996, MIT or reporting violations at the two injection wells. *Id.* Such fact is not surprising since Heitman was an oil "pumper' who worked on the oil wells, and not a contractor hired to work on the saltwater injection wells which do not produce oil. *C. Exh. 60.14.f. at paras. 5 & 6.* This circumstance, by itself, renders Heitman's testimony irrelevant to the finding that maintenance and operational activities occurred at either injection well (since he was not hired to work on injection wells), and no weight should have been given to the statement as to Respondent's liability for the alleged SDWA violations for these or any other wells.

### iii. Declaration based on inflammatory hearsay, opinion, and belief

Further, as with the Huelsing statement, a substantial portion of Mr. Heitman's statements are expressly based on inadmissible and highly irrelevant and/or inflammatory hearsay, opinion, belief, speculation, and surmise, rather than facts known or observed first hand by Mr. Heitman. *See e.g. Compl. Exh. 60.f:*

1. "I have heard that [Respondent] often will not bill [investors] for years and then send a bill demanding not only reimbursement for the costs but interest also.". *Id. at para. 2*;
2. "....there may have been small areas of ground that were contaminated with saltwater.". *Id. at para. 5;*
3. "Edward Klockenkemper...did not want to be bothered by environmental regulations.". *Id. at para. 7.*

### iv. Indicia Of Bias Present From Admited Firing of Declarant By RWS And Declarant's Unsuccessful Lawsuit Against Respondents

Additionally, an obvious source of potential bias is provided by Heitman's statement he was fired by Respondents, that the declarant had sued Respondent Klockenkemper, and that Respondents allegedly owe him money. *Compl. Exh. 60.14.f at para. 3.*

### v. Material Inconsistencies Between 2003 and 2005 Heitman Statements And Inconsistencies in Arkell Report Precluded Summary Judgment

Similar to Mr. Arkell's summary of the alleged June 2003 statement of Mr. Huelsing, Mr. Arkell again appears to attribute specific statements, naming the Huelsing #1 well, to Mr. Heitman in 2003 that Mr. Heitman did not make in his November 2005 sworn statement. *Compl. Exh. 60.13* at p10. Interestingly, Mr. Arkell's June 2003 summary attributes specific mention of the "Zander #1" well to Mr. Heitman, although the well at issue in the amended complaint is in fact the Zander #2 well.

As mentioned above, an inspection of the Heitman statement also reveals that neither the Zander #1 or #2 well is mentioned specifically by Mr. Heitman in his 2005 statement. *Id.* The following table again illustrates that subtle yet material differences between Arkell's 2003 attributions and Heitman's 2005 sworn statement:

| | **Arkell - 2003** | **Heitman - 2005** |
|---|---|---|
| 1 | "...Heitman said that he worked for Klockenkemper as a pumper on the *Huelsing #1 oil lease...The well* was producing during this entire time" (*Compl. Exh. 60.13 at p10, para. 1*) | "I worked for Edward Klockenkemper and Rocky Well Service as a pumper on the *Huelsing oil lease*. *The lease* was producing oil during this entire time." (*Compl. Exh. 60.14.f* at para. 5) |
| 2 | "He also worked at *the Zander #1 oil lease...*" *Id.* | I also worked for Edward Klockenkemper and Rocky Well Service as a pumper at the *Zander oil lease...*"(Id. at p2, para 6) |
| 3 | "He said the *Zander #1 well* was never productive and they always just got saltwater from it..." Id. | ...the only substance pumped *from the Zander wells* was saltwater..." (*Id.* at p3, para. 6) |

Again, contrary to the June 2003 Arkell memorandum's recollection, the November 2005 statement is not specific as to the injection wells at issue, but rather refers to the "Huelsing oil lease" and the "Zander oil lease" and the production wells thereon. *C. Exh. 60.14.f at paras. 5, 6*. Again, as with the June 2003 Huelsing statement summary, Mr. Arkell or Mr. Heitman appears to incorrectly characterize the Zander injection well as an oil production well, even though the injection well could not be "producing during this entire time". (See 1 above). Then,

in the 2005 statement, like Mr. Huelsing, Mr. Heitman does not refer to Huelsing #1 injection well (or the "Zander #1"), as Mr. Arkell's 2003 summary attributes. *Compare C. Exh. 60.14.f to C. Exh. 60.13 at p10.*

Why this is begs the issue of the need for Mr. Arkell's original recordings and notes, as well as cross-examination on Mr. Heitman's declaration at hearing.[57] The conflicts and other problems entirely remove any usefulness of the statement to EPA for support of its case as to the two wells, and it was error to rely on the affidavit to try to prove Mr. Klockenkemper was directing "maintenance and operational activities", let alone illegal operations, at the time of the violations at these 2 wells, or any other injection wells at issue.

#### d. Finding 2(b): Officer Does Not Cite Support For Any But Atwood #1, Huelsing #1, Zander #2 Wells, and is Unsupported As to Those Three, Thus It Must Be Vacated As To All 6 Wells

Officer Toney cites no evidence for her Finding 2(b) as to any of the other three wells at issue, thus finding 2(b) does not attach to the three remaining wells. Further, the declarations cited in support do not support the Officer's hypothesis as to the three wells/leases named , as depicted above. Thus, finding 2(b) must be vacated as to all wells.

### 7. Finding 2 (c): "He sought access to the wells from property owners"; Unsupported by Single Atwood lease Witness

#### a. *C Ex. 60.14.b - 10/17/05 David Jones (Atwood #1)*

#### i. Jones Admits Selling Atwood Property In 1968, And To Not Speaking With Respondent Since 1985

Jones admits a lack of first hand knowledge of what Mr. Klockenkemper was doing during the time of the violations, since the events he testified to occurred prior to 1985, and likely prior to 1968, and since he admits to infrequently visiting the Atwood lease:

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[57] Mr. Arkell testified that his initial write ups were based on notes he took while interviewing the declarants, and that he had provided the notes to the Agency. *4/25/07 Tr. H. at 120-122 (Arkell).*

> "The land where the Atwood #1 well was located was sold to Harry Pierce in about 1968 as we needed the money...I believe...I retained the oil and gas rights, however, I am not sure. However, since I do not own the property where the wells are located, I really do not check up on the area all that often." *C. Exh. 60.14.b at para. 5*.

Like the previous declarants, Jones also admits to not having contact with Respondents at the time of the MIT violations: "I have not spoken to Edward Klockenkemper in more than 20 years." *Id. at para. 6.*

**ii. Jones States Atwood #1 Inoperative Since 1975**

Jones admits that the Atwood #1 well "has not been operative for about the past 30 years...", thus indicating that any alleged access would not have been requested for the inoperative Atwood #1 injection well, but rather for one or more of the Atwood production wells. *Id. at para. 4.* This also indicates that neither Mr. Klockenkemper or RWS were operating the Atwood #1 in 1995-1996 on a "day to day" basis. *Id. at para. 4.* Jones admits that he has no actual knowledge that the Atwood #1 well ever operated prior to 1975: "I do not know if it has been used for underground injection disposal...", thus he cannot testify as to what Mr. Klockenkemper was doing in regard to the operation of, or access to, the Atwood #1 well even when it may have been operative more than 30 years ago. *Id. at para. 6*.

**iii. Jones Sole Alleged "Access" Incident Does Not Specify That Atwood #1 Involved Or Subject of Incident and Does Not State Date/Year of Alleged Occurrence**

The only reference in the Jones Declaration to a "request" for access is an undated incident where Jones states Mr. Klockenkemper allegedly "demanded that an access way between the two wells in the middle of the field be allowed". *Id. at para. 3*. Notably, Jones does not state that one of the 2 wells at issue regarding the access road was the Atwood #1 injection well, and he fails to mention when this incident occurred. *Id.*

**iv. Jones Refers To Atwood Production Wells, Not Atwood #1 Injection Well**

In fact, it appears that the alleged access incident Jones was referring to involved Atwood production wells: "Saltwater extracted from one of the wells ruined a large part of my wheat crop one season many years ago". *Id. at para. 3*. Given that saltwater is extracted from production wells and then reinjected by way of a separate injection well (such as Atwood #1), it appears that

Mr. Jones statements in para. 3 refer to oil production operations and alleged releases of the brine extracted with the oil from the Atwood lease production wells, and not Atwood #1 injection well. *Id. See C. Exh. 86 at 1, C. Exh. 87 at 1, C. Exh. 89; See Also 4/26/07 H. Tr. at 237 (Morgan)(*"...brine that is produced with the oil...is separated from the loose oil and contained and...many times it's put back in the injection wells...It's just a salt water disposal well. It's just for disposal, it's not going to reproduce [Oil]".); *See Also C. Exh. 84 at 2-3, and figure 2*.

**b. Communicating With Tenant Farmers and Owners Regarding Access to Oil Well Leases Not Violative of SDWA and Not Indicia that Respondent Personally "Operated" the Injection Wells in 1995-1996, and Only Well Mentioned is Atwood #1, Not Any of the Other Five Injection "wells"**

In any event, Respondent objects that the act of seeking access from property owners to a well field has no relation to proving that Mr. Klockenkemper was conducting illegal or other violative operations in regard to the six wells in 1995-1996, and thus finding 2(c) itself is irrelevant to liability under the SDWA. *12/27/06 Decision at p.* Additionally, the Jones statement refers only to the Atwood lease, and thus the Officer's use of the word "wells" or "owners" is not supported by the Jones statement to the extent her finding is meant to infer the finding applies to all six injection wells at issue. *Id. at para. 2.*

**c. Finding 2(c) Entirely Unsupported As to Atwood #1 or Any Other of the 6 Wells and Must be Vacated**

Given the foregoing, the Officer Toney's finding 2(c) has no support and must be vacated. Further, it has nothing to do with operations at the Atwood #1 or any of the other injection wells at issue here, and 2(c) is thus irrelevant, in addition to unsupported, to Mr. Klockenkemper's liability for the Atwood #1 violations, let alone the other 5 MIT violations at other wells.

**8. Finding 2 (d) "He supervised and personally directed work being performed on the wells by others": Unsupported by Sole Declarant**

**a. *C Ex. 60.14.f. - (Dale Heitman - Huelsing #1/Zander #2)***

Respondent incorporates herein, his discussion of Heitman's statement in the objections to finding 2(b) above, and for that same reasons asserts that the Heitman declaration is irrelevant to and does not relate what Mr. Klockenkemper was doing in regard to supervising anyone at the Huelsing #1 and Zander #2 wells, let alone the other 4 wells on other leases, at the time of the 1996 MIT violations. *C. Exh 60.14.f.* The only thing it establishes is that Mr. Klockenkemper, on behalf of RWS, hired and directed Mr. Heitman up until approximately 1989, when Heitman alleges he was fired. *Id. at paras. 2, 3, 5, 6.*

**b. Finding 2(d) Applies Only to Huelsing and Zander Leases and Is Unsupported As to Those By Heitman Declaration, and Must Be Vacated as to all 6 Wells**

Heitman does not have facts to testify to regarding what Mr. Klockenkemper did as far as RWS other four wells at any time, and admittedly was not supervised or "directed" by RWS at the 2 leases he speaks to after 1989, thus he has no facts as to 1996 MIT violations at either lease. *Id.* The Heitman statement should not have been relied upon for any of the findings as to these two or any other of the six wells, and the finding must be vacated. *FRCP 56(e); FRE 602.*

**9. Finding 2 (e): "He was the person in charge of Rocky Well Service and the operational and maintenance activities at the wells." Unsupported by C Exhs. 60.14.c." (R. Maschoff - Twnehafel #2) 60.14.e (D. Huelsing - Huelsing #1), 60.14.f (Heitman - Huelsing #1/Zander #2), 60.14.g. (Lyle Allen - Harrell #1)**

**a. *C. Exh. 60.14.c - 10/17/05 - Ruth Ann Maschoff (Twenhafel #2)***

**i. Testimony Irrelevant Because Directed At Oil Production Wells, Not Injection Wells, And Indicates Twenhafel #2 Inactive Between 1987 and 1998**

Like Heitman's declaration, Maschhoff's testimony is also directed at production, not injection, wells, and indicates the entire well field was inactive in 1995: "In about 1977, my father and I signed an oil and gas lease transferring the productions rights for the Reinhold Twenhafel lease to Mr. Klockenkemper" (*Compl. Exh. 60.14.c. at para. 4*), and "There was not any production from the wells from about 1987 to 1998" (*Id. at para. 5*). Her declaration also incorrectly states that the Twenhafel #2 well was one of the Twenhafel lease's "oil wells", rather than an injection well, indicating a lack of reliability as to her statements vis a vis being directed to the Twenhafel #2 injection well. *Id. at para 3*.

**ii. Admits No First Hand Knowledge of Respondent Accessing Wells After 1987, and Alleged Non-MIT Related Tank Leak Reportedly Occurred in 1992**

Also contrary to the Officer's implication that Maschoff had first hand knowledge of Mr. Klockenkemper being "in charge" of operational activities at the injection "wells" is Maschoff's statement that she did "not know of [Mr. Klockenkemper] accessing the oil sells site after 1987." *Id. at para. 7.* Maschoff also admitted a lack of first hand knowledge in that she stated that she does "not visit the....Twenhafel wells site very often, maybe an average of once or twice a year", that the only time she recalls being there was in 1998, and the only incident she related was a 1992 leak from a tank of an unspecified nature. *Id. at paras. 8, 6.*

### iii. Testimony Based On Hearsay, Opinion, and Speculation and Admits Lack of First Hand Knowledge Since She Admittedly Does Not Know If RWS Ever Worked Wells

Ms. Maschoff also relies on out-dated hearsay and speculation with regard to the Officer's overarching assertion that Mr. Klockenkemper was "in charge" of RWS "and the operational and maintenance activities at the wells", and in fact admits lack of knowledge as to the finding:

> "I understand that he is owner and operator of Rocky Well Service, Inc...From talking to an oil man by the name of Leonard Brake many years ago, I understand that Edward Klockenkemper may have had contractors or employees working for him. However, I do not know who they are or if they ever worked at the site of the subject oil wells." *Id. at para. 4.*

### iv. Indicia of Bias - Admits to Being at Odds With And Suing Respondent Klockenkemper

As with the other declarants, Ms. Maschoff also admits to having a beef with Mr. Klockenkemper, stating she sued him in 1998 in an attempt to terminate the inactive lease due to "years of non-production", which was not resolved until 2004. *Id. at paras. 7, 8, 9.* As a result, Maschoff states that the wells were not put into operation until after she leased the Twenhafel rights to Ed Huels (who had been named as the permittee for the wellfield as of 1/25/02 by the IDNR - *See. R. Exhs. 80a, 80b, 81a-81e*). Such admission implicates the potential for biased testimony that should have been subjected to cross-examination.

### v. Maschoff Declaration Does State or Show Respondent Was In Charge of or Directing Operations or Maintenance at Twenhafel No. 2, Which was Not Operating

Mrs. Maschoff's statement contains no admissible information tending to show that Mr. Klockenkemper was "in charge of" or directed any "maintenance or operational activities" at the Twenhafel #2 injection well at the time of the violations, and lends no support to finding 2(e).

**b. *C. Exh. 60.14.e - (Undated) Vincent J. Huelsing (Huelsing #1)***

**i. Heulsing Declaration States That None of Huelsing Wells Operational 1992-2005 And Does Not Relate to Operations and Maintenance At Huelsing #1, Thus Does Not Support Finding 2(e)**

Respondent incorporates herein his discussion of and objections to the Officer's reliance on Mr. Huelsing's statement in the discussion of finding 2(b) above, and for that same reasons asserts that the Huelsing declaration is irrelevant to and does not relate what Mr. Klockenkemper was doing in regard to being in charge of "operational and maintenance activities at the Huelsing #1 injection well, let alone the other 5 wells, at the time of the 1996 MIT violations. *C. Exh 60.14.e.* Mr. Huelsing's statement that "none of the Huelsing oil wells" were operational from approximately 1992-2005 (*Id. at para. 9*) refutes the Officer's finding that there were "operational and maintenance activities" at the Huelsing #1 well in 1996 to be "in charge of".

**c. *C Ex. 60.14.f. - 11/21/05 Dale Heitman (Huelsing #1/Zander #2)***

**i. Heitman Has No First Hand Knowledge Of Who Was In Charge At RWS After Being Fired in 1989, And Declaration Does Not Support Finding 2(e)**

Respondent incorporates herein his discussion of Heitman's statement in the objections to finding 2(b) above, and for that same reasons asserts that the Heitman declaration is irrelevant to and does not relate what Mr. Klockenkemper was doing in regard to operational or maintenance activities at the Huelsing #1 and Zander #2 wells, let alone the other 4 wells, at the time of the 1996 MIT violations. *C. Exh 60.14.f.* The only thing it establishes is Mr. Heitman worked for RWS up until approximately 1989, when Heitman alleges he was fired. *Id. at paras. 2, 3, 5, 6.* Consequently, Heitman has no first hand knowledge to testify as to what Mr. Klockenkemper did or if he was in charge as far as RWS or the 2 wells at the time of the 1996 MIT violations. His statement should not have been relied upon for any assertions as to these two or any other of the six wells. *FRCP 56(e); FRE 602.*

**d. *C. Exh. 60.14.g - 11/22/05 Lyle Allen - (Harrell # 1)***

**i. Allen Admits That He Does Not Know If Any Harrell Lease Well Was Used For Injection**

Allen admits to having no knowledge of the presence of a saltwater injection well on the Harrell lease: "I do not know if one of the wells was used for saltwater injection." *Compl. Exh. 60.14.g. at para. 3.* Thus, he has no first hand knowledge of any operational or maintenance activities conducted by Respondents in regard to saltwater injection well Harrell #1, and has no facts to testify to same or as to whether Respondent was "in charge" of same. *FRCP 56(e); FRE 602.*

**ii. Admits No Operations Observed At Time of MIT Violations, Wells Observed Were Production, Not Injection**

Allen states that the Harrell wells have "been inoperable for more than 10 years", further indicating he did not observe any maintenance or operational activities there since prior to 1995. *Id.* Allen appears to be of the impression that the 2 wells he observed were oil wells, since he states that he beleived that saltwater was pumped from the 2 wells through piping to a tank located between the 2 wells. *C. Exh. 60.14.g at para. 5.*

**iii. Does Not State When He Accessed Wells, When Alleged Observations Occurred Or That He Observed Respondent "In Charge" of Harrell #1 or at Lease Prior to 2004**

Thus, his statement that "Klockenkemper and others working for him" accessed the two wells, does not, according to Allen, relate to the injection well, and in any event Allen fails to state the basis for his knowledge (e.g that he saw them or that he saw tire tracks), or to provide a date or even year for his alleged observations or inferences. *Id.* The only time that Allen specifically states he saw Respondent at the site was in 2004 when the stored materials were removed from the site, but he did not talk to him. *Id. at para. 8.* Allen also stated that his conversations with

Mr. Klockenkemper "focused on his storage of junk and scrap materials on my property", rather than on operation of the wells. *Id at para. 7.* Allen also contradicts himself, stating that the wells were inactive since prior to 1995, but that "Klockenkemper appears to be the person in charge of...operating the wells", and fails to provide a basis or time frame for his speculative assertion. *Id. at para. 7.*

**iv. Potential Bias Present Due to Admitted Past Run-Ins With Respondent, Including, as Reported by EPA Investigator Arkell in 2003, Threatening To "Kick" Klockenkemper's "Ass", and Reliance on Hearsay To Impugn**

Like the other declarants relied upon, Allen also has personal issues with Mr. Klockenkemper over alleged run-ins, claims of vandalism, and Allen's dislike of RWS storage of wellfield materials on the oil lease, lending to a possibility of biased testimony. *Id. at para. 6.* - In fact, Allen's reportedly made a 2003 statement to Mr. Arkell that Allen had in the past threatened to 'kick Mr. Klockenkemper's ass' over a dispute as to oil well access and equipment storage/theft (which fact did not get included in his instance declaration). *C. Exh. 60.13 at p*6. Further lending to suspicion is Allen's reliance on hearsay regarding several of Allen's irrelevant inflammatory accusations:

- With regard to Allens' accusations that he had near physical run-ins with Klockenkemper over Klockenkemper's allegations of vandalism by Allen: "I have spoken to other persons who have told me [he ] made the same accusations about me to them"; *Id. at para. 6.*

- With regard the Harrell "wells" alleged improper physical status: "Inspectors from...[IDNR]...have been to the...wells...My understanding from speaking with them is that the wells had not been properly plugged...". *Id. at para. 8.*

**v. Allen Declaration Contains No Facts Showing Respondent Was In Charge Of Operation or Maintenance Activities At Harrell # 1 Or Other Wells in 1995-1996, And Does Not Support Finding 2(e)**

As with the other declarations, Allen does not testify to any facts that establish or even allow an inference in favor of EPA's claim that RWS/Klockenkemper was observed by Allen to be

in charge of the operational activities and maintenance at Harrell #1 or any of the six injection wells, at or around the time of the violations.

**10. Finding 2 Unsupported in Fact: Officer Erred By Entirely Failing to Cite Support For Finding 2 For Wohlwend #6 Well, And By Lumping Injection Wells Together For Liability Purposes**

Respondent objects that no testimony whatsoever was cited as to Finding 2 for the Wohlwend Well, yet liability was still assessed therefore. Respondents object that, in doing so, the Presiding Officer, like EPA, improperly lumps all six wells together for liability purposes despite the six distinct violations alleged, thus preventing Respondent from proving non-liability for an individual violation and reducing the penalty thereby.

**11. Finding 2: EPA/Arkell Failed to Verify Content or Follow Up On Declarants' 2003 or 2005 Statements**

Finally, Mr. Arkell admitted that he did nothing to verify the content or veracity of statements that were being made to him by the declarants, and that he did not bother to interview other witnesses that had information beyond those on the list provided by EPA counsel, despite acknowledging contradictions:

"Q: Did you do any independent investigation of your own to verify any statements that were being made in these declarations?

A: Well, no, other than just talking to each witness. Sometimes they don't totally corroborate each other. But for the most part, they do.

Q: But as far as your own independent investigations, did you determine whether or not what the witness was saying was true, did you? You didn't do any subsequent independent investigation, correct?

A: Well, there may have been more than one witness talking about the same well site, so that would be additional information. But, no, I didn't seek out every last witness that maybe had information.

A: I'm asking you with regard to what each witness said in his declaration. Did you do any investigation on your own to verify whether their statements were factual or what they said was true or not?

A: No."

*4/25/07 Tr. H. at 126-127.*

## 12. Finding 2 Is Entirely Unsupported And Must Be Vacated as to All Wells

When taken cumulatively, the declarations are inadmissible due to their temporal irrelevance, lack of specificity, hearsay basis, inflammatory content, lack of confirmatory investigations, and potential bias of the witnesses. It was error for the Presiding Officer to assign weight to and to base her findings upon them instead of hearing from the witnesses under cross examination first, as was done with Perenchio's and Mr. Klockenkemper's written declarations. *FRCP 56(e); FRE 602, Payne, Supra, Allen Supra.*

Taken individually or cumulatively, they simply do not contain facts that support EPA's contention or the Officer's stated findings, and attempted inference, that Klockenkemper actually conducted or directed any operational activities at the injection wells at any time relevant to the 1995-1996 MIT violations. Rather, the flaws and nature of the declarations require that they be disregarded as proof of EPA's case as to operating in violation of the SDWA permitting requirement, and instead be seen as support for Respondents' contention that there was no illegal operational activity at the injection wells that required another permit, or that could be considered continuing illegal conduct. Consequently, finding 2 must be vacated in its entirety.

## 13. Finding Three - Fact that Klockenkemper Handled RWS Business/Environmental Affairs Immaterial To SDWA UIC Program Liability

Finding 3 is essentially the same as finding 1, and the fact that an officer was the contact between a company and environmental agencies and handled a company's environmental affairs is insufficient basis alone, without a showing that the involvement caused the company to engage in a affirmative pattern of on-going illegal unpermitted or proscribed conduct (e.g injection without a permit, or injection in violation of a cessation order), to assert non-permittee liability on Mr. Klockenkemper as a person. *225 ILCS 725/8a; 62 IAC 245.150(a). See In Re J. Magness, Supra, and other cases discussed above; See Respondents' 8/28/06 Response at 7-20.*

The documents cited by Ms. Toney all indicate that Mr. Klockenkemper handled RWS affairs and signed corporate documents and correspondence as "President", and that Mr. Klockenkemper was acting for, and not as, RWS. They also show that RWS hired contractors to work the wells, rather than having its President personally working on the injection wells. *See e.g. R. Exh. 47*(2001 Prior Oil Co. Letter to RWS Re; Inability to Access Twenhafel well due to weather). To wit:

| R. Ex. No. | Date | Subject |
|---|---|---|
| 6 | 1/11/93 | USFG letter to IDMM re RWS's inability to address Twenhafel lease due to Mr. Klockenkemper's reports of litigation and conflicts with landowner |
| 8 | 2/17/93 | USFG letter to RWS re effect of IDMM failure to recognize Force Majeure (3 attached letters - 1/6/93 IDMM to DeMoss; 1/11/93 USFG to IDMM; 1/15/93 IDMM to USFG) |
| 12 | 8/27/94 | RWS corporate check for RWS wells ($1,500), w/ disclaimers regarding lack of ability to operate Wohlwend lease |
| 14 | 7/28/95 | RWS corporate check to INDR for 1995 Annual Well Fees |
| 17 | 4/17/97 | IDNR Letter from *Lawrence E. Bengal* to RWS re 4/17/97 meeting w/ RWS and granting deferment of submission of past and future Annual Fluid Injection Reports pending resolution of Twenhafel #2/Wohlwend #6 related litigations |
| 26 | 9/23/99 | IDNR Letter from L. Bengal to RWS re permittee #721 & 7/7/99 NOV re Wohlwend lease stating that either Temporary Abandonment ("T.A."), MIT or plugging will resolve violations for Wohlwend #6 |
| 32 | 10/13/00 | RWS letter to USEPA/J. L. Traub re RWS intent to comply with 9/8/00 NOV |
| 40 | 2/28/01 | RWS letter to INDR/Phillips re Zander lease access rproblems |
| 43 | 3/13/01 | RWS letter to EPA J. McDonald re Huelsing No. 1 MIT, force majeure events at Wohlwend and other leases |
| 45 | 4/27/01 | RWS letter to EPA/J. McDonald re: successful Wohlwend #6 MIT |
| 47 | 11/13/01 | Prior Oil Co. letter to RWS re weather delays preventing plugging/abandonment work on Twenhafel lease |
| 54 | 2/8/02 | RWS letter (w/ Atts.) to Sheriff, landowners, EPA/J.McDonald re Twenhafel wells and stating fact that RWS corporate entity responsible for SDWA compliance |
| 55 | 2/13/02 | WDNR/Bengal Letter to RWS documenting transfer of Twenhafel wells to Huels and stating that "All regulatory liability transferred to the new permittee..." (cc's to *Jody Traub & J. McDonald)* |
| 60 | 4/27/02 | RWS letter to IDNR transmitting OG-18 Annual well reports for 2001 |

Thus, as in *J. Magness Inc, Supra,* the documents cited by Toney prove that Mr. Klockenkemper himself did not operate or inject into any of the wells.

## E. Mr. Klockenkemper's Other Affirmative Defenses Erroneously Rejected

Respondents incorporate herein by reference their arguments made in Respondents' *8/26/06 Response to EPA's 7/21/06 Motion* against the Officer's rejection of their affirmative defenses, and assert that the Officer erred in such rejections for the same reasons Respondent asserted against EPA's similar position below.

### 1. 3rd Affirmative Defense - Equitable Estoppel/Estoppel en Pais: EPA Estopped From Asserting That Respondent Was Permittee or "Authorized" To Inject By Way of RWS's Permit Based On Initial 7/9/01 Complaint's Designation of RWS As Sole Permittee And Failure to Include Mr. Klockenkemper In First Complaint Despite Knowledge of Respondent's Role As President of RWS

Next, Officer Toney rejects the third affirmative defense (estoppel), finding that Respondent did not establish "affirmative misconduct by the government or reasonable reliance thereon.". *12/27/06 Decision at 13.* No further discussion is provided by the Officer. *Id.*

#### a. Error - Full Development of Record Should Have Been Allowed Prior to Decision on Liability

Officer Toney's finding that Respondent did not "established affirmative misconduct" or "reasonable reliance" begs the Respondent's instant arguments that the issue should have been allowed to be fully developed and explored at hearing, as was allowed by the cases cited in support of this defense. *See e.g, In the Consolidated Matters of County of Bergen and Betal Environmental Corporation, Inc. Docket Nos. RCRA-02-2001-7110 and RCRA-02-2001-7108*

*(Order of March 7, 2003)(*Motion to strike affirmative defenses of laches and equitable estoppel denied, since possibility exists that Respondent could successfully prove its case after full development of record); *In the Matter of Franklin and Leonhardt Excavating,* Docket No. CAA-98-011 (Order of 12/7/98)(Denial of motion to strike estoppel defense where record undeveloped as to authority and interrelationship between state and federal agencies implementing same CAA regulations, where defendant alleged that past actions of state estopped federal government's claim).

Respondent summarizes his arguments from his briefs before the Presiding Officer below. As set forth in Mr. Klockenkemper's 6/6/06 Answer and Amended Affirmative Defenses, Respondent argued EPA was estopped by: 1) EPA's failure to timely investigate and include Respondent in first July 9, 2001, complaint despite prior actual and constructive knowledge of Respondent Klockenkemper estopped EPA from adding him; and 2) EPA's July 9, 2001, pleading of Rocky Well Service as the "permittee" in the original complaint estopped EPA from post facto expanding jurisdiction and liability as to Mr. Klockenkemper in the subsequent amended complaint as if he were a "co-permittee", since there is only one permittee, RWS, for the wells, and since there was no statutory notice that such status existed. *6/6/06 Answer; See Also Respondents Response to EPA Motion to Strike*; *7/9/01 Complaint at paras. 20, 22, 23, 27, and 28.*

Since EPA had another Respondent, Rocky Well, against which to proceed for the very same violations, and since Respondent could not have been and is not the permittee or owner of the injection wells, and where EPA had substantial time prior to Respondent's belated inclusion in this matter to assure it had both the legal and factual basis to enforce 62 IAC 240, et seq., or some other theory, against him, personally, forcing Respondent to proceed was highly prejudicial when compared to the prior status quo between EPA, IDNR and original sole respondent, Rocky Well.

**b. Elements of Estoppel Alleged and Prima Facie Case Made By Respondents**

As argued in *Respondent's 3/14/06 Response to EPA Motion to Strike,* estoppel is available against the EPA if 4 elements are shown:

1. Misrepresentation by the party against whom estoppel is asserted;
2. Reasonable reliance on that misrepresentation by the party asserting estoppel;
3. Change in position to the detriment to the party asserting estoppel; and
4. Affirmative misconduct or act to mislead on the part of the government

*LaBonte v. USA, 233 F.3d 1049 (7th Cir. 2004). See Respondent's 3/14/06 Response to EPA Motion to Strike at 12-15.*

**c. Elements Were Shown to Be Present, or at Least Raised Sufficient Material Issues to Allow Hearing on Facts Underlying Defense**

**i. EPA's Original Complaint, 1/25/02 NOV, and Amended Complaint Allege Radically Different Interpretations of the Illinois SDWA, and Combined With Record Raise Issues of Misrepresentation of Federal Law and of EPA's Change in Enforcement Position Sufficient For Hearing (Elements 1, 3 and 4)**

EPA's initial complaint pleaded the current state of SDWA liability at that time, alleging and holding only the permittee responsible for failure to MIT and report. *7/9/01 Complaint; 62 IAC 240.10 and 240.150.* The material change in the government's position and reinterpretation of the SDWA arises in the changes from the initial July 9, 2001, complaint issued only to RWS, to the January 25, 2002, NOV and February 20, 2003 Amended Complaint, now including Mr. Klockenkemper. *C. Exhs. 37, 39, 43.* The first complaint pleaded RWS as being the permittee. *C. Exh. 37 at paras. 20, 22.* It also expressly (and correctly) pleaded that the "permittee" of a Class II UIC well was responsible for performing MIT's and annual reporting under EPA's (then) interpretation of the Illinois SDWA., *C. Exhs. 39, 46.* However, shortly after Rocky Well's August 23, 2001, answer, EPA states it "determined that Respondent Klockenkemper was subject [to the SDWA]". *Amended Complaint at para. 35.*

**A. EPA Decision to Change Initial Liability Scheme to Include Mr. Klockenkemper Can Be Viewed As Misrepresentation Where True Reason was that EPA had Coincidentally Determined RWS Was Unable to Pay**

As reflected by the record, the negotiations included an inability to pay claim which was substantiated by RWS on or about November 29, 2001. *See 2/6/03 Kossek Order Granting Leave to Amend at 2, 7-8*; *11/29/01 Status Report.* Respondent asserts that it is more than

coincidence that EPA's change in enforcement position followed RWS's informal establishment of financial inability to pay the $100,000 + penalty, a condition later formally confirmed by EPA on the record. *See C. Exh. 127 - Statement of Gail Coad; See 2/6/03 Kossek Order at 7.*

### B. EPA Potentially Misled Respondents Into Believing Only RWS Liable in Original Complaint To Gain Investigative Advantage

These undisclosed changes in liability assessment raised the issue whether EPA misled RWS and MR. Klockenkemper into believing only RWS was liable in order to extract information from Mr. Klockenkemper to be later used against him. EPA's assertions that it became "aware" of Mr. Klockenkemper's role during the negotiations bolsters Respondent's argument that EPA failed to inform as to the EPA's changed interpretation of the SDWA, and raised the material issues of what EPA knew, and when, in regard to Mr. Klockenkemper's role, sufficient for examination and resolution at hearing. Genuine issues are raised by EPA itself, where it has made conflicting claims as to when and what it knew as to Mr. Klockenkemper and why he was not considered liable on or before July 9, 2001.[58]

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[58]EPA claimed in 2006 that it did not initially name Respondent Klockenkemper due to a "misplaced respect for the corporate status of Rocky Well..." , but then also contradictorily stated it might have been because EPA "misunderstood the extent of" Respondent's "participation" in Rocky Well's activities. *EPA 10/3/06 Response to Respondents' 9/18/06 Motion to Compel at 6.* EPA also claimed that "Shortly after filing the initial complaint in July 2001...Complainant determined that E.J. Klockenkemper was the individual who made the business and operational decisions". *Id.* EPA also claimed that the tax records received from RWS during negotiations somehow alerted EPA to Mr. Klockenkemper's liability. 2/6/03 Kossek Order at 5. This claim is belied by the very exhibits the Presiding Officer cited in support of her Finding No. 3, which show that Mr. Klockenkemper was known to EPA to be acting on behalf of RWS with regard to regulatory matters long before the 2001 complaint, and his moniker of "President" clearly indicated he was "in charge" of RWS. *See e.g R. Exhs. 6, 8, 12, 14, 17, 26, 32, 40, 43 and 45.* EPA's claim that it lacked knowledge as to Mr. Klockenkemper's roles prior to filing of the initial complaint is also belied by EPA's own evidence. To wit, the May 19, 1999, IDNR referral specifically refers to Rocky Well's president: "The principal in this corporation has a history of being litigious, unresponsive to the Department and uncooperative...". *C. Exh. 33 at p2.* The body of the referral also states that, in addition to the NOV's attached to the referral, there was also a "listing of available corporate information...attached" to the referral which mentions Mr. Klockenkemper by name and lists his roles within RWS (which attachment EPA for some reason failed to provide in the January 30, 2006, PEX in this matter). *Id. at p2, and attachments thereto at p13.* (Emphasis Added).

Additionally, EPA's 9/8/00 NOV to RWS lists Mr. Klockenkemper in the address heading as RWS's "President", and contains the salutation "Dear. Mr. Klockenkemper". *C. Exh. 34 - 9/8/00 EPA NOV.* These

### C. First, Third and Fourth Elements Present: Affirmative Act is Change in Interpretation and Misrepresentation of SDWA Liability

Thus the first, third and fourth elements are supported here: EPA's "affirmative act" and change in position was the alleged belated determination that Respondent was a SDWA "Person", and the subsequent issuance of the 1/25/02 NOV and Amended Complaint altering the statutory framework from that represented in the initial complaint to include Mr. Klockenkemper. This represents a material act changing the government's position as to the prior scope of the regulated community vis a vis who was responsible for the MIT requirement under the SDWA Illinois UIC, expanding it from the named permittee (initial complaint) to the non-permitted environmental or officers of permittees. *Amended Complaint* at para. 35. EPA's potentially covert conduct of discovery as to Mr. Klockenkemper by way of its action against Rocky Well, in addition to apparent undisclosed civil investigation(s) of Mr. Klockenkemper, also is affirmative or misleading conduct directed at Respondent by the government, as required by the doctrine of equitable estoppel.[59]

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two exhibits, alone, give imputed and actual knowledge of Mr. Klockenkemper's roles to EPA sufficient to have at least been further investigated during the pre-filing investigation it claims to have engaged in.

Thus, EPA had sufficient notice of Rocky Well's corporate structure and Mr. Klockenkemper's offices, well before the July 9, 2001, complaint, as evidenced by the May 19, 1999, referral and September 8, 2000, NOV to RWS, and other documents (see below). A simple pre-July 1991, corporate records checks and/or Dun & Bradstreet run (as done after issuance of the 1/25/02 NOV) would have revealed his corporate roles, which were a matter of public record. (*see e.g. C. Exh. 60.1.a - 5/21/02 RWS Corporate Records from Nevada Secretary of State showing Mr. Klockenkemper's multiple offices*; C. *Exh. 60.1.b - undated printout from Nevada Sec, State showing multiple roles of Mr. Klockenkemper; C. Exh. 60.1.d. at p9 - 2/23/83 Illinois Annual Report for RWS disclosing multiple offices of Mr. Klockenkemper and listing Mr. Klockenkemper and J.J. Klockenkemper as Directors of RWS*; *C. Exh. 60.1.g - 9/27/05 D & B Report*). The fact that investigation seems to have postdated the 1/25/02 NOV raises a material issue as to how EPA made the determination that he was subject to the SDWA prior to the earliest documented evidence of any investigation, and whether EPA knew it would proceed but waited to allow gathering of information from him during negotiations without his knowledge he was a target, clearly affirmative misconduct.

[59] EPA listed in its PEX two civil investigators who potentially had undisclosed information as to Mr. Klockenkemper, personally. *C. 7/23/06 Initial PEX at 2 - 3.* This gives rise to further prejudice since the summary imposition of liability on Mr. Klockenkemper denied him the opportunity to cross-examine EPA's alleged liability witnesses with regard to the liability issue by the denial of hearing.

### ii. Mr. Klockenkemper Reasonably and Detrimentally Relied on EPA's Initial SDWA Interpretation That Only RWS Liable (Element 2)

#### A. No Notice Prior to 2002 NOV That Mr. Klockenkemper Seen As Liable Since No NOV's Issued to Corporate Officers by IDNR UIC Program and Since Initial Complaint Does Not Allege Any Wrong By Respondent and Acknowledges Respondent as President of RWS

It is evident that neither Rocky Well or Mr. Klockenkemper had any reason or notice prior to the 2002 NOV, based upon the State and Federal governments' lack of issuance of NOV's to officers of UIC permittees as if they were also a permittee, to suspect Mr. Klockenkemper would be subjected to personal liability under the SDWA for the MIT violations in this matter. *R. Exh. 99 - Affidavit of E.J. Klockenkemper at paras. 5, 6, 7.*

No mention whatsoever was made of Mr. Klockenkemper in the body of the initial complaint, despite EPA's pre-existing knowledge of his existence and role in RWS from the May 19, 1999, referral, such knowledge being reflected in part by the fact the initial complaint was served to RWS c/o "Mr. Edward J. Klockenkemper". *C. Exh. 37 at last page (Certificate of Service)*. Mr. Klockenkemper also made himself and his role in RWS known to EPA well prior to July 1, 2001, by way of his prompt October 13, 2000 response and status report to EPA's Jody Traub on behalf of Rocky Well in response to EPA's 2000 NOV to RWS. *R. Exh. 32*.[60]

#### B. Detriment Occurred Since Mr. Klockenkemper was Suddenly Exposed to over $100,000 Liability By Change in Interpretation Without Formal Rulemaking or Statutory Amendment and Without Ability to Modify RWS Position or Mitigate Penalty Accordingly, And Without Ability To Present IDNR Witnesses to Rebut EPA's New SDWA Interpretation

[60] In fact, the Presiding Officer cites this exhibit in her third finding to support EPA's and her argument that he was involved in RWS environmental affairs (which still does not count as personally "operating" the wells). Again, this finding and EPA's asserted lack of knowledge of Mr. Klockenkemper until after July 9, 2001, is at least put at issue for purposes of this defense by the very evidence that is cited against him by the Decision, which letter clearly shows his office as "President", his "knowledge and information" about RWS environmental affairs and that he "responded to third parties on behalf of [RWS]".

Thus, Mr. Klockenkemper reasonably relied on EPA's initial pleading to believe he would not be alleged to be liable, and EPA's material change in position from attempting to hold only the Permittee liable in the initial complaint, to holding the environmental affairs officer of a permittee jointly and severally liable as well in the amended complaint was detrimental, since Mr. Klockenkemper suffered sudden unforeseen exposure to over $100,000 in personal liability without proper rulemaking or statutory notice. *In the Matter of: American Tube Company, Inc.*, Docket No. EPCRA-3-99-0010 (Order of 12/3/99)(Recognizing due process defense claiming that EPA's application of state regulations and failure to issue notice to respondent failed to provide fair notice, and raised material issue of whether the regulations as applied by EPA in particular case provided fair notice as to what conduct was prohibited, or what conduct was required); *In the Matter of Freudenberg-NOK*, Docket No. CWA-5-98-006 (Order of 5/14/99)(Recognizing due process affirmative defenses that EPA interpretation of rule allegedly violated was not adopted by State and that EPA failed to give notice to Respondent of its interpretation and its intent to enforce same).

Further detriment and prejudice occurred due to the fact that Rocky Well was forced to take a potentially binding position in this matter prior to Rocky Well or Mr. Klockenkemper being aware that EPA was going to exert SDWA jurisdiction over Mr. Klockenkemper in this matter, personally. *Id.* It cannot be disputed that EPA's delay in prosecuting Mr. Klockenkemper deprived him of the opportunity to attempt to mitigate the penalty by settlement at the earliest opportunity. *Id.* Finally, the Presiding Officer's decision of Klockenkemper's liability on summary judgement denied him the due process right to hearing to challenge EPA's interpretation with IDNR witnesses showing IDNR does not consider an officer of a UIC permittee to be liable for violations of or authorized to inject under the permittee's permit.

### C. Detriment Present Where EPA Has Failed to Date To Include In Record Facts or Documents Claimed to Have Caused Change In Position in 2001-2002

The fact that there is no explanation by EPA any where in the record to date as to what specific evidence caused EPA to arrive at its sudden and unheralded change in position when it alleges it did, also indicated the need for further exploration of this issue and the overarching

defenses of laches, due process, arbitarary and capricious statutory interpretation/application and estoppel at hearing. *See e.g. In the Consolidated Matters of: County of Bergen and Betal Environmental Corporation, Inc.,* Docket Nos. RCRA-02-2001-7110 and RCRA-02-2001-7108 (March 7, 2002, Order at pp3-4)(Claims of estoppel and laches should be fully developed on record to allow decision on merits of defense).

**D. Detrimental and Erroneous to Decide Defenses Where Primary Witnesses Not Then On Record, And Prejudice Because Witnesses Never Presented For Cross Examination**

Prejudice is also present because Respondents were not allowed to cross-examine EPA's primary witnesses at hearing on liability, since he was not presented in support of the EPAs' case. Given the fact that EPA's Jeffery McDonald was the one person at EPA who had firsthand knowledge of the details of the reasons for and timing of EPA's change in position to pursue Mr. Klockenkemper, as well as to the other matters at issue in this defense, and the fact Respondents were, by way of the Officer's 12/27/06 Initial Decision, rendered unable to query him as to the circumstances surrounding the complaints or as to any affirmative defense, it was improper to reject the estoppel and related defenses at that time without allowing hearing from the key witnesses on the issues.

**2. 7th Affirmative Defense - Error to Reject Unclean Hands/Arbitrary and Capricious Enforcement Defense**

**a. Unclean Hands May Be Asserted Against EPA Where Action Was Arbitrary and Capricious**

The doctrine of unclean hands can be invoked to prevent a plaintiff from gaining unjustly from the legal system. *Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244-245 (1933)(Violation of equitable principal constitutes dirty hands preventing equity).* A court may dismiss a complaint under the doctrine of unclean hands when there is a close nexus between a party's unethical conduct and the transactions on which that party seeks relief, and where not to do otherwise, would allow the plaintiff to use the legal process to reap an undeserved benefit. *Id.* Unclean hands may be asserted against EPA. *In The Matter Of Re Nibco, Inc., Docket No. RCRA-VI-209-H (Order of 5/29/96).*

Furthermore, EPA, like all federal agencies, is required to heed 5 U.S.C. §§ 706(2)(A) of the Administrative Procedures Act, which allows courts to set aside agency action if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. An agency determination may be set aside if it is "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Wisconsin v. Environmental Protection Agency*, 266 F.3d 741 (7th Cir. 2001)(Agency must consider relevant data under the correct legal standards and offer a satisfactory explanation for its actions).

**b. Indicia of Arbitrary and Capricious Conduct Amounting to Unclean Hands Present on Record Sufficient To Raise Material Issues of Fact**

Respondent asserts that several circumstances existed as of the time of the Decision which indicated disputed facts underlying the issue of arbitrary and capricious enforcement and should have been allowed to go to hearing rather than decided summarily. These include:

1. Why EPA pursued all six wells in this matter in face of its acknowledgment that IDNR did in fact request that EPA not pursue three of the wells in this action. *C. Exh. 59 - 4/26/02 INDR Letter to EPA; EPA 2/13/06 Memorandum in Support of Motion to Strike at 25-26*;
2. What EPA's basis was for the statement that its actions were justified here because "IDNR was unable for years to obtain compliance from Respondent Klockenkemper" when the record in this matter conclusively shows that the State never issued an NOV or any other notice to Mr. Klockenkemper, personally, for any violation cited in this matter. EPA 2/13/06 *Memorandum at 26*;
3. The details of EPA's apparent consideration of using 2005 MIT dates for the wells for its penalty calculations, despite the fact that successful MITs were run in 2001 and 2002, and EPA's implications that it was giving Respondents a break by not using the 2005 dates, when the EPA penalty policy forbids such assessment beyond 5 years;
4. EPA's unilateral expansion of the SDWA to include Mr. Klockenkemper just after it learned in 2001 that RWS was unable to pay a penalty. (See Discussion above);

As noted in item 1 above, EPA arbitrarily continued this action despite the April 26, 2002, IDNR request that EPA remove the Huelsing #1, Twenhafel #2, and Wohlwend wells from the administrative enforcement action and complaint. *C. Exh. 59- 4/26/02 IDNR Letter to EPA.* Given that the state never expressly requested that Mr. Klockenkemper be pursued personally,

EPA's continuation of the action against him, personally, let alone RWS, was arbitrary and capricious and raised issues of material fact sufficient to survive a motion summary judgment and be put to hearing.

### 3. 12th Affirmative Defense - Rejection of Selective Enforcement Defense Prior to Hearing In Error

To establish a defense of selective enforcement, a defendant must show an enforcement action was in bad faith based on a desire to prevent the exercise of a constitutionally protected right, as follows:

> (1) the exercise of a protected right;
>
> (2) the prosecutor's stake in the exercise of that right;
>
> (3) the unreasonableness of the prosecutor's conduct; and,
>
> (4) that the prosecution was initiated with the intent to punish the defendant for exercise of the protected right.

*In Re: Goodman Oil Co., Docket No. RCRA -10-2000-0113 (Order of 8/22/01)*

#### a. Respondent Klockenkemper Utilized His Constitutional Rights to Sue For Redress Numerous Times Against IDNR; to Establish RWS; and to Complain, to Displeasure of Government Officials

First, EPA does not dispute, and as in fact the Officers' third finding reflects, Mr. Klockenkemper, as president of RWS, exercised the right and duty to seek redress for Rocky Well's perceived wrongs, and that he, as an officer of and on behalf of Rocky Well, sued the State of Illinois several times regarding issues surrounding the wells and violations at issue, as shown by the various cases EPA has included in its PEX. *See e.g. R. Exh. 25 (9/2/99 Illinois interoffice memo denying that E.J. Klockenkemper has right to sue); C. Exh. 77.a - Civil Complaint By Mr. Klockenkemper against IDMM*).

By establishing Rocky Well, he also exercised his right to organize a company to participate in commerce while limiting his personal exposure, and by complaining to government officials he exercised his right to be heard as to his issues.

**b. State and Federal Prosecutors Have Stake In Preventing Protected Conduct and Depriving/Discouraging Use of Same**

Second, it is clear that the prosecutors here, both the state and EPA, have a stake in preventing or inhibiting Respondent's rights of judicial process, limited exposure and petitions for redress, and in punishing him, by way of their ad-hoc determination that Mr. Klockenkemper was suddenly personally liable for RWS violations. EPA has a clear stake in attempting to have the court ignore Rocky Well's corporate existence by recognizing EPA's new liability theory, since, without Mr. Klockenkemper, EPA is limited to the limited assets of the permittee, Rocky Well.

**c. Totality of Prosecution of Case Establishes Unreasonableness of EPA Conduct**

Numerous indicia of the unreasonableness of EPA's conduct exist, to wit:

1. EPA's 2 year delay in pursuing Mr. Klockenkemper personally;
2. the change in statutory interpretation in face of the lack of new facts in the amended complaint supporting personal liability;
3. the fact the State of Illinois does not consider Respondent Klockenkemper to be the permittee or otherwise liable under the SDWA and no evidence that it has ever asserted such a claim against him for these or any other violations was adduced;
4. the fact that Mr. Klockenkemper was not named in the May 19, 1999, referral to EPA (*R. Exh 33*);
5. the fact that EPA persisted in pursuing claims as to three of the wells even after Illinois explicitly requested EPA not do so (*R, Exh 59*);
6. EPA's lack of evidence as to Mr. Klockenkemper's personal involvement.

**d. EPA's Prosecution Punitive Where RWS had Valid Corporate Existence, Where No Statutory or Factual Notice To Mr. Klockenkemper Existed and No Valid Basis Existed in Record for Pursuing Him Personally**

The foregoing factors also support the fourth element, especially the fact that Illinois did not request EPA to pursue Mr. Klockenkemper. Consequently, a material issue for hearing is raised as to whether EPA had any valid reason to pursue Respondent individually, and whether there was improper motive in EPA's attempts to ignore the SDWA and Illinois UIC program jurisdictional definitions as well as Rocky Well's corporate form in pursuing him personally when he was not regulated by the SDWA.

### 4. 14th Affirmative Defense - Impossibility of Compliance Due to Lack of Access or Control of Wohlwend #6 and Twenhafel #2

The Officer also summarily found that there were insufficient facts indicating that impossibility was an issue, with regard to two wells which were under separate litigation in 1995-1996 and not in RWS's legal possession or control on the dates of violation and which rendered it impossible for RWS to MIT them in the 1995-1996 time span. *12/27/06 Decision at 15*. Again, the Presiding Officer provided no explanation of her finding. *Id.*

#### a. Record Reflects That Charles Fisher Operated and Had Legal Possession To Wells At Time of Violations

Respondents argued that neither Mr. Klockenkemper nor RWS were in legal possession of Twenhafel and Wohlwend wells at time of violations because Charles Fisher was adjudicated to have acquired interests in, held possession of Twenhafel and Wohlwend leases, and operated a well or wells on the Wohlwend lease, from 1980 to 1997. *R. Exh. 19 - 4/22/97 Court Order*. Respondents noted that the text of the April 22, 1997, order in *Klockenkemper v. Fisher,* (Ill. App. 5th Cir. - No. 5-96-0002, April 22, 1997)*(See R. Exh. 19*) expressly supports Respondents' assertions that Mr. Fisher held the leases, access rights and operated the wells at issue at the time of violation:

> "Fisher...started working the [Twenhafel and Wohlwend] leases in 1976...while the [Klockenkemper] case was in some sort of litigation hiatus, Fisher had set out to [and did by 1987] acquire...the majority of all remaining interests in the original leases" (R. Exh. 19 at 1-2)
>
> * * *
>
> "...Fisher remained in possession of the Wohlwend lease after 1980 and used the equipment and produced oil for his own benefit ***until the present*** [1997]" (*Order* at p4, emphasis added)
>
> * * *
>
> "[During the] seven-year litigation hiatus...Fisher remained in possession of the Wohlwend lease...and attempted to make a few oil runs only after acquiring a new lease in 1982 on the property...we also believe that Fisher hardly has abandoned any interest in the equipment on the leases when he has been constantly litigating to defend such title...(*Order* at pp7-8).

**b. Fisher Possessed Wells Up Until 1998, Thus Error to Find RWS or Mr. Klockenkemper Liable**

As evidenced by the 4/22/97 Order, any court grant of production rights, including the right to access the lease, if it was valid, did not occur until 1997, after the alleged violations. Quite simply, any "vesting" of rights in Mr. Klockenkemper did not occur until the 1980 order was reinstated in 1997, and Mr. Klockenkemper could not be responsible for the wells prior to the April 1997 decision. Ms. Maschoff also confirmed this status as to the Twenhafel #2 well. *See C.. Exh. 60.14.c. - Statement of Ruth Ann Maschhoff (stating the lease for the wells was not operated and in litigation until well after 1997).* Thus, it was impossible for RWS and Mr. Klockenkemper to MIT the wells, since the state court orders at issue here clearly state and find that Mr. Fisher was in possession of both leases, and operated or had the right to operate (and the responsibility to MIT) at least at or around the time of the alleged violations.

**c. Error to Reject Defense Without Hearing Due to Disputed Possession**

Consequently, Respondents presented sufficient indicia of disputed material facts which would tend to defeat EPA's claims as to Rocky Well or Respondent in regard to the Twenhafel and Wohlwend wells, if in fact someone else besides Rocky Well or Respondent had been adjudicated the (ostensible) operator of the wells at the time of the violations. *See Maschoff v. Klockenkemper*, No. 5-99-0276, (Ill. App. Ct. 5th Cir. - Order of December 2, 2000), *(R. Exh 33).* Consequently, it was error for Ms. Toney not to allow this defense to go to hearing prior to rejecting it.

## E. Conclusion - Partial Accelerated Decision Must Be Reversed As It Erroneously Assesses Personal Liability Since Mr. Klockenkemper is and was not Regulated Under the Illinois SDWA

Klockenkemper was not a "person" regulated by the Illinois SDWA in law or in fact.

### 1. E.J. Klockenkemper Improperly Found to Be "Person" Violating SDWA MIT Requirement Without a Finding That He Was The Permittee or Injected In Violation of SDWA

The Officer, apparently adopting EPA's theory of a new "third prong" of SDWA liability beyond a permittee or unpermitted violator, found that Mr. Klockenkemper was a "person" under the SDWA due to Mr. Klockenkemper being the "person" or "officer" who conducted the Permittee's (Rocky Well's) business affairs "in relation to the wells at issue". *12/27/06 Decision at 14, Findings 1, 2, and 3*. In an attempt to exert jurisdiction, EPA's complaint designates him not only as a "person", but also as a co-permittee "authorized" under the permit along with RWS, in an attempt to make him subject to the permit's requirements, and have him subjected to a requirement of the SDWA. *Id. See Amended Complaint at paras. 17, 25, and 26*.

Absent a finding, that he was subject to a permit requirement, or an allegation that he injected without a permit, EPA and the Officer cannot sustain the analysis that leads to the Officer's finding that Mr. Klockenkemper was a "person" subject to and regulated under the Illinois SDWA through the permits in the same manner as RWS is. *42 USC 300h-2*. Conversely, a finding that RWS was the named "permittee", as set forth in both complaints, excludes Mr. Klockenkemper from being subject to or authorized by the permit, since only the permittee is required to comply with the permit and is thereby authorized to inject. *62 IAC 240.10*.

In order for EPA to have SDWA jurisdiction over Mr. Klockenkemper, EPA was required to meet the jurisdictional prerequisites set forth at 42 U.S.C. 300h-2(a)(1):

> (a) Notice to State and violator; issuance of administrative order; civil action
>
> (1) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources (within the meaning of section 300h-1(b)(3) of this title or section 300h-4(c) of this title) that <u>any person</u> who is <u>subject to a requirement of an applicable underground injection control program in such State</u> is <u>violating such requirement</u>, (emphasis added).

Thus, it was not enough for EPA or the Officer to only find the first element present (that a respondent is a "person", which EPA alleges at paras. 16 and 17 of the Amended Complaint). EPA had to prove and show two other prerequisites: 1) that each named respondent/person was obligated to comply with a SDWA requirement imposed upon him by the Illinois UIC program (e.g. the Illinois permit, thus making a "person" a regulated "permittee", as EPA attempts to allege as to both RWS and Mr. Klockenkemper at paras. 25 and 26 of the Amended Complaint)), and 2) that the permit was violated by each named respondent.

The Officer erred since under the Illinois SDWA UIC Program , a "person" can be "subject to a requirement of [Illinois]...applicable injection control program" only when 1) the person is named in a permit which authorizes injection, which they are required to comply with (as the "permittee"); or 2) the person did something (inject) for which he should have had a permit for (unpermitted injection).

**2. Sole SDWA Requirement Applicable to Non-Permittee Is To Get A Permit Prior to Drilling or Injecting, EPA Complaint Incorrectly Alleges Both Respondents Were Authorized to Inject By RWS's Permit (and thus regulated by it), But Does Not Allege Unauthorized Injection, Therefore the Complaint Fails to Confer Jurisdiction Under the Illinois SDWA, and Mr. Klockenkemper Should Have Been Dismissed With Prejudice**

Basically, the sole SDWA requirement imposed on any "person" is to obtain a permit if they want to inject, which, according to EPA's complaint, both RWS and Mr. Klockenkemper complied with. *See Amended Complaint at paras. 25 and 26.* It is undisputed that only RWS is named in the six permits. Illinois law does not authorize anyone else to inject by way of such permit, including Mr. Klockenkemper, thus EPA's allegation at para. 25 that he is authorized by RWS's permit is invalid at law since he must have his own permit, and must be stricken. *See 225 ILCS 725/8b (*"Sec. 8b. No person shall drill, convert or deepen a well for the purpose of disposing of oil field brine or for using any enhanced recovery method in any underground formation or strata without first securing a permit therefor"*)*. Further, EPA does not allege or show on this record that Mr. Klockenkemper himself performed any unauthorized injection for which he personally should have had a permit, or that RWS was operated as a sham corporation.

### 3. EPA Failed to Pierce Corporate Veil Despite 2/6/03 Grant of Leave To Amend Based On Assertion the Veil Would Be Pierced

Officer Kossek's 2/6/03 Order granting leave to amend to add Mr. Klockenkemper assumed the he was not the "permittee" (finding the both sides agreed he was not), but rather was expressly based upon EPA's assertion that it would pierce the corporate veil under "hornbook principals concerning corporate law", and did not authorize EPA to pursue Mr. Klockenkemper directly under the SDWA as if he were the permittee:

> "Without even addressing the interplay between the SDWA definition of "person" and the IAC definition of "Permittee", EPA should not be precluded, at this stage of the proceeding, from attempting to prove Mr. Klockenkemper is liable based upon standard principles of hornbook corporate law. EPA is attempting to "pierce the corporate veil". Mr. Klockenkemper will have ample opportunity to raise the corporate status and his actions as affirmative defenses...It will become a question of fact to be developed in the administrative record." *2/6/03 Kossek Order at 10.*

However, the amended complaint EPA filed on 2/20/03 did not plead piercing the corporate veil, but rather improperly attempts to subject Mr. Klockenkemper to SDWA requirements, and thus to 42 USC 300h-2, by way of pleading him as authorized to inject by RWS's permits, when in fact only the permittee is authorized to do so. *62 IAC 240.10*; *Amended Complaint at para. 25.* Officer Toney's 12/27/06 Decision acknowledges EPA's failure to pierce the corporate veil as Officer Kossek assumed it would:

> "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.". *12/27/06 Toney Decision at 12.*

Thus, EPA never did and cannot establish SDWA jurisdiction over Mr. Klockenkemper, and did not pierce the corporate veil to reach him as it asserted it would in 2003, and thus the 12/27/06 Decision granting EPA's Motion on liability must be vacated and he must be dismissed with prejudice since he is neither the permittee or an unpermitted violator, is not subject to RWS's permit requirements, and was not shown to have operated RWS as a sham. 42 USC 300h-2; 225 ILCS 725/8a; 62 IAC 240.150(a).

Respectfully Submitted By:_____*s/: Felipe N. Gomez*_____ Date: October 30, 2008

**APPENDIX 1**

**TABLE OF AUTHORITIES**

**(for Part 1/2)**

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**FEDERAL CASES**

## ENVIRONMENTAL APPEALS BOARD



## OFFICE OF ADMINISTRATIVE LAW JUDGES

## FEDERAL STATUTES



## FEDERALLY-APPROVED STATUTES



## FEDERAL REGULATIONS

**FEDERALLY APPROVED STATE REGULATIONS**

**FEDERAL RULES**

## STATE CASES