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

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 2 of 2)

October 30, 2008

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(PART 2 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 2 of 2 of his Appellate Brief, setting forth errors and arguments regarding Presiding Officer Toney's 7/23/08, 7/12/07, 8/27/07, 10/2/07, 11/29/07 and 5/17/06 Orders in the above captioned matter. This part 2 continues the page numbering and outlining begun in Part 1 of this Brief, and incorporates herein by reference the Statement of Issues (Sec. I), Statement of the Nature of the Case (Sec. II), and the Summary of Facts relevant to the issues presented for review (Sec. III) set forth at part 1 of this Brief. As with part 1, the arguments herein are generally presented in keeping with the structure and order of arguments and issues set forth in the order being discussed, and the relevant facts for each order challenged are discussed in conjunction with the arguments as to such order. A Table of Authorities for this part 2 is appended here as appx. A.

VIII. 7/23/08 INITIAL DECISION

A. Background/Procedural History

Subsequent to the 12/27/06 Partial Accelerated Decision, the parties continued their pre-hearing exchanges, and a hearing on penalty was held from April 24-26, 2007, in the Illinois

Appellate courthouse in Mt. Vernon, Illinois.[1] Prior to the hearing, EPA's sole penalty calculation witness, Lisa Perenchio, provided her direct testimony by way of a 40 CFR 22.22(c) declaration, but such declaration did not include any supporting exhibits. *C. Exh. 141*. Rocky Well Service, Inc. ("RWS") and Mr. Klockenkemper did likewise, and unlike EPA, provided foundation for and introduced Respondents' hearing exhibits as a part thereof. *C. Exhs. 181 and 182*, respectively. Direct testimony and evidence rebutting EPA's findings of harm and the EPA's penalty assessment was also provided under 40 CFR 22.22(c) by RWS's expert witness Mr. John Morgan. *C. Exh. 180*.

1. Respondents incorporate herein the objections and arguments made in their 12/21/07 post-hearing brief, 12/21/07 proposed findings of fact and conclusions of law, 1/22/08 response to EPA brief and 2/4/08 reply to EPA response to Respondents' brief

Respondents incorporate herein by reference the objections and arguments set forth in their post-hearing briefs and responses in the matter below as basis for and their arguments on appeal in opposition to the 7/23/08 Initial Decision, due to the fact that the Officer nearly verbatim adopted EPA's arguments. *See 12/21/07 Post-Hearing Brief, 12/21/07 Proposed Findings of Fact and Conclusions of Law, 1/22/08 Response to EPA Brief and 2/4/08 Reply to EPA Response to Respondents' Brief*. Given the length and depth of the post-hearing pleadings, this brief addresses the issues and errors set forth in the 7/23/08 Initial Decision, and incorporates by reference without repeating each and every argument, objection and error set forth in the post-hearing briefs and findings of fact, as to the penalty assessment and hearing below.

B. Summary of Respondents' arguments

Respondents appeal the Initial Decision as being in error and inconsistent with the record below, and for ignoring or improperly rejecting Respondents' numerous relevant objections and

[1]The transcripts from the hearings are referred to herein by the date, page number and person testifying (e.g. *4/26/07 Tr. at 10 (Perenchio)*.

arguments set forth in their post-hearing briefing, and for entirely rejecting without discussion all of Respondents' proposed findings of fact/conclusions of law, and adopting her own or EPA's instead. *Initial Decision at 21-24.* Respondents also challenge findings Nos. 5-8, 10-14, 16, 19, 20-28 as erroneous, and make other points of error, as discussed herein.

C. General Points of Procedural Error

1. Officer Toney's summary adoption of EPA's arguments nearly verbatim without independent analysis erroneous and arbitrary and capricious

As a general matter, Respondents object that Ms. Toney essentially adopted the EPA's recommendations, approach, and analysis, almost verbatim as put forth previously by EPA (her calculated assessment differs from EPA's by only $10 (Ms. Toney elected not to round up the total initial gravity based penalty of $115,790 to $115,800, as had EPA). *See Order at 12, fn24.* This approach deprived Respondents of an objective review and analysis of their arguments.

2. Officer Toney improperly failed to objectively consider evidence by formulating findings first and then accepting only evidence that supported her preconceived determinations, rather than impartially arraying and weighing all evidence in order to reach her findings

In her introductory preamble, the Officer states that formulation of her findings occurred prior to an impartial consideration of evidence, rather than by consideration of evidence prior to making findings. *Id. at 4.* Respondents object to Ms. Toney's statements at p4, para. 2 of the decision (*bolded text below*) that she appears to have improperly reviewed the evidence against her own preconceived findings, rather than reviewing the evidence first, weighing the competing evidence, and then comparing it to the parties' proposed findings to see which findings and conclusions had the most evidentiary support. Quoting Ms. Toney:

> "I have considered the entire administrative record of this proceeding including, but not limited to, the pleadings, the transcript of the hearing, all proposed findings, conclusions and supporting arguments of the parties in formulating this Initial Decision. **To the extent that the proposed**

> **findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings and conclusions stated herein, they have been accepted, and to the extent they are inconsistent therewith they have been rejected.** Certain proposed findings and conclusions have been omitted as not relevant, or as not necessary to a proper determination of the material issues presented. **To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited..." *Id. at 4.***

Respondent asserts that it was improper for the Officer to accept and reject evidence based upon whether an item supports the findings and conclusions stated in her decision, rather than reviewing all proposed evidence and comparing how much evidence supports one party's position and proposed findings versus, the other party's, prior to making any findings.

3. Toney Order of 11/29/07 was prejudicial and in error since it limited Respondents to the "record" at 11th hour where 11/1/07 Order allowed citation to entire "administrative record", and where Officer Toney interpreted "record" to mean "hearing record", and then nonetheless allegedly considered "entire administrative record" in determining the appropriateness of EPA's proposed penalty, in contradiction of her own Order

On 11/1/07 Officer Toney entered an order regarding the post-hearing briefing format, stating that citation would be allowed to the "administrative record" for purposes of supporting evidence citations. *11/1/07 Order*. On November 26, 2007, during a status call, Respondent Klockenkemper's counsel confirmed this allowance, which had been relied on to draft the nearly completed brief and lengthy proposed findings of fact, due on December 3, 2007. *See 11/29/07 Notice of Objection to 11/29/07 Order*.

However, on November 28, 2007, Officer Toney made an unscheduled status call to Mr. Klockenkemper's counsel, during which she informed that the 11/1/07 Order would be amended to limit briefing citations to the "hearing record", and that she would not consider references to the larger administrative record. On November 29, 2007, Officer Toney issued an order limiting citation to the "record". *11/29/07 Order*. Consequently, Respondent's counsel was forced to seek additional time to rework the brief and findings of fact to excise the citations to non-hearing materials and attempt to modify those portions with support from the hearing record, causing time and funds to have been expended for naught in reliance on the 11/1/07 Order, and additional time and funds to correct the pleadings, to the prejudice of and great inconvenience to Respondents.

See 11/29/07 Notice of Objection.

Given the last minute material change in briefing format limiting references, it is also capricious that Officer Toney stated in the Decision that she "considered the entire administrative record", and was not limited to the materials she had limited briefing to (e.g transcript, hearing exhibits, findings and briefs). *7/23/08 Order at 4 (See underlined text above)*. The combination of the last minute order and then Toney's reliance on materials she did not allow Respondents to rely on, amounts to arbitrary and capricious conduct on behalf of the Presiding Officer, and constitutes reversible error. Respondents likewise cite to the "entire administrative record" in their instant Briefs as necessary and appropriate.

4. Officer Toney's summary rejection of, and failure to discuss and explain rejection of the majority of Respondents arguments was erroneous, arbitrary and capricious, and renders Decision void of any indication that Officer in fact even considered the unmentioned proposed findings and arguments

Officer Toney erred by her failure to indicate which specific findings, conclusions and arguments of each party she "accepted", which she omitted as "irrelevant" or "not necessary", or what testimony she discredited as not in "accord", and fails to explain the rationale or basis for doing so. *Id. at 4.* Such approach makes it impossible to review and challenge a great portion of Toney's underlying decisions since Respondents are not made privy to her decision-making process and which evidence she relied upon for support and which was rejected, and why. *Id. at 4.* Such opaque approach, combined with the preconceived decision-making as to findings of fact prior to considering any evidence, violates due process and both the SDWA and 40 CFR Part 22, since it does not provide an objective decision-making process and prevents a fair review and appeal of the Presiding Officer's underlying reasoning for her penalty decision.

5. Officer Toney's assessment of the penalty "jointly" against Respondents violates the SDWA, since the Act does not provide for CERCLA-like joint or several liability for a permittee and its officers.

Ms. Toney stated that she assessed the $105,590 penalty "jointly" against Respondents. *7/23/08 Order at 5*. Respondents assert such assessment is in error, *inter alia*, because the Illinois SDWA, unlike CERCLA, is not a joint and several liability statute, and does not provide for imposition of such joint liability. *225 ILCS 725/8a*. Respondents assert that the Officer, and EPA, erroneously treated the Illinois SDWA as if it imposed CERCLA liability, leading to the erroneous finding of liability and imposition of penalty upon Mr. Klockenkemper. Consequently, Officer Toney's entire "joint" penalty analysis is in error, and must be reversed as to Mr. Klockenkemper.

6. Respondents object to EPA hearing exhibits not introduced by way of witness who generated or received document in course of official duties

All parties' declarations were appropriately moved into evidence at the hearing, along with Respondent's hearing exhibits. However, on 4/24/07 EPA presented Respondents with a binder containing EPA's proposed hearing exhibits, which appeared to possibly contain items not included in the pre-hearing exchanges, and in any event could not be reviewed now that hearing was underway. *See 4/24/07 EPA Proposed Hearing Exhibits.* The compilation was not accompanied by an affidavit establishing foundation for the exhibits, and Respondents object to the admittance into evidence of any EPA exhibit which was not introduced at hearing by way of a live witness subject to cross examination. Additionally, Respondents object to any exhibit, to the extent it was used by EPA against Respondents, that was attempted to be introduced by way of a witness that did not either generate or receive the document in the course of his duties (e.g. See testimony of Inspector Matlock, attempting to introduce another inspector's inspection reports, such as *C. Exh. 69; 4/24/07 Tr. at 178-180*).

D. Statutory Factor 1 - Seriousness: Officer's misinterpretation/misapplication of SDWA statute and penalty policy resulted in excessive penalty from selection of "most serious" penalty matrix from Table I of penalty policy, where Officer found that EPA did not show proof of actual harm from violations, but rather only "programmatic harm"

1. Presiding Officer erred and was arbitrary and capricious by stating Officer will be closely scrutinized by EAB for compelling reasons for deviating from the penalty policy, where in fact only total ignorance of policy results in such scrutiny as set forth in *Carroll Oil*

With regard to application of the penalty policy, in this case, Respondents urged the Officer to apply the penalty policy differently than EPA, primarily in regard to EPA's choice of the highest seriousness matrix in Table I of the interim UIC policy, rather than selecting a lower initial level within the matrix, which would result in a penalty more reflective of the lack of proof of actual harm from the violations. *See UIC Policy at Table I and associated text; See Respondents' 12/21/07 post-hearing Brief in Support at 9-11; See Respondents' 2/4/08 Reply to EPA's Response at 2-3.*

In apparent response to Respondents' urging the Officer to move outside the highest penalty matrix box in Table I of the UIC policy, based on a lack of proof of harm, Officer Toney stated in her preamble that "the EAB will 'closely scrutinize' a Presiding Officer's reasons for choosing not to apply an agency penalty policy to determine if those reasons are compelling.". *7/23/08 Order at 3 (citing to Carroll Oil Co., 10 E.A.D. 635 (EAB 2002*). However, a review of *Carroll* reveals that Ms. Toney mistates and overstates the "scrutiny" standard, since the *Carroll* panel only held that a total ignorance of a policy would be closely scrutinized:

> "...in circumstances in which an ALJ has chosen not to apply an Agency's penalty policy **at all**, rather than applying the policy differently than advocated by the complainant, we will closely scrutinize the ALJ's reasons for choosing not to apply the policy to determine if they are compelling. *Bruder*, 10 E.A.D. 598, 613.". *Carroll at 654-658* (Emphasis Added).

As indicated by the post-hearing briefs, Respondents did not urge the Officer to not apply the penalty policy, but rather to apply it differently than done by EPA, consistent with an objective reading of *Carroll. See Respondents' 12/21/07 post-hearing Brief in Support at 9-11; See Respondents' 2/4/08 Reply to EPA's Response at 2-3.* Such position is also supported by a review of the SDWA itself, which does not mention penalty policies at all, and by 40 CFR 22,

which states only that EPA "consider" guidelines: neither mandates strict adherence to a penalty policy over statutory and reality-based considerations. *42 USC Sec. 300h; 40 CFR Part 22.*

Concomitantly, *Carroll Oil* does not prevent the Officer from deviating from EPA's application of the penalty policy, contrary to the Officer's implication or mis-perception that Respondents urged her to ignore same. In fact, *Carroll* is best read to require an ALJ to evaluate and take into account a lack of site-specific actual or potential harm resulting from the violations when evaluating EPA's application of statutory factor 1, and to apply the policy differently to arrive at the correct result. *Carroll, Supra*.

2. Presiding Officer erred by misconstruing SDWA in regard to incorrectly equating the endangerment assumed by the SDWA from "any injection", to a mandate allowing EPA to assume the highest level of endangerment from "any violation", regardless of whether harm in fact exists or was threatened

In her preamble to her analysis of statutory factor 1, and foreshadowing the Officer's forthcoming discounting of the lack of actual or potential direct harm in her upcoming findings, Ms. Toney stated:

> "The UIC Penalty Policy provides that several elements are to be considered in evaluating the seriousness of a violation, including (1) the *potential* of a particular violation to *endanger* underground sources of drinking water...As to element (1), it is significant that the statute defines the term "endanger"to include any injection which *may* result in the presence of contaminants in underground sources of drinking water ("USDWs"). 42 U.S.C. § 300h(d)(2)." *Decision at 5-6*. (Emphasis by Ms. Toney)

As does EPA, Officer Toney errs in misreading the SDWA term "any injection" from 42 USC 300h(d)(2) as being the same for seriousness purposes as the penalty policy term "any violations", in order to justify her inference of a high potential for "endangerment" from the RWS's violations despite lack of any proof of any threat, direct or indirect, to the environment around the wells (versus to the SDWA program):

> "The Policy itself speaks to the "potential" for such endangerment. Thus, a violation need not rise to the level of actually causing harm to the environment for it to be of a serious nature. *See Carroll Oil Co., Inc. 10* E.A.D. at 657 (seriousness of a violation is or can be based on potential

rather than actual harm), *see also Everwood Treatment Co., Inc.*, 6 E.A.D. 589, 603 (EAB 1996), aff'd No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998)(certain violations may have "serious implications" for the [statutory] program and can have a "major" potential for harm regardless of their actual impact on humans and the environment) *Decision at 6*.

Clearly, the UIC SDWA program contemplates that high seriousness will be indicated by the potential threat presented by "injections", and not just merely from the existence of a particular type of non-injection "violation". *42 U.S.C. § 300h(d)(2)*. EPA and the Officer's interpretation effectively constitutes legislation by executive order since it expands the SDWA ambit beyond the plain meaning of the text, and reads out of the statute the requirement that an "injection" be shown to present at least a threat of harm to the environment in order to find the "violation" to be an "endangerment" and thus of the highest seriousness. *Id.; Decision at 6.*[2]

Quite, simply, *Carroll* and the SDWA itself do not support EPA's and the Officer's interpretation of the penalty policy to automatically and categorically require that any MIT violation must be designated to be of the most serious nature, irrespective of whether EPA showed any injections that presented a real threat of environmental harm to any SDWA. As such, the Officer's reading of the SDWA, penalty policy and *Carroll*, as set forth in her preamble and in the following discussion of seriousness, must be rejected. *Decision at 5-11*.

3. Presiding Officer erred by refusing to deviate from EPA's application of penalty policy, ignoring that *Carroll* panel reduced the seriousness of the penalty based upon site-specific circumstances indicating lack of proof of actual or potential harm and due to EPA's failure to take lack of actual or potential harm into account prior to selecting Table I level of seriousness

a. EPA's and Officer's automatic application of highest severity matrix level in all cases as done here was rejected by EAB in *In Re Carroll Oil*

EPA and the Officer cited to the EAB decision *In Re Carroll Oil* in support of Region 5's argument that EPA does not need to show "actual harm" when assessing penalties. *EPA*

[2] It should also be noted that EPA's complaint did not allege that any injections occurred, and EPA did not attempt to plead or prove such necessary prerequisite to finding an "automatic" serious threat of harm.

Response to Respondents' Post-hearing brief at 5-6; Decision at 6,9. Respondents countered with the argument that, absent a showing of actual "harm", *Carroll* and logic required that EPA must at least show "actual circumstances" allowing a reasonable assumption that actual harm or a real potential for endangerment existed, both in temporal and factual relation to the violation based upon the circumstances at each well. *See Respondents' 12/21/07 post-hearing Brief in Support at 9-11; See Respondents' 2/4/08 Reply to EPA's Response at 2-3.; See 7/23/08 Decision at 9.*

b. *Carroll* EAB reduced penalty from highest to moderate severity based on failure of EPA proof of actual or credible threat of harm

The Officer's citation to *Carroll* contradicts her own rigid approach to the first statutory factor, since the EAB in *Carroll* rejected EPA's rigid application of the "harm" criteria and actually lowered EPA's initial "automatic" choice of the highest gravity matrix level from high to moderate, based on EPA's lack of a showing that there was any potential for harm (e.g. no showing that there was any gasoline in the USTs involved in that case to leak out), and thus finding that the conditions at the offending USTs were not conducive to a finding of the highest threat of harm. *In Re Carroll Oil at 670, fn 34.*

To wit, the *Carroll* panel stated:

> "We acknowledge that the Penalty Policy, Appendix A, automatically ranks violations of 40 C.F.R. § 280.70(c) as major with respect to potential for harm and extent of deviation from requirements. However, the Board is not bound by the Agency's penalty policies, see *In re Rybond, Inc., 6 E.A.D. 614, 639 (EAB 1996)*, and in this case, as explained above, we regard a moderate" ranking for the "potential for harm" criterion as more appropriate.

Carroll at 670, fn 34.

As a result, EAB ended up reducing EPA's $19,500 proposed total penalty over 25% to $13,750, a figure that EAB reached only after adding in a $7,950 economic benefit component, that EPA had not included in its original calculations (resulting in a much sharper actual reduction in EPA's initial proposed gravity component to $5,800 from $19,500). *Id.*

4. Officer erred by lumping the wells together and failing to consider seriousness of each "particular violation" at each particular well, based upon site specific information, as required by penalty policy, and thus EPA and the Officer failed to comply with the SDWA, 42 USC 300h, and EPA failed to establish prima facie case for each well under 40 CFR 22.24

Respondents assert that the Officer, like EPA, erred by failing to analyze the seriousness of each violation at each well, and erred by grouping all six MIT violations as if they had occurred at one well for purposes of her analysis under the seriousness factor.[3] *See Respondent's post-hearing Brief at 2-4, 8-10.* As pointed out in Respondents' post-hearing brief, such approach makes it impossible to discern if EPA or the Officer considered each well, and relatedly one violation more serious than the other, or how much of the total penalty should be attributed to (or deducted from) each well's penalty assessment. *Id.*

Further, as discussed in Respondents' briefs, a failure by EPA to properly calculate the gravity portion of the penalty and a failure to consider site specific information can be considered a failure of EPA to prove its proposed penalty under 40 CFR 22.24, and is a violation of the governing statutory provision at 42 USC 300h. *In the Matter of: Bil-Dry Corp. Docket No. RCRA-III-264.* EPA's failure to individually calculate, explain and document how it arrived at the gravity penalty for each violation for each well, can also be considered improper calculation. In such instances the ALJ should deviate from the applicable penalty policy and consider site and violation-specific information, especially where a penalty policy requires, or EPA applied, a rote or mechanical selection of seriousness, without a particularized evaluation. *In the Matter of:*

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[3]At hearing, EPA's penalty calculator, Lisa Perenchio acknowledged that EPA's selection of the seriousness level in Table I of the Policy in this case was driven solely by the category of violation, and acknowledged that any MIT violation was automatically assigned the highest level of seriousness in Table I by EPA, in this and in every case, irrespective of the particular facts of the case or well. *4/25/07 Tr. at p145, L18-22, and p146, L23 to p147, L18, and p148, L20 to p149, L18.* Perenchio also admitted that the Policy expressly requires that EPA take into account the "potential" for a "particular violation to endanger...(USDW)" in using Table I. *C. Exh. 47 at 1, Section I.A,; 4/25/07 Tr. at p147, L19 to p148, L6.* Relatedly, Perenchio admitted that the Policy does not state that the Table I seriousness level should be mechanically assigned by EPA based on the "potential" for a "category of" violation to endanger USDW, as it is now being read by EPA. *4/25/07 Tr. at p148, L7-12*; *C. Exh. 47 at 1, Section I.A.* Ms. Perenchio admitted that she did not take any case-specific or RWS well-specific facts into account for Counts I and II in this case, other than the fact that MIT "category" violations were alleged, when selecting the "High" level. from Table I. *4/25/07 Tr. at p156, L6-23; C. Exh. 141, at para 22.*

Gypsum North Corporation, Inc., Docket No. CAA 02-2001-1253 at pp10-11 (11/1/02)[4]. The admitted lack of evidence of harm from RWS wells, and lack of evidence of potential harm from RWS wells to a specific SDWA located within the zone of harm for each of the far flung wells, means that EPA and the Officer did not consider same, or assure a prima facie case was presented as to statutory factor 1. The high seriousness determination for each of the wells, is unsupported in fact and law. *Decision at 5-11.*

5. Officer erred by relying on generic, immaterial, non-well specific testimony as to "programmatic harm" as substitute for well-specific calculations and well specific testimony for MIT violations' seriousness determination

a. Perenchio testimony admittedly generic, program-wide, and not specific to RWS's wells or RWS's MIT violations, no evidence presented that there was anything in RWS's wells to leak out

With regard to the Officer's stated evidentiary basis for her specific analysis of the seriousness of the RWS MIT violations, Officer Toney stated that she relied in the main on Ms. Perenchio's admittedly generic testimony:

> "Complainant produced ample evidence at the hearing to demonstrate the potential for environmental harm that can result from failure to conduct mechanical integrity testing of underground injection wells [citing in footnote 6 to Ms. Perenchio's declaration, *C. Exh. 141*]. There are approximately 8,000 Class Il underground injection wells in Illinois, all of which have the potential to leak and contaminate groundwater. Injection wells are designed to dispose of brine, and if they leak, they can contaminate groundwater. Brine from oil and gas operations can contain any one of a number of contaminants including chloride, sulfate, iron, sodium, barium, benzene, ethyl benzene, toluene and xylene. *Decision at 6-7.*

An inspection of Ms. Perenchio's testimony reveals that she did not testify as to what "environmental harm" could result from RWS's failure to MIT, or what the likelihood was that any RWS well would leak, but rather only that all "approximately 8,000" Class II wells have the

[4] The *Gypsum* Court stated: "Because the Policy operated as an edict, affording no individualized assessment of the particular facts surrounding the violation, it failed to comport with the statutory command that the penalty criteria be considered. Accordingly, the Court departs from the Policy and looks to the statutory criteria to determine an appropriate penalty". *Id.* Such is the case with RWS.

potential to leak. *C. Exh. 141; see fn 3, infra*. She did not testify that any brine was present in any RWS well to leak at the time of the violations or otherwise, and did not testify as to the presence or chemical content of any fluids within RWS wells at any time. *Id.* Thus, her testimony lends nothing to the determination of how serious the MIT violations were, or what harm was presented from a potential leak from any RWS well, and it was error to rely on it since the SDWA calls for specificity as to each "particular violation", not generic assertions. *42 USC 300h.*

b. Inspectors Brown and Matlock's testimony only dealt with the Atwood #1 (Brown) and Huelsing #1/Zander #2, and neither testified that they saw any evidence that any of the three wells leaked or had an actual potential to leak, no relevant facts adduced

Officer Toney also relied on Inspectors Matlock's and Brown's generic testimony to attempt to shore up her conclusion that RWS's MIT violations were of a high level of seriousness, due to the potential of a Class II well leak to go undetected by lack of an MI:

> "A timely and correctly performed mechanical integrity test can detect a leak of a UIC Class II well at a point in time before contaminants reach underground sources of drinking water, which the SDWA is designed to protect [citing in fn 7 to *4/24/07 Matlock Tr. at 205-207*, and to *4/25/07 Brown Tr. at 50-51*]. In addition, the record establishes that both operating and non-operating injection wells can pose a risk of contamination to USDWs [citing in fn 8 to *Matlock, Id.* and *4/25/07 Brown Tr. at 170-171*]. All of these facts contribute to a conclusion that the violations at issue here warrant a penalty calculated on the basis of a high level of seriousness." *Decision at 7*.

However, an inspection of inspector Brown's testimony at the cited pages 50-51 of the hearing transcript reveals that she did not testify as to the seriousness of any of RWS's MIT violations, but rather only that Illinois had outlawed dual production/injection wells, such as the Atwood #1. *4/25/07 Tr. at 50-51*. Ms. Brown also admitted on cross examination that her involvement with the inactive Atwood No.1 well was not related to the current MIT violations, but rather to surface issues such as the presence of alleged "debris" and storage of well-related materials, and marking issues, occurring since 1998. *See Respondents' Brief at 17; Respondents' Proposed Findings of Fact at p57, Sec. III.B.24.* Also, indicating a lack of harm, Ms. Brown also testified that the Atwood #1 well was inactive since she started inspecting it in

1991, since it was a banned "dual purpose" production/injection well. *Id.; 4/25/07 Tr. at 46-47.*

Matlock's testimony at the cited pages 205-207 also did not touch on the alleged "high" seriousness of any of RWS's MIT violations, but to the contrary stated that he found the evidence (passing of MIT's in 1991, 2001 and 2005) to indicate that the risk of loss of Mechanical Integrity ("MI") was low, and that MI had in fact been maintained at the two wells for the entire period 2001-2005:

> "Q Okay. So Huelsing #1 well, would you agree that the fact that it passed MIT in 1991, 2001, and 2006, would indicate that it wasn't communicating [leaking fluid underground] during that time?
> A. Yes.
> Q And with regard to the Zander well, would the fact that it had been MIT'd in 1991, was inoperative for a great period of time in between, and then was MIT'd again on September 12, 2005 also indicate that it likely was not communicating?
> A. Yes, but it was not active at that time.

4/24/07 Tr. at 205, L8-19; Findings of Fact at p79, Sec. V.C.

c. Perenchio and Matlock testified that the risk is not the same for operating and non-operating wells, and that risk was lower for non-operating well, due to lack of injection fluid in the well

Contrary to the Officer's implication that the risk from an operating injection well was the same as an inoperative well, Matlock also testified that an inoperative injection well is less prone to leak than an operative one. *Decision at 7; 4/24/07 Tr. at 206-207.* After equivocating, Perenchio also admitted that the risk of fluid migration was less at an inoperative well than an injecting well since "obviously, if you're not injecting anything, it's not going to go anywhere because it's not -- there's nothing to go anywhere." *4/25/07 Tr. at 172, L5-6.; See Respondents' Findings at p118, Sec. IX.C.1.iv.*

d. Officer Toney erred by grouping wells for seriousness determination and by failing to cite any evidence of seriousness as to Wohlwend, Twenhafel or Harrell wells, in addition to citing evidence that does not support conclusions as to other three wells, thus she failed to support her selection of highest matrix in Table I of policy under 40 CFR 22.24 and 42 USC 300h

Again, as did EPA, Officer Toney again erred by lumping the six wells together for purposes of her Table I matrix selection and conclusions, and in fact failed to cite any testimony or other evidence as to the other three wells (Wohlwend #6, Twenhafel #2 and Harrell #1). *Decision at 6-7.* Combined with the fact that the cited evidence does not establish that any of the MIT violations themselves represented a serious risk of harm to a USDW, Officer Toney entirely failed to support her determination that the highest Table 1 matrix was appropriately selected for any of the six wells.

e. Officer erred in finding that "Respondents were operating six wells in violation of the [MIT] requirements for periods of time varying from over four to nearly ten years", when hearing testimony established that wells were inactive prior to, at and after the time of the violations and were not being injected into by RWS

After her disposal of the Table I selection, in discussing her Table II selection, Ms. Toney erroneously stated that RWS operated all six wells "in violation of the [MIT] requirement" for 4 to 10 years after 1995-1996 violations. *Decision at 7.* This finding is abjectly incorrect based on the government's own documents and witnesses, which establish that none of the wells were operated without an MIT having been performed at least once first. As noted above, Inspector Brown stated **Atwood # 1** had not been operable from at least 1991 until it was plugged. *4/25/07 Tr. at 46-49.* IDNR Inspection reports evidence that the **Harrell #1** was inactive from at least 1990-2001 *(C. Exhs. 63, 77.b, 77.c, 71.a, 72.a, 72.e*), as confirmed by Inspector Cunningham during his testimony. *4/24/07 Tr. at 225-227.*

IDNR reports also document that the **Twenhafel #2** well was inoperative from at least 1988-2002, when it was transferred to Mr. Huels, who operated it after it passed MIT. *C. Exh. 64.a; R. Exhs. 80.a and 80.b.* **Wohlwend #6** was also documented by IDNR to be inactive and capped from 1990-2003. *R. Exhs. 83.b, 85.a-85.e, and C. Exh. 74.* Inspector Matlock

testified that the **Zander #2** well was inactive from 1991 to 2005. *4/24/07 Tr. at 205*. Finally, IDNR records show that the **Huelsing #1** was operated in 2001, after it was MIT'd on 3/14/01. *R. Exh. 76.b; R. Exh. 118.*

Consequently, Officer Toney's interpretation of the parties' joint stipulation and finding that RWS blatantly operated all six wells in violation of MIT requirements for "4 to 10 years", is not supported by the record and must be disregarded.

f. Officer Toney's deviation from Penalty Policy regarding "small size of Respondent's business and his advanced age" begs issue of why Officer refused to deviate within rubric of Table I of Policy, and such refusal is arbitrary and capricious

Like EPA, Officer Toney stated she took the small size of RWS and Mr. Klockenkemper's advanced age into account, in regard to the seriousness of the violations, "although not specifically required to" under the Policy. *Decision at 8.* Such deviation is at odds with Officer Toney's refusal to move down to a lower matrix within Table I, and Respondents assert that her selective adherence to the Policy is arbitrary and capricious.

g. Officer erred in stating "Because most of what takes place in an injection well occurs underground, mechanical integrity tests are the only way to determine if an injection well leaks underground", since EPA MIT Guidance states that several other methods besides a pressure test, including "well record evidence" may be used to show MI is present

Officer Toney erred in attempting to increase the apparent severity of RWS's MIT violations by stating that an MI pressure test was the "only" method of determining if a leak occurs underground, since EPA's own MIT technical guidance manual lists at least 5 other methods of verifying MI. *Decision at 7; C. Exh. 84 at 5-6, and Table 1.* Further, the guidance states that well records showing adequate cementing are also indicative of the absence of fluid migration from the well to a USDW. *C. Exh. 84 at 28.* Thus, the Officer's attribution is incorrect, since there are other methods besides a MI pressure test to assure that MI is present.

h. Officer Toney's selection of lowest multiplier within highest seriousness level in Table II in error and arbitrary and capricious since selection should have been from lowest Table I and Table II levels, if any

Officer Toney's error in selecting the highest matrix resulted in an artificially high selection of a $1,000 multiplier, whereas a selection of a lower initial matrix would have allowed a much more realistic multiplier reflecting the lack of harm and impact on the environment from the MIT violations. *Decision at 8.* Alternatively, Respondents assert that the Officer should have reflected the lack of seriousness and inactive status of the wells, by selecting a much lower multiplier than $1,000 for the 6 wells as a group.

6. Officer Toney's summary rejection of Respondent's arguments that the "gravity" was improperly analyzed and calculated without support and in error since EPA may not merely review a violation for and rely on "programmatic harm" alone as term is interpreted by Presiding Officer based on the evidence presented

In her summary of Respondents' arguments, the Officer stated:

> "Respondents argue that Complainant's calculation of the gravity penalty component is flawed because it failed to consider specific facts as to each of the six violating wells and the nature of the environment surrounding each of the six wells and any USDWs. Respondents further argue that the testimony and affidavit of Lisa Perenchio are insufficient to establish the seriousness of the violations because Ms. Perenchio "did not present any factual evidence supporting her assertions that the programmatic severity of the MlT violations indicated that a high deterrent penalty component should be added to the gravity" and that Complainant failed to establish "that there was a USDW present under any well, or what the name and location of the supposed USDWs were."[citing Respondents' Brief at 9-10]. Respondents maintain that the agency's selection of a high seriousness level was driven solely by the category of the violation, not a "particularized evaluation of the circumstances of each violation" [citing Brief at 3]. Respondents cite to three U.S. EPA administrative cases in support of their argument that failure to consider well specific information can be considered a failure to prove its proposed penalty wider 40 C.F.R. § 22.24. *Decision at 8.*

Clearly, Respondents' 25 page Brief and lengthy Proposed Findings and Conclusions contained more arguments and points of error than the few arrayed in a single paragraph by the Officer, especially with regard to the specific circumstances surrounding each MIT violation at each well, and Respondents assert it was error to ignore same, without some mention of the

Officer's disposition of same. *See Findings of Fact at Secs. I-Wohlwend (p2), II-Twenhafel (p42), III-Atwood (p51), IV-Harrell (p60), V-Huelsing (p76) and VI-Zander (p84)*.

a. Officer's summary rejection of three of Respondents' several cited cases in support of 40 CFR 22.24 dismissal in error because she ignores requirement that each violation must be reviewed for actual or potential harm, and the programmatic harm must be tied to violations themselves, in order to conduct proper analysis and support high gravity selection

i. Perenchio made same admission as EPA calculator in *Gypsum North Corp., Inc., CAA-02-2001-1253, 2002 EPA ALJ Lexis 70* that EPA selected initial gravity component for RWS's MIT violations based solely on the generic category of violation without any individualized assessment or consideration of well-specific facts

Beginning with the rejection of the three of the many cases cited by Respondents which the Officer addressed, with regard to *In Gypsum North Corp., Inc., CAA-02-2001-1253, 2002 EPA ALJ Lexis 70*, Officer Toney held that the fact that Ms. Perenchio explained her generic approach to calculating and assessing a non-well specific, "group" gravity penalty, and her consideration of the "specific circumstances" (apparently alluding to Mr. Klockenkemper's age and the small size of RWS) somehow satisfied the acknowledged holding of *Gypsum. Decision at 9*. There, the ALJ held that a penalty calculation must afford an "individualized assessment of the particular facts surrounding the violation," and that a calculator could not blindly apply the penalty policy by rote to classify that same category of violation as being of the same seriousness each time.[5] *Gypsum at 10-11*. In *Gypsum*, EPA's enforcement officer had made the initial gravity penalty amount selection based solely on the classification of the violation (there a failure to notify EPA of asbestos-related demolition), and admitted that he assigned the highest level penalty of $16,500 by rote and was constrained to do so by the CAA policy. *Gypsum at 10.*

[5]The *Gypsum* ALJ held that EPA's penalty calculator cannot initially blindly select the gravity of a penalty based on the "category" of violation, where the resultant penalty component is always same for every violation of that type, but must consider individual facts from the outset. EPA's enforcement witness agreed that a "subhuman" could perform the initial gravity "calculation" because every time there's a first time no notice violation, a violator gets a $16,500 penalty and that he could not adjust the amount up or down based on the directives of the penalty policy. *Id.*

Like the *Gypsum* EPA witness/calculator, Ms. Perenchio acknowledged on cross that her and EPA's selection of the seriousness level in Table I of the Policy was driven solely by the category of violation, and she acknowledged that every MIT violation was automatically assigned the highest level of seriousness in Table I by EPA, in every case, irrespective of the particular facts of the case. *4/25/07 Tr. at 145, L18-22, and 146, L23 to 147, L18, and 148, L20 to 149, L18.* Rather, Perenchio stated that for "this first step we just use the table for the seriousness of the violations". *4/25/07 Tr. at p144, L13-21.* Perenchio also admitted that she did not take any well or case-specific facts into account, other than the fact that MIT violations were alleged, when selecting the "High" level from Table I for Counts I and II in this case. *4/25/07 Tr. at p156, L6-23; C. Exh. 141, at Para 22.*

Thus, like EPA in *Gypsum*, EPA here failed to consider the particular circumstances of the violation prior to assigning the highest gravity penalty level, and EPA's overly rigid, non-fact based approach should not have been adopted by the Officer.

ii. Despite rejecting ALJ's total disregard of penalty policy, EAB in *In Re Carroll Oil* still reduced EPA's initial gravity component to moderate from high due to EPA failure to consider and prove site-specific, actual or potential threat of harm to surrounding environment

As discussed at *Section VIII.D.1, 2 and 3, infra*, despite disregarding the ALJ's calculations, the *Carroll* EAB nonetheless criticized EPA for failing to establish that there was anything left in the UST's have leaked, and concomitantly reduced the potential for harm de novo from serious to moderate in the applicable penalty matrix there. *In Re Carroll Oil, 10 E.A.D. at 657.* Thus, contrary to the Officer's assertions here, that case does not stand for the proposition that EPA may assess a gravity penalty based solely on programmatic harm. *Decision at 6, 9.* Rather, it supports Respondents' assertions that some case-specific findings of harm, or at least a realistic potential of harm to a USDW through which the wells pass (versus harm to the program) must be shown to support the highest severity level.[6]

[6]*Also See e.g In the Matter of: Leisure Valley West, Central and Docket Nos. SDWA-III-023, East Water Systems; Olan Hott, SDWA-III-024, SDWA-III-025)(6/25/99 - Initial Decision)*(High SDWA seriousness for failure to monitor shown by actual data indicating coliform bacterial in water during the

iii. In *In Re Bil Dry, Docket No. RCRA-III-264*, EPA's proposed penalty of $231,800 was reduced to $103,400 for operating a hazardous waste TSD without a permit, in part due to fact that EPA overstated the potential for harm since only 3 of 260 drums actually contained hazardous waste

In *Bil Dry*, a cement facility located in a residential area was found to be operating without a permit, illegally storing combustible and other wastes, and violating several other basic core RCRA requirements. *In the Matter of: Bil-Dry Corp. Docket No. RCRA-III-264.* In reducing the penalty by more than 50%, the ALJ held that EPA's recommended penalty of $231,800 was:

> "inappropriate given the facts and violations at issue. Upon careful analysis of the evidence, in the exercise of his discretion, the undersigned departs from EPA's calculations and assesses a penalty different from that proposed by the agency....EPA's penalty calculations are incompatible with previously reached conclusions that Drum No. 5 did not contain solid waste, and the fact that violations pertaining to Drums 2-4 are found to have only occurred as of April 9, 1996. *Id. at Section B.1.*

Thus, while part of the reduction was in the multi-day component, *Bil Dry* still required that some site and violation-specific evidence be adduced to allow a significant penalty. Given the final penalty of $103,000 for *Bil Drys'* illegal operation of a hazardous waste TSD in a residential neighborhood, RWS's penalty seems inappropriate given the facts and violations at issue here, especially where EPA failed to show that there was even any USDW's to be threatened by RWS's inactive wells (which are for the most part located miles from each other).

b. Officer Toney's rejection of Respondents' arguments and holding that Ms. Perenchio's testimony establishes sufficient evidence of actual or potential harm by showing the "programmatic severity" of RWS violations at the six wells is patently erroneous and unsupported by record

After cursorily distinguishing the three cases discussed above, Officer Toney then asserted that EPA had met its 40 CFR 22.24 burden regarding statutory factor 1, by way of Ms.

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time of violation, and by fact 7 boil orders were issued as a result)(5/25/99); *In the Matter of Sunbeam Water Company, Inc., Docket No. 10-97-0066-SDWA Garden Grove Public Water System, et al. (10/28/99 - Initial Decision)* (High Seriousness for SDWA failure to monitor indicated by repeated detects of total coliform bacterial contamination, evidence of complaints of gastrointestinal problems from people drinking Sunbeam water, and findings of physical deficiencies in Sunbeam's water system).

Perenchio's fact-starved testimony:

> "Moreover, as recited above, Ms. Perenchio's affidavit establishes more than sufficient factual evidence to support her assertion of the 'programmatic severity' of Respondents' violations for failure to conduct mechanical integrity testing on the six wells. While Respondents are correct that the record does not contain well-specific information as to the presence of underground sources of drinking water in the vicinity of any of the six wells, case law is clear that a demonstration of actual harm to a specific aquifer is not required in order to assess a penalty for a high level of seriousness. Harm to the statutory program is sufficient. In this case, Ms Perenchio applied the statutory penalty factors to the facts of these violations as directed by the UIC Penalty Policy. The Policy permits the agency to determine the seriousness of the violation as reflective of the *potential* of a particular violation to endanger USDWs, "endanger" being defined by the statute as an injection which *may* result in the presence of contaminants in USDWs. 42 U.S.C. § 300h(d)(2). Thus, the agency is not required to demonstrate actual harm to a specific aquifer in order to assess a penalty of a high level of seriousness under the UIC provisions of the SDWA. *Decision at 9.* (Emphasis in Original)

i. Presiding Officer correctly found that EPA failed to prove actual or potential harm related to the wells, since Perenchio failed to cite any indicia of actual or potential harm, state inspectors testified there was no observed harm, and since EPA failed to show that a USDW was even present in the area of each well

A. Perenchio admitted that her testimony contains no well-specific or USDW-specific facts indicating that she considered the potential for harm from RWS's failure to MIT to a USDW for either Table I or II

In prefacing her cursory rejection of Respondents' arguments that site and well-specific evidence that harm or a credible threat thereof to a particular USDW must be shown under both the Illinois SDWA and UIC penalty policy, Officer Toney first admits that "Respondents are correct that the record does not contain well-specific information as to the presence of [USDW] in the vicinity of any of the six wells". *Decision at 9 (Emphasis Added).* Respondents agree with this fact, which comports with Ms. Perenchio's testimony that she had "no idea what condition these wells" were in when she calculated the penalty. *4/25 Tr. at 179-180.*

The Officer's finding of a lack of a showing of actual or potential harm to a USDW is also consistent with Perenchio's cross-examination testimony with regard to paragraph 25 of her declaration, that while Perenchio claimed in that paragraph that she "considered the potential for Respondents' failure to timely conduct [MIT] to endanger USDWs", she admitted that nowhere in her narrative did she relate what specific facts pertinent to any particular well she allegedly

considered in support of her determination of the threat to USDWs. *C. Exh. 141 at p6, para. 25; 4/25/07 Tr. at p162, L9 to p163, L13.* Perenchio also admitted that she failed to consider any well specific facts in determining the severity in Table I and the severity range for Table II, and as such admits that facts related to each well's "particular violation" (as stated in the UIC policy), and those facts allegedly creating the potential for each well to present an endangerment, were never considered by EPA for either statutory factor analysis on Count I or Count II. *4/25/07 Tr. at p180, L5-18; C. Exh. 141, at p8, paras 31-34 and at p9, para. 34.*

B. State inspectors were unable to testify to any fact indicating a threat to a USDW from any RWS well

The Officer's finding of "no USDW - no harm" is supported by the state inspectors for each well, who testified that they inspected the wells numerous times and observed nothing to indicate conditions which could indicate a threat of loss of MI or releases to a USDW. Based on the history of the subject wells (inactivity, proper permitting, adequate construction, properly shut-in and successful MIT's both before and after the 1995-1996 missed MIT) the wells were not likelyto be leaking or communicating from the injection zone to a USDW or otherwise having potential to impact a USDW. *See e.g. (Inspector Matlock - 4/24/07 Tr. at pp204-206(Huelsing well)); Matlock - 4/24/07 Tr. at 205, L13-19 (Zander well)); Inspector Cunningham - 4/24/07 Tr. at 265-266 (Harrell well)); Inspector Brown - 4/25/07 Tr. at 43, L15, to p46, L13, and at p48 (Atwood well).*

Consequently, the Officer in essence rejected EPA's generic assertion that a high potential for harm existed at each well, and agreed with Respondents that EPA had not shown any circumstances establishing that there was a high or even moderate threat of any well impacting a USDW.[7] Notwithstanding, the Officer proceeded to select the highest matrix based on speculative, non-well specific concerns that themselves were not supported on the record. As

[7] Another example of the type of impact that is considered to present a moderate to high threat of harm is shown in the *Everwood* case cited by the Officer and EPA in conjunction with *In Re Carroll*, where the Respondent had wilfully buried hazardous wastes in an active effort to violate the RCRA land ban rules, bringing the wastes into direct contact with the environment, and even there the EAB cut EPA's proposed penalty by nearly 50%. *In Re Everwood Treatment Co. 6 E.A.D. 589 (1996); Decision at 6.*

such, as discussed further below, the EAB's approach in *Carroll* brooks for a revision of EPA's matrix selection to a level reflective of the lack of indicia of actual or potential direct harm to a USDW from any of the wells here. *Carroll, Supra*.

ii. Officer's rationale for finding EPA met 40 CFR 22.24 burden as to statutory factor 1 by showing "programmatic harm" in error since "programmatic harm" is already taken into account as a separate element from "actual or potential harm" under the penalty policy, and since Perenchio's declaration is insufficient to even demonstrate "programmatic severity"

A. Officer's approach in error because it improperly includes and substitutes "programmatic harm" for a showing of actual or potential harm to a USDW in Table I and Table II analysis, where policy requires that such theoretical harm to the UIC be taken into account in regard to both Table I and II analysis, <u>after</u> evaluation of actual or potential risk of harm to environment

Ms. Toney's seriousness analysis is in error since it effectively substitutes the "programmatic harm" element of the Table I and II analysis for the fact specific "harm to a USDW" findings EPA is required to make for Table I analysis, as indicated by Toney's own recitation of the Table II elements as including "the importance of the violation to the regulatory scheme". *Decision at 7, 9.* Further, such approach ignores the Table I and II criteria that requires analysis of the "potential [of the MIT violations]...to endanger USDW". *Id.* Thus Officer Toney errs by incompletely performing the required Table I and Table II analysis of facts specific to the violations and the wells to evaluate environmental harm or endangerement to a USDW, prior to addressing the programmatic harm issue. *Id.* Implicit within the "endangerment" showing is proof that there is actually a USDW present to be threatened by the well's violation, which Toney admits was not done. This requirement that some harm or at least credible potential therefor, be shown prior to allowing reliance on programmatic harm is illustrated by the very cases the Officer cited in support.

B. Caselaw requires that "programmatic harm" actually be presented from and be tied to potential harm to environment from specific violations at issue, and not from generic recitation of scope and breadth of UIC program and theoretical harm caused by MIT violations in general, thus Perenchio testimony is insufficient as to this element as well

Ms. Toney cites to two cases, *Phoenix Construction Services, Inc. 11 E.A.D. 379, 396-400 (EAB 2004)*(CWA), and *Predex Corp., 7 E.A.D. 591, 601-602 (EAB 1998)(FIFRA)* in an attempt to support her findings that a showing of programmatic harm, alone, supports a substantial penalty under these facts. *Decision at 9, fn 15.* However, neither case supports EPA's or the Officer's reliance on programmatic harm alone, for imposition of substantial penalty.

I. *In Re Predex Corp., 7 E.A.D. 591, 601-602 (EAB 1998)(FIFRA)* resulted in no penalty being assessed based on lack of actual or programmatic harm, and EAB rejected and did not impose a "substantial penalty" for purely programmatic harm despite EPA's urging

Contrary to Officer Toney's parenthetical, the EAB in *Predex* did not impose a substantial penalty for programmatic harm, but quite the opposite. *Predex Corp., 7 E.A.D. 591, 601-602 (EAB 1998)*. Rather, the EAB upheld the ALJ's decision to issue a warning to Predex in lieu of a substantial penalty due to the lack of harm to the environment or the FIFRA program caused by Predex:

> "The Presiding Officer found that "[h]ere, no harm to human health or the environment resulted from the violations at issue...only Respondent's want of due care"...**The Presiding Officer rejected the Region's contention that harm to the FIFRA regulatory scheme warranted imposition of a significant penalty in this case.** The Presiding Officer first noted that harm to the regulatory scheme caused by a failure to register is taken into account under the framework of the ERP. The Presiding Officer noted that the ERP guidelines...tak[e] into account actual harm to human health and the environment and the importance of the requirement to the goals of the statute...the Presiding Officer held that "Complainant's argument that damage to the FIFRA program warrants a substantial penalty is rejected." *Predex at 599-600.* (Emphasis added).

As in *Predex*, and as recited by Officer Toney, the UIC penalty policy already takes programmatic harm into account, and also requires some demonstration of potential harm to support a substantial penalty. *C. Exh. 47 at 2 (UIC Policy).* Consequently. *Predex* in fact

supports a lower or no penalty assessment given the lack of demonstrated harm or threat thereof to a USDW, and the associated lack of showing of harm to the program. *Predex, Supra.*

II. *In Re Phoenix Construction Services, Inc. 11 E.A.D. 379, 396-400 (EAB 2004)*, a CWA 404 unpermitted illegal wetland destruction case found programmatic harm occurred only where EPA first showed actual harm from act of filling, and where lack of permit went to core of 404 program, and even then penalty was reduced to only $23,000

Unlike RWS (who had a permit and was not accused of illegal injection), the Respondent in Phoenix was found liable for a $23,000 penalty (from $27,000 proposed by EPA) where it knowingly filled in a wetlands without a permit, causing at least temporary destruction of the wetlands:

> "Similar to the principles enunciated in the RCRA context, the failure to obtain a permit goes to the heart of the statutory program under the CWA...Thus, the obtaining of permits and the following of such conditions is critical to the basic purpose of the section 404 program as well as the CWA...[therefore]...The Presiding Officer did not err in finding that there was harm to the regulatory program based upon Phoenix's failure to obtain a section 404 permit prior to filling the wetlands. She also did not err in finding that the harm to the regulatory program resulted in a potential risk of environmental harm...The Presiding Officer did not err in finding that the Region proved, by a preponderance of the evidence, that Phoenix's activities caused actual harm to the adjacent wetlands, at least temporarily. *Phoenix at 398-399, 380.*

Consequently, *Phoenix* also fails to support EPA's and the Officer's assertion that a substantial penalty can be imposed where EPA has failed to show any harm or threat of harm whatsoever, and where the violations at issue, lack of MIT's at shut-in, inoperative wells, do not go to the UIC's core purpose of requiring a permit prior to injection to avoid impacts to USDW, RWS having obtained same and having not been shown to impact any USDW. Rather, the fact that Phoenix was only assessed a $23,000 penalty, in the face of both actual environmental impacts and related programmatic harm from blatantly and knowingly filling a wetlands, in full view of others who might do the same, begs the issue of how a $115,000 proposed penalty can be upheld by the Officer or the EAB for RWS's rural, isolated, inactive, shut-in injection wells. *Phoenix, Supra.*

c. *In Re Safe and Sure Products, et al.8 E.A.D. 517 (EAB 1999),* assessing a final $30,000 penalty from the $229,000 proposed by EPA, establishes inadequacy of Perenchio declaration to proving substantial "programmatic harm" to support $105,590 penalty for six passive violations, by itself, where no actual or potential harm to a USDW, no misleading conduct, no repeated pattern of 100's of ongoing repeated MIT violations, and no illegal operation without permit, alleged or shown

In *In Re Safe and Sure Products, et al, 8 E.A.D. 517 (EAB 1999)* the EAB rejected Respondent's request for a warning in lieu of a penalty where harm to the FIFRA registration program is always assumed from a failure to comply with the FIFRA core registration requirements, and where EPA proved that there were nearly one hundred violations of FIFRA, that distribution of Respondents' unregistered and misbranded products was widespread, and where EPA established that the violations reoccurred over more than a decade. *Id. at 518-519.*

Even given the egregious illegal unpermitted operations by Safe and Sure, which caused substantial amounts of mislabeled poisons to be placed into commerce for decades, the EPA's proposed penalty of $229,000 (revised down from EPA from over $400,000), was reduced by the ALJ over 80% to $30,000. *Id.* Thus, even where actual and potential harm may be combined with lying to inspectors (as did Safe and Sure President Mr. Workman), illegal operations, repeated violations and violation of the core requirement of FIFRA to allow a finding of programmatic harm, a "substantial" penalty is far, far less than that proposed by EPA for RWS relatively minor violations. *Id.*

Given that the foregoing cases found a non-theoretical programmatic harm related directly to the harm presented by the violations and compounds being illegally distributed or disposed of, and they are not helpful to supporting the type of disembodied alleged programmatic harm contemplated by EPA and Officer Toney under the SDWA UIC program as to RWS's non-injection violations.[8] The EPA's failure to establish that, for each well, a USDW was at least

[8] As argued at Sec. XI.A of Respondent's proposed findings of fact (p141), Ms. Perenchio's testimony did not even establish the "deterrence" basis which EPA allegedly was proceeding on, especially her failure to cite facts evidencing how RWS's MIT violations compared to the overall regulatory background of the thousands of wells in the Illinois UIC program, or that there was anyone or any need to deter any operators from similar violations under the program. *Respondents FOF at p141, Sec. XI.A.*

present and in a position to be threatened by each of the wells, and failure to establish that the condition or operation of the wells was such to allow an inference that there is a credible chance of impacts from the wells thereto, entirely undercuts EPA's alleged claims of programmatic harm and is not a basis for any penalty, let alone a substantial one. *In Re Carroll Oil, Supra; In Re Safe and Sure Products, Supra, Predex, Supra.*

d. Perenchio was not expert or first hand witness and did not testify to or rebut Morgan testimony, but responded to cross examination as to direct declaration testimony only, and declaration does not meet 40 CFR 22.24 burden as to statutory penalty factors

Perenchio was not presented or qualified as an expert witness with Vitae in this matter, but rather was presented as a fact witness as to EPA's penalty calculation, and EPA counsel did not lay the foundation for any expert opinion as to the site-specific conditions and their import from Perenchio. *FRE 701, 702 and 703; C. Exh 141.* Nowhere in its prehearing exchange or in her affidavit did EPA qualify her as an expert geologist or other technical expert, or present an expert's curriculum vitae. *See Gilbert Martin Woodworking Co. d/b/a Martin Furniture, Docket No. EPCRA 09-99-0016(6/13/01)*[9]

Perenchio was thus not presented to nor did she specifically attempt to rebut any of Respondents' expert's (John Morgan) testimony, or opinions as to particular well specific issues related to the conditions at and of the wells, especially as to rebutting his opinions that the wells had not lost MI between 1991-2005 and that the likelihood of endangerment from the lack of the 1995-1996 MIT was low or not present. *R. Exh. 180.* Ms. Perenchio was not presented with or asked by EPA counsel to opine upon Mr. Morgan's testimony or opinions, or even state that she was aware of it. *C. Exh. 180; 4/25 and 4/26 Tr., et seq.* Nowhere does Perenchio or any other EPA witness, expert or otherwise, establish that there was a USDW present under any well,

[9]EPA witness who reviewed another employee's calculations under penalty policy to determine whether the factors were applied in making the proposed penalty was not an expert or fact witness, but rather, with her affidavit deemed her direct testimony, her live testimony began with cross-examination. *See Also In the Matter of Rizing Sun, L.L.C., Docket No. FIFRA-9-2004-0024* (Complainant must identify and include Curriculum Vitae of Expert in Prehearing Exchange)

or what the name and location of the supposed USDW's were. Thus, EPA failed to carry its 40 CFR 22.24 burden, and it was error for Ms. Toney to rely on same for the seriousness findings.

e. Perenchio testimony inadequate and insufficient for reasons set forth at Respondents' 12/21/07 Proposed Findings of Fact, Sections IX and XI.A

Respondents also assert Ms. Perenchio's testimony was flawed and inusfficient basis for Ms. Toney to base the gravity portion of the penalty for those reasons set forth in their *Proposed Findings of Fact, Section IX (p116).* Ms. Perenchio admitted that she claimed to have made many findings which were not reflected in her declaration testimony, and a comparison of Perenchio's and Morgan's testimony indicates that Mr. Morgan also rebutted those findings that were in fact made (contrary to Officer Toney's immaterial and erroneous assertions that Mr. Morgan did not rebut Perenchio's testimony as to the "importance of [MIT]" and "harm that can result" from lack of MITs), thus such testimony is unreliable, in addition to irrelevant to actual or potential harm. *Decision at 10; Compare C. Exh. 141 at p6, para. 25 and 4/25/07 Tr. at p162, L9 to p163, L13 (Perenchio) to C. Exh. 180 (Morgan); And See FOF at p141, Sec. XI.A.*

7. By basing statutory factor 1 solely on theoretical presence of programmatic harm with no nexus to violations themselves, Officer Toney effectively reads first statutory factor out of SDWA and results in penalty becoming punitive and imposed without due process and not in compliance with 40 CFR 22.24

While Ms. Toney is correct that EPA need always not show <u>actual</u> harm in a penalty case, she ignores the fact that EPA must at least show a credible <u>potential</u> for harm from the violation, and the physical circumstances attendant to it, to the regulated media (here a USDW).[10]

[10]Given the effort EPA put into attempting to prove the injection wells somehow injured Mr. Vonder Haar's cows (*4/24/07 Tr.*), and the thrust of the remaining 2 days of direct attempting to show surface impacts, EPA apparently thought it needed to show some impacts to the environment (albeit those impacts having nothing to do with MIT, but rather related to the surface environment), even if that media was not a USDW. Given Ms. Toney's holding, it would appear that there was no need for a hearing as to seriousness, since the application of statutory harm here was summarily based upon Perenchio's affidavit and did not take any hearing testimony as to lack of threats into account.

Decision at 6,9, 10. This burden is the same here as under RCRA or CERCLA, where EPA must show a potential for a release to the general environment for jurisdiction/penalty (which is assumed there from the release or threatened uncontrolled release or presence of a contaminant in the environment).

By ignoring the requirement for showing some potential or actual harm from the violations themselves to the regulated or protected media, EPA Region 5's approach basically reads out of the statute the SDWA requirement that each "particular" violation (e.g. rather than each type of violation) must be evaluated for impacts to both the environment, and to the UIC program. Conversely, a proper, balanced analysis of the seriousness factor results in the more reasonable finding that, assuming, *arguendo*, that EPA had proved that a USDW exists in the areas that could be reached by any of the wells, there likely was no actual, and very little potential harm to any USDW, thus allowing EPA to arrive at a much lower gravity penalty amount more reflective of the circumstances surrounding the violations.

8. Officer erred in rejecting John Morgan's expert testimony as to the lack of seriousness found by IDNR in assessing much lower penalty amounts, and erred by disregarding Morgan's un-rebutted opinion that available well-specific facts indicated that no impacts occurred and threat of harm was low or marginal, despite Officer's finding that no USDW was shown to be present or impacted

Respondents presented expert witness John Morgan to testify by declaration (*C. Exh. 180*) and for live cross examination at hearing (*4/26/07 Tr.*), as to seriousness and unreasonableness of the EPA's calculated gravity component of the penalty under SDWA statutory factor 1. Respondents' arguments based upon his testimony are presented in their post-hearing brief and findings of fact, and are adopted here in rebuttal of EPA's and Officer Toney's findings. *See Brief at 9, 10, 15, 18, 19, 20, 21, 23; See Also Proposed Findings of Fact at p98, Section VIII.A-K.*

a. Mr. Morgan's un-rebutted testimony as to lack of harm was erroneously discounted and ignored by the Presiding Officer

While the Officer seems to tacitly agree with Respondents' penalty and harm expert

witness, former IDNR SDWA UIC Enforcement Director, John Morgan, in that there was no actual or potential threat of harm to any USDW from the violations, she errs in failing to readjust the gravity component downward from "most severe" accordingly. *C. Exh. 180 - Morgan Report.* She found that, since "most of what occurs with the respect to the operations of an underground injection well takes place underground, [MIT] are the only way to determine if a well is leaking and posing a threat to the surrounding environment...I find Mr. Mogan's testimony unpersuasive on the issues of seriousness of the violations at issue. *Decision at 10-11.*

b. Morgan's opinions as to the reasonableness and basis (and lack thereof) for IDNR and EPA findings and penalties were disallowed without legal basis despite his personally having reviewed and approved the same type of penalties for the very same personnel that issued the state penalties in this case

Officer Toney also erred in refusing to allow Mr. Morgan's testimony as to his opinion that EPA's penalty calculations were too high for the low seriousness of the violations, and that, if any, the IDNR's total penalty of $1,900 for the very same six violations was more appropriate, since IDNR found the violations to be of low seriousness. *Decision at 10, fn 16; 4/26/07 Tr. at 211-212 (Toney); See well by well discussion at C. Exh. 180 at 6-8.*

Such was error, where Morgan made his findings of the degree of potential and actual harm as required by the UIC policy, based on his first hand experience in assessing such penalties for failure to MIT when he was the Chief of the Oil and Gas division which directly oversaw and oversees the UIC program. *Decision at 10, and fn 16; C. Exh. 180 at 1, and Att. A morgan (Vitae).* This included his experience supervising the very persons who initiated this very action, where he approved their calculations and assessed UIC penalties for all such wells in Illinois.[11] *C. Exh. 180 at 1, fn 1.*

[11]Mr. Morgan hired and supervised Michelle Phillips (the IDNR penalty approver for these violations) and supervised her and Mr. Bengal (who referred this matter to EPA - *See C. Exh. 33*) in issuing NOVs and assessing penalties.

c. Officer Toney erred by failing to at least consider the IDNR's findings of lack or harm, low seriousness and penalty calculation for all six wells of $1,900, as discussed by Mr. Morgan

Officer Toney expressly rejected without discussion the IDNR NOVs and penalty assessments for these six violations, despite the NOVs being based on the first hand observations of the persons who prepared them for the six wells, and thus being probative of actual conditions, and threat of harm, at and from the wells. *Decision at 11, fn 18.* Respondents adopt here Mr. Morgan's discussion of the IDNR assessments and the State's findings of low seriousness and no harm, in appeal of Ms. Toney's competing findings and analysis. *C. Exh. 180 at 6-8; Findings of Fact at p98, Sec. VIII.*

Officer Toney also ignored caselaw cited by Respondents that stands for the proposition that in instances where there is doubt as to the basis, efficacy or correctness of EPA's penalty calculations, a fact finder may consider and/or adopt the calculations and gravity assigned by the state EPA personnel involved in responding to the violation. *Respondents' Brief at 4; See In the Matter of Pepperell Associates, Docket No. CWA-2-I-97-1088)(2/26/99)*[12]

9. Statutory Factor 1 - Annual Reporting violations: gravity component of $990 should be eliminated due to failure to show harm since there was nothing to report for the six inactive wells for 3 years at issue (1996-1998), and since no facts were taken into account or annual reports reviewed regarding actual or potential harm, thus 40 CFR 22.24 burden not met as to seriousness factor

It is established on the unrebutted record that none of the six wells were active from 1996-1998. *C. Exh. 180 at Att. B, Sec. II.A. (Morgan).* Perenchio admitted that there would be nothing to report in an annual report for a well that was not operating, and that the submission of an annual report showing no pressure or injection was not the only way to tell if a well was

[12]Where Respondent cast sufficient doubt on the accuracy of USEPA's gravity component of the penalty calculations, Presiding Officer instead adopted spill calculations of the Maine DEP inspector who responded to and directed the cleanup of the oil spill, resulting in a 40% reduction in the base gravity penalty.

operating or not. *4/25/07 Tr. at p181, L16 to p182, L8.*

Perenchio also admitted that her testimony contains none of the specific facts she claims to have considered in determining the potential endangerment to a USDW from the annual reporting violations. *4/25/07 Tr. at p182, L9 to p183, L1; C. Exh. 141 at p10, para. 38.; Decision at 11-12, fn 19, 20,* 22. Despite her alleged emphasis in her direct testimony *(C. Exh. 141, p10, para. 9*) and testimony on cross examination (*4/25/07 Tr. at p183, L21 to p184, L7*) on the importance of annual reports for assuring presence of MI, Perenchio admitted that with regard to reviewing the available annual reports: "I did not review any. I was not aware that any were submitted". *4/25/07 H. Tr. at p184, L8-12.*

In fact, Respondents submitted annual reports for all years not cited by EPA in the complaint (1993, 1996, 1998-2004) for all wells. *2/20/03 Amended Complaint; R. Exhs. 117-121.* Consequently, for the foregoing reasons, no penalty should be assessed for the three annual reporting years at the inactive wells due to EPA's failure to meet its 40 CFR 22.24 burden.

10. Statutory Factor 1- Annual Reporting: EPA/Officer was arbitrary and capricious if consideration of Respondents' age and RWS size is viewed as discount designed to assure that total proposed penalty does not exceed the (then) $125,000 civil referral cut off

EPA's sudden surge of apparent compassion for Mr. Klockenkemper's senior citizen emeritus status, and for RWS business fortunes, and reduction of the monthly multiplier (36) to a yearly one (3), also conveniently avoids pushing the total gravity for all Counts over the then $125,000 cut off, after which the matter must be referred to DOJ for civil enforcement. *Decision at 12, fn 2.* Such motivation could reasonably in part explain EPA's interjection of claimed considerations attendant to the fifth factor (RWS small size/Economic Impact) and sixth factor (Respondent's age/Other Matters) into its analysis of the first statutory factor in explanation of why EPA did not calculate the gravity component as high as it could have. *Decision at 8, 12.*

In fact, Ms. Perenchio admitted that if she had calculated a separate penalty at the going rate for each well in Count II, alone, the gravity portion of the penalty would have been at least four times the amount of the current Count II penalty of $60,000, or $240,000. *4/25 Tr. at p176, L13 to p177, L16, and p178, L24 to p179, L4.* Ms. Perenchio also admitted that had the

penalty been calculated ,"as in most instances" (e.g. well by well for the full time of alleged non-compliance) for either Count I or Count II, and had the same downward adjustments occurred as those already made, Region 5 would not have been able to bring this case administratively, but would have had to refer it to DOJ for civil filing (assuming DOJ would be willing to accept the referral, let alone sign a federal complaint on these facts). *4/25/07 Tr. at p178, L1-12.*

Respondents assert that true compassion of this sort would brook for EPA's proposal of a penalty within the wherewithal of RWS's ability to pay, rather than one that EPA's own financial expert has found RWS has no ability to pay. *See 2/28/07 Gail Coad Declaration - C. Exh. 126 (Contains CBI).*

11. Grouping of wells for gravity assessment purposes aggregates harm and prevents Respondents' from being able to assess what dollar amount and level of threat EPA assigned to each well, and thus violates SDWA Sec. 1423.

EPA's approach of "grouping" the wells together for purposes of seriousness of harm, prior to determining length of violation, improperly aggregates the threat of harm such that it is uniform for each well, where realistically it should be somewhat different for each well. Such grouping and blanket assignment of seriousness prevents Respondents' from being able to assess what level of threat EPA beleived was presented by each well, and makes it impossible for a reviewer to determine the concomitant level of seriousness EPA assigned for each well, in violation of the SDWA requirement that the seriousness of the violations be determined.

12. $115,790 assessed gravity penalty erroneous for foregoing reasons

Respondents assert that the Officer's $115,790 gravity assessment is in error for the foregoing reasons, including due to the lack of EPA's meeting its 40 CFR 22.24 burden of proof by way of EPA's failure to show actual or potential harm to any USDW.

E. Statutory Factor 3 - Past History of Violation: Officer erred since there was no history of violations cited by EPA/Perenchio as claimed by Officer

The Officer claims that EPA "noted numerous UIC violations identified and/or prosecuted by the state [but] EPA chose...not to increase the proposed penalty...". *Decision at 12-13 [citing C. Exh. 141 at 12, para. 45]*. However, Ms. Perenchio does not list any of the alleged past violations at para. 45 or elsewhere in her declaration, but rather states only that "I was aware [RWS] had a prior history of numerous UIC violations...prosecuted..by the state." *C. Exh. 141 at 12, para. 45.* Thus, the Officers' finding that EPA considered but ignored RWS's alleged past violations is erroneous and must be disregarded. *Decision at 12-13.*

F. Statutory Factor 4 - Good Faith Efforts: Officer and EPA erred by failing to properly consider and discount for numerous documented good faith efforts by RWS and Respondent to comply with SDWA, authorities and MIT requirements, as set forth in post-hearing Brief and findings of fact

Ms. Toney improperly enumerated and discussed only three of Respondents' several asserted indicia of good faith efforts: 1) RWS's numerous interactions and communications with IDNR and EPA regarding the MIT and reporting violations; 2) RWS's on-site activities such as well repair, work-overs and grading/rebuilding of access roads; 3) Financial ability of RWS to come into compliance with MIT violations. *Decision at 13-16.* However, as with statutory factor 1, Officer Toney did not address the numerous good faith efforts claims made by Respondents on a well-by-well basis, but rather again improperly lumped them together in her analysis. *Id.*

Unlike Ms. Toney, Respondents provided a breakdown of such various and differing good faith efforts on a well by well basis in their Brief. *See Brief at 13 (Sec. II.B.1.b* - Wohlwend*), at 15 (Sec. II.B.2.b.* - Twenhafel*), at 18 (Sec. II.B.3.b.* - Atwood*), at 20 (Sec. II.B.4.b* - Harrell*), at 21 (Sec. II.b.5.b* - Huelsing*)*[13]*, and at 23 (Sec. II.b.6.b* - Zander*)*.

[13] Respondents note that due to a typographical error, while Sec. II.B.5 of the post-hearing Brief (p21) is correctly titled and refers to the Huelsing #1 well, the text of that section inadvertently refers to the "Harrell" well, but should be read as titled in reference to the Huelsing injection well. *Brief at 21, Sec. II.B.5.*

Respondents adopt and incorporate here the arguments and caselaw set forth in the foregoing cited sections of their Brief (and related findings of fact) as part of this appeal in regard to the good faith efforts that the Officer failed to credit, which good faith efforts Respondents respectfully request that the EAB acknowledge and credit against any penalty. *Id.*

Respondents also incorporate here and refer the EAB to Attachment C to the 40 CFR 22.22 declaration of RWS, which attachment lists for each well a chronology of the various documents and events related to RWS's compliance efforts, beginning with RWS updates to IDMM beginning in 1988 through 2005. *C. Exh. 181 at Att. C (see e.g. C.8 - R. Exh. 160 - 1998 RWS response letter to IDMM).*

1. **Officer failed to properly apply SF 4 due to lumping of wells and failure to distinguish between wells as to differing and various well-specific good faith efforts and attempts toward compliance, in violation of SDWA requirement to consider factors in relation to each particular violation**

While acceptable for purposes of calculating a single length of violation for the wells as a group, Officer Toney's continued practice (apparently of convenience) of lumping the wells together for all other purposes of analysis (especially as to the nature and degree of harm presented by each well and actions taken as to and force majeure events ("other matters") encountered at each well by RWS, and improperly fails to consider and credit the efforts for each well, and thus Respondents' assert Ms. Toney failed to properly apply and analyze statutory factor 4 in relation to the each of the six "particular" violations.

2. Officer ignored and misconstrued numerous good faith communications efforts to regulators

a. Officer improperly and over-narrowly interpreted *Carroll Oil's* treatment of good faith efforts in refusing to recognize RWS's efforts that the *Carroll* EAB stated would indicate good faith efforts with regard to compliance related communications with IDNR and EPA, and ignored numerous such communications in rejecting RWS "communications" good faith effort defense

The Officer apparently relied for the most part on *Carroll Oil, Supra*, for her analysis of what constitutes good faith efforts in regard to a Respondent's dealings with regulatory agencies. *Decision at 13*.[14] However, a review of *Carroll* indicates the EAB found Carroll Oil had ignored the majority of the state and federal agency's communications over a 10 year period, making only a single communication to each, failing to inspect and then report on the condition of the violating USTs, and ignoring subsequent responses from the government. *Carroll at 660*. The EAB cited to testimony that Carroll Oil never visited the USTs to check on their condition, and thus found that the near total ignorance of the agency's communications and the UST's conditions did not amount to good faith efforts to bring Carroll into compliance. *Id.* A review of the afore-referenced sections of the Brief, and findings of fact cited therein, reveals that RWS, unlike Carroll Oil, did in fact make the numerous, substantive and consistent "communications" and well condition inspection efforts that the *Carroll* EAB had found the Carroll Oil had not made.[15]

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[14]Citing *Carroll* for proposition that "good faith efforts" means "diligence, concern, or initiative", shown by "prompt response" to agency compliance status inquiries, keeping regulators appraised of the condition of the regulated units, and seeking and following up on agency guidance/advice to work towards compliance.

[15] Mr. Klockenkemper documented the conditions of the wells during his visits to well sites by way of photographs, including: *R. Exh. 157 (photo of **Zander #2** taken by RWS/Mr. Klockenkemper circa 1993); R. Exh. 178a-c (photos by RWS of **Atwood #1** circa 1993); R. Exh. 152 - (1994 photos by RWS of **Wohlwend #6** depicting condition and interference); R. Exhs. 161, 162 (photo of **Harrell #1**)*

b. Officer erroneously rejected RWS's "communication" efforts by equating lack of "good faith efforts" to come into compliance after the date of violation to RWS failed pre-violation efforts to comply with the MIT deadlines, where the instant action and the proposed penalty already account for initial lack of successful good faith efforts, and where Perenchio admitted that post-NOV efforts do count as "good faith" efforts, thus Officer misconstrued and improperly shortened the applicable time span for good faith efforts

The Officer, after acknowledging that "the record establishes that Respondents did indeed submit correspondence to both state and federal agencies over the course of several years", and after acknowledging that RWS had in fact met with IDNR in 1997, regarding compliance issues, improperly focused only on a single 2/21/01 RWS communication to EPA. *R. Exh. 39* (2/15/01 RWS letter to EPA). The Officer found that "This correspondence, dated four to five years after the compliance deadlines for these wells, did not constitute the "prompt response" or "diligence, concern, or initiative" that rises to the level of good faith efforts to comply" with the [MIT]...requirements...". *Decision at 15*.

The Officer's attempt to equate "good faith efforts" with RWS's compliance efforts prior to the MIT deadlines confuses the fact that good faith efforts to comply after the deadlines are also relevant. *Carroll, Supra.*; *4/25/07 Tr. at p191, L12 to p192, L3(Perenchio)*. Such restriction improperly penalizes RWS twice for the failure to comply by the deadline, since this action and the proposed penalty are addressing the initial lack of successful compliance efforts. The Officer's narrow construction of good faith to pre-violation efforts also contradicts Perenchio's admission that post-NOV compliance efforts were indications of good faith efforts to assure future compliance with the SDWA. *4/25/07 Tr. at p191, L12 to p192, L3*. Consequently, it must be rejected, and RWS's post-violation and post-NOV efforts should be credited.

A review of the afore-cited sections of the Respondents' post-hearing brief indicates that Respondents' cited numerous communications as part of its good faith efforts defense, beginning in 1988 and continuing up to 2005. *See Brief at 13 (Sec. II.B.1.b* - Wohlwend*), at 15 (Sec. II.B.2.b.* - Twenhafel*), at 18 (Sec. II.B.3.b.* - Atwood*), at 20 (Sec. II.B.4.b* - Harrell*), at 21 (Sec.*

II.b.5.b - Huelsing*), and at 23 (Sec. II.b.6.b* - Zander*).*[16] Consequently, the Officer's rejection of RWS's "simple, minimal costs [sic] actions", including both pre and post-violation communications and other good faith efforts was in error, since the numerous and repeated communications are far, far, more than the two that the *Carroll* EAB found not to represent good faith efforts in that case. *Decision at 16; Carroll, Supra*.

c. Perenchio admitted seeing documents indicating good faith efforts, but notwithstanding, improperly based her determination that RWS made no good faith efforts on hearsay from Mr. McDonald

Under cross-exam, Ms. Perenchio admitted seeing, but not considering or documenting , "about a half inch thick pile of letters from the State to Mr. Klockenkemper, letters back..., inspectors' reports...internal memos, the enforcement actions, bond forfeitures...", and admitted that she did not document her observations in her penalty narrative affidavit. *4/25/07 Tr. at p185, L14 to p186, L9; C. Exh. 141, p15, para. 53.* Ms. Perenchio also claimed she based her failure to find good faith efforts on hearsay, namely a conversation that EPA's initial penalty

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[16] The following hearing exhibits were cited as evidence of good faith communication efforts (taken from Att. C. to RWS's declaration):

R. Exh. 160 -	11/5/88- RWS letter to IDEM regarding Huelsing and other wells' status and compliance efforts
R. Exh. 6 -	1/11/93-USFG letter to IDMM on behalf of RWS re Force Majeures delaying compliance
R. Exh. 11 -	4/27/94-RWS notification to IDMM re lack of control over Wohlwend lease
R. Exh. 17 -	4/17/97-IDNR letter to RWS regarding compliance meeting and granting deferral
R. Exh. 18 -	4/18/97-RWS counsel letter to IDNR notifying of court decision putting possession of Twenhafel and Wohlwend in C. Fisher's control
R. Exh. 87.b-	10/13/99-RWS status letter to IDNR
R. Exh. 87.c-	2/15/00-RWS letter to IDNR re Force Majeures preventing MIT of wells
R. Exh. 87.d-	6/16/00-RWS letter to IDNR re vandalism of Wohlwend well
R. Exh. 32 -	10/13/00-RWS letter to EPA/Jo. L. Traub with proposed abatement plan for all wells, and indicating RWS ready to MIT Harrell, Zander and Huelsing upon EPA's approval of plan, to which EPA did not respond *(See also 4/25/07 Tr. at p190, L3-12 (Perenchio acknowledging letter not taken into account)).*
R. Exh. 39-	11/00-Huelsing MIT attempt (poor well head seal)
R. Exh. 39 -	2/15/01-RWS compliance effort status letter to EPA offering to enter CAFO for all wells, to which EPA did not respond
R. Exh. 40-	2/28/01-RWS letter to EPA re Force Majeures (no response from EPA)
R. Exh. 43-	3/13/01-RWS letter to EPA re successful MIT of Huelsing, Force Majeures at Wohlwend
R. Exh. 45-	4/27/01-RWS letter to EPA updating on compliance efforts and upcoming MITs on Zander and Harrell, to which EPA did not respond
R. Exh. 54-	2/8/02 -RWS status letter to EPA re Twenhafel inactivity since 1980's and compliance efforts
R. Exh. 153	11/14/02-RWS letter to IDNR notifying of initiation of operations at Wohlwend lease

calculator Jeff McDonald had with IDNR's Michelle Phillips, which was related to her by McDonald "while he was working on the complaint", wherein he claimed that Phillips told McDonald that the State had found no good faith compliance efforts. *4/25/07 Tr. at p184, L21 to p185, L13.* Consequently, it was error for both EPA and the Officer not to afford a good faith reduction for RWS's communications with, and updates to, the regulatory agencies. *Carroll Oil, Supra.*

d. Officer fails to credit and without basis and erroneously construes RWS's 1997 compliance meeting with IDNR as an attempt to delay compliance, and ignores that such effort resulted in IDNR deferral of compliance with MIT/Reporting requirements for Wohlwend and Twenhafel wells pending resolution of ongoing court cases disputing ownership of same

In rejecting Respondents' communication arguments, the Officer stated with regard to RWS's 4/17/97 compliance meeting with the IDNR: "While Respondents requested to meet with IDNR, it appears from their correspondence that they hoped to further delay bringing the wells into compliance." [*citing R. Exh. 87.b - 10/13/99 RWS status update IDNR*]. However, an inspection of this letter reveals that it does not mention the 1997 meeting or allow any implication that RWS was trying to meet for the purposes of delay, and rather was keeping IDNR updated on its compliance attempts and plans. *Id.* RWS was seeking additional time to comply based upon the need for further guidance from IDNR regarding conflicting requirements (e.g. EPA telling RWS to MIT where state was attempting to requiere plugging of the wells), and regarding work RWS claimed to have already done that IDNR apparently was unaware of, or was not acknowledging. *R. Exh. 87.b.*

By dismissing or construing the RWS-IDNR meeting as an attempt to delay compliance, the Officer ignores that RWS's meeting with IDNR in 1997 resulted in IDNR actually deferring MIT and annual reporting compliance for the Wohlwend and Twenhafel wells pending resolution of the litigation, as well as attempting to agree to a plan to achieve global compliance, and the RWS was keeping IDNR updated regarding RWS's compliance status and the conditions of the wells. *R. Exh. 17* (4/17/97 IDNR Letter to RWS granting deferral for Twenhafel and Wohlwend wells).

The Officer's contention that RWS's efforts in meeting with IDNR and thereafter were part of a scheme to delay compliance is baseless and must be rejected. *Decision at 14*.

3. Officer erroneously ignores, discounts and rejects numerous indicia of good faith, on-site and MIT-related work efforts based on her erroneous perception that they were "part of doing business and not related to MIT" and had to occur prior to violations

Next, Officer Toney discounted RWS's many site-related work efforts to comply with the SDWA, such as grading lease roads, constructing containment dikes, and most importantly, "well-work overs", as "part of the business of operating oil and gas wells, and are not necessarily aimed at accomplishing a [MIT]" and since "none of these efforts occurred any earlier than 1997...and most occurred...after 2000.". *Decision at 15*. [citing Respondents' Brief at 13].

a. Officer erred in discounting good faith efforts occurring after violations occurred, where EPA admitted that post-violation and post-NOV compliance efforts are indicia of good faith

As noted with relation to RWS's regulatory communications, Officer Toney's de-emphasis on Respondents' post violation and post-NOV compliance efforts is not in accord with Ms. Perenchio's testimony that post-NOV compliance efforts were indications of good faith efforts to assure future compliance with the SDWA. *4/25/07 Tr. at p191, L12 to p192, L3*. It also ignores the fact that this action addressed the lack of adequate or successful per-violation compliance efforts, thus leaving post-violation good faith efforts to mitigate the prior lack of compliance for analysis . *Id.* Thus, good faith efforts after the violation are central to this inquiry, and are not insignificant as rendered by the Officer's temporal dissatisfaction with their post-violation timing. *Decision at 15.*

b. Officer erred in assuming that grading to assure heavy equipment access to well and "workovers" are not "necessarily" related to MIT, MIT is culmination of multi-step process to prepare the well occurring over weeks, months or years, not does not comprise just a one day test

The record establishes that the process of MIT'g an injection well does not merely consist of walking up to a well and attaching a pressure pump for 30 minutes, but rather is a process of coordinated steps by several types of contractors that can stretch from months to years prior to the well being ready for the actual pressure test. Respondents' expert, **Mr. Morgan**, testified that the MIT process involves access/lease road construction to allow entry of well drilling and workover equipment, scheduling and execution of well preparation/workover (e.g. opening/clearing/refurbishing), scheduling and setting of tubing and packer, initial inspection of setting by IDNR, scheduling and executing resetting/adjustments (if needed), and then scheduling and execution of the final pressure test with IDNR inspector present. *C. Exh. 180 at 9.* This process was confirmed by EPA's witness Mr. Matlock, who stated that the amount of time it took to MIT a well could vary greatly, and that the time it took to work over the Zander No. 2 well for MIT was not unusual. *4/24/07 Tr. at pp150, 196-198 (Matlock).*

c. Officer erred by not according weight to numerous indicia and testimony the RWS made good faith efforts at wells both before and after time of violations

i. Four inactive wells were properly "shut-in" until they were MIT'd, in compliance with 62 IAC 240.760(h), indicating pre-violation good faith compliance with MIT requirements

As an initial matter, RWS did in fact promptly comply with the MIT-related requirement that a well that was not MIT'd must be shut-in (e.g. capped), as indicated by Mr. Morgan's review of inspector's reports for each of the four wells that were not MIT'd in 1991, and as reported by the inspectors or landowners. *C. Exh. 180 at Att. B, Sec. II.A* (Morgan report - 4 inactive wells capped*); R. Exh. 83.b and 85.b. (*Inspection reports- **Wohlwend #6** shut-in 1990*); R. Exh. 77.b. and 4/24 Tr. at 253-254 (*Cunningham Inspection report and testimony - **Harrell #1** shut-in beginning 1992*); C. Exh. 60.13 at p2 (*2003 Arkell Summary of Interviews -

Huels statement that **Twenhafel #2** was shut-in and inactive until transferred to him*); C. Exh. 60.14.d (*10/18/05 Pierce statement that **Atwood #1** inactive and shut-in since 1970s*)*.

ii. RWS MIT'd Huelsing and Zander wells in 1991 and Wohlwend and Huelsing wells within 8 months of 2000 NOV, prior to issuance of complaint

EPA's complaint acknowledges that RWS had already MIT'd the Huelsing and Zander wells in 1991. *C. Exh. 43 at para. 45.* RWS again attempted to MIT the Huelsing #1 in 1995 and November 2000, and then promptly MIT'd both the Huelsing and Wohlwend wells within 8 months of the NOV, as admitted by Ms. Perenchio, prior to the 7/2/01 complaint. *4/25/07 Tr. at p188, L11 to p189, L7-19; C. Exh. 34 - 9/8/00 NOV.* Contrary to the Officer's implication, the prior MIT's at the only two wells capable of operating show good faith efforts to comply with the MIT requirements, and the quick response to the NOV qualifies as the type of "prompt response" contemplated by *Carroll*, as cited by the Officer.

iii. RWS achieved full MIT compliance at all wells by 2005, after years of "continuous" good faith attempts, which extended back beyond the date of eventual compliance

The record reflects that RWS dutifully brought all wells into compliance during the initial stages of this action, such that there was no injunctive relief to be had after RWS successfully MIT'd the Zander well again in 2005, after several years of trying in the face of several force majeure events and circumstances.

A. Zander #2 - RWS continuously worked from 1997-2002 to repair repeated vandalism and encountered other force majeures prior to MIT

From 1997 to 2002, RWS made numerous good faith efforts to prepare the Zander No. 2 well for MIT, which process was delayed by a lack of available well rigs due to backlog of jobs, equipment failure, need for complete reworking due to vandalism/foreign material in well, weather, flooding, inaccessible lease roads, and abandonment proceedings, causing RWS to be unable to timely MIT. *R. Exh. 179a-v.*

As indicated in the records, and as a result of the vandalism on the lease, RWS had workers at the Zander lease preparing the lease and the Zander No. 2 well for MIT at over 20 times: 10/8/02 12/10/01, 10/20/01, 10/19/01 (2 contractors), 10/18/01, 10/17/01 (2 contractors), 10/16/01 (2 contractors), 10/15/01, 10/12/01, 10/11/01, 10/10/01, 10/9/01, 11/24/00, 9/19/00 (2 contractors), 3/2/00, 2/17/00, 4/19/97. *R. Exh. 179a-v.* Frank Goff also testified that his company attempted to prepare the Zander #2 well for MIT, but encountered obstructions in the well that prevented MIT. *4/25/97 Tr. at 92-93.*

Each of the invoices provided at *R. Exh. 179a-v* depicted the dates and work that Rocky Well had done, and expenditures made by RWS (totaling over $16,452) for the various contractors listed in the invoices, on the Zander No. 2 well between 1997 and 2002. *4/26/07 Tr. at 112-120, 149 and 152 (Klockenkemper); R. Exh. 179a-v.* Mr. Klockenkemper's testimony reveals that RWS was not shirking its MIT obligations at this well, but was in fact expending consistent "continuous efforts", contrary to Officer Toney's finding that continuous good faith efforts were not found.[17] *Decision at 15, fn 36.*

B. Witnesses confirmed Wohlwend MIT efforts began in 1998, soon after legal possession of operating rights was gained by RWS by court order

On 4/22/97, the Illinois Appellate Court in the 1977 *Fisher v. Klockenkemper* litigation finally awarded the Wohlwend lease to RWS and ordered that Fisher remove his equipment, weather allowing. *R. Exh. 181 at 11* (RWS Declaration), and *R. Exh. 19 at 8*. (4/22/97 Ill. App. Ct. 5th Dist. Order re Twenhafel and Wohlwend leases & lack of operation of Leases by RWS,). Subsequently, during the period 1998-1999, EPA witness **Jeff Vonder Haar**, admitted that Rocky Well and Mr. Klockenkemper did periodically attempt to monitor the wells and grade the roads in order to work on the wells, and that he personally observed several RWS attempts to

[17]Under questioning by EPA counsel: "Q And those invoices represent the work that Rocky Wells was attempting to do on the Zander lease? A That's right. Some of them -- I couldn't locate all of them all the time. But, yes, we spent a lot of money trying to get the well back in operation so we would MIT it. Q. So you testified that you presented these documents in order to show the efforts you were making -- A We was making an effort, yes. Q -- (continuing) to be in compliance? *A That's right. 4/26 Tr. 1t 149.*

work on the Wohlwend wells in 2002, 2004 and 2005. *4/24/07 Tr. at 26-27.* Also, EPA investigator Mr. Arkell's Report contains Sheriff's Reports documenting that RWS attempted to access or work at the Wohlwend lease at least more than a dozen times between 1997-2005. *C. Exh 60.12.a-r.*

Further, Respondent **Klockenkemper** testified that in late 1998 when Rocky Well finally was awarded possession of the Wohlwend lease, there were no roads to most of the wells, because they had been plowed under and farmed over by the surface tenant Vonder Haars. *4/26/07 Tr. at p168, L13 to p169, L14 (Klockenkemper) ; Also See 4/25/07 Tr. at p58, L11-24* (*Gentles)*. Soon after taking possession of the Wohlwend lease, RWS had a grader come into the Wohlwend lease and had graded a lease road with drainage ditches, but these ditches were destroyed by Vonder Haar's farming operations, rendering the road too muddy to allow heavy workover equipment access to the well after a rainfall. *4/26/07 Tr. at p169, L6 to p170.*

Similar to the Zander MIT preparations, RWS witness and former contractor **Frank Goff** estimated he went onto the Wohlwend lease "twenty-five or thirty" times in the 2000-2001 time frame in effort to prepare the lease and Wohlwend #6 well for its 4/23/01 MIT. *4/25/07 Tr. at 85-86, 89 (Goff)*. RWS witness/contractor **Al Gentles** also testified that he observed RWS's efforts to prepare the well for MIT when he monitored RWS's contractor's regrading of the Wohlwend lease roads "to see that nobody bothered the operator when he was re-grading the roads". *4/25/07 Tr. at p58, L11-24.* (*Gentles).*

Consequently, the Officer's blanket finding of a lack of good faith efforts ignored the substantial weight of evidence indicating that RWS put in significant and repeated good faith efforts prior to the 2001 Wohlwend MIT, and was not just sitting on its hands prior to that. Furthermore, the efforts at the Zander and Wohlwend leases are indicative of the time it can take from initial preparations to final MIT when there are complications to achieving readiness for an MIT. *R. Exh. 179a-v.*

C. Twenhafel MIT efforts also began well before well transferred to Huels in January 2002, even though RWS never had possession of operating rights

On July 28, 1988, the permit to the Twenhafel Lease was unilaterally involuntarily transferred by IDMM from Charles Fisher to Rocky Well Service, Inc., but Fisher remained in

possession of the lease and wells thereafter. *R. Exh. 181 at para. 11* (RWS Declaration). On 5/25/92, Fisher signed and submitted a Well Data Sheet for Twenhafel No. 2 indicating that Fisher was the operator and that the right to the Twenhafel No. 2 well was in litigation in the matter *Fisher v. Klockenkemper, 77-L-24. R. Exh. 181 at p11; R. Exh. 79.h* (5/25/92 Fisher IDMM Completion Report). Neither Mr. Klockenkemper or RWS operated the Twenhafel lease between 1987 to at least 1998, and her Twenhafel litigation *Maschhoff v. Klockenkemper, 97-CH-7* with Mr. Klockenkemper did not end until 2004. *R. Exh. 33* (12/02/00 Ill. App. Ct Order in 97-CH-7)*; C. Exh. 60.14.c at paras. 5 and 9* (10/17/05 Maschhoff Statement).

On 12/02/00, the Illinois Appellate Court found that a 1980 order granting Klockenkemper production rights had in fact been retroactively vacated by the court that issued it, and that the operating lease claimed by RWS had terminated due to non-production during the years the *Fisher v. Klockenkemper* litigation was ongoing. *R. Exh. 181 at p11; R. Exh. 33 at pp1-2 and p8.* On 11/13/01 despite the lack of an operating lease, RWS still attempted in good faith, albeit unsuccessfully, to have the Twenhafel wells plugged by Prior Oil Co., which was estimated to take 2 weeks, weather allowing, considering the "soft, marshy land where the wells are situated". *R. Exh. 181 at p11; R. Exh. 47* (11/13/01 Prior Oil Company Letter to RWS). On 1/25/02, the Twenhafel permit was transferred to Ed. Huels. *R. Exh. 181 at p11; R. Exh. 50* (1/25/02 OG-26 Form).

D. Huelsing #1 well was MIT'd 3 times by RWS between 1991-2006, an average of once every 5 years, RWS attempted to MIT in 1995, and RWS was observed to be making good faith attempts to comply on this lease by Inspector Matlock

Inspector Matlock confirmed that RWS successfully MIT'd the Huelsing well 3 separate times (1991, 2001, and 2006), that he had observed RWS attempting to re-establish the lease road, and that Rocky Well Service's workers on the Huelsing lease "at least eight to ten times" in a two year period. *R. Exh. 76.a* (OG-23 MIT Compliance Report)*; R. Exh. 76.b; R. Exh. 76.c;. 4/24/07 Tr. at p183, L24, and p184, L1-7, and p185, L5-13, and at p189, L7-23; 4/24/07 Tr. at p151, L2-9.*

Respondent Klockenkemper also testified that in 1995 RWS hired contractors and went to

the lease to prepare the Huelsing #1 for MIT, but were run off by the Huelsings courtesy of the Sheriff, and that the RWS had attempted in vain to reestablish the lease road to allow equipment in to the wells on several occasions. *4/26/07 Tr. at 170-177.* RWS contractor Frank Goff also testified that he worked on the Huelsing lease twenty-five to thirty times for Rocky Well over the years, and had encountered difficulty accessing the wells in the past with a pickup truck, due to the farmer's repeated plowing of and planting of corn on some of the Huelsing lease roads *4/25/07 Tr. at 93-96.* Given RWS's virtual compliance with the MIT requirement of once every five years, and the attempted MIT in 1995 and other activities, RWS cannot be said to not have made good faith attempts at the Huelsing #1 well, either.

E. Harrell #1 and Atwood #1 capped and inactive, damages too great to repair, but RWS still inspected

As discussed below in relation to "other matters", force majeure events resulting in major damage to lease equipment prevented RWS from restoring and MIT'g the Atwood and Harrell leases/wells. Nonetheless, the record reflects that RWS periodically checked on and photographed the wells, indicating good faith efforts as depicted in *Carroll Oil. R. Exh. 161-162* (photos of Harrell #1 and damages to lease)*; C. Exh. 60.14.g* (Lyle Allen Declaration stating RWS vehicles kept getting stuck on Harrell's muddy lease road during site visits); *R. Exh. 178a-c and 4/26/07 Tr. at 187-191* (RWS photos of damages to Atwood #1 and Klockenkemper testimony that he visited Atwood several times in 1990's and feared for his life, due to fact that the lease and equipment was all shot up).

4. Given the great weight of uncontroverted "good faith efforts" evidence, Respondents were shown to have made good faith compliance efforts that ensured substantial compliance with both the intent and letter of the Illinois SDWA UIC program, and EPA/Officer failed to comply with required application of statutory factor 4 to reduce the penalty

As depicted above, the Officer ignored and failed to credit the great weight of the evidence indicating that EPA erred when it failed to find any good faith efforts, which is not surprising considering Ms. Perenchio's testimony that she did not try to find or document any

such efforts by RWS. EPA and the Officer thus both failed to address and apply statutory factor 4 to this matter, and Officer Toney's findings must be reversed and a reduction afforded to Respondents.

G. Statutory Factor 5 - Economic Impact: EPA/Officer erred by not reducing penalty due to RWS inability to pay where SDWA is not joint and several liability statute, and, in the alternative if joint and several liability is in fact found under the Illinois SDWA, Respondents should be allowed to share "jointly and severally" in RWS's inability to pay reduction.

1. EPA found RWS unable to pay proposed penalty

Officer Toney acknowledged that RWS had been determined unable to pay the penalty per EPA financial expert Gail Coad's analysis. *Decision at 16-17; C. Exh. 141 at para. 50 (Perenchio); C. Exhs. 126 and 127 (G. Coad declarations).* Given that RWS meets the criteria, and given that EPA asserts "joint and several liability", a logical extension is that both Respondents should also have jointly and severally been afforded the reduction.

2. The SDWA is not a joint and several liability statute, thus RWS should have been afforded a reduction in penalty, and Mr. Klockenkemper should not be required to pay same, and Officer's reliance on *Sunbeam Water Co.* is in error

Since Mr. Klockenkemper cannot be held wholly (or even partially) liable for RWS violations under the SDWA by the letter of the statute, RWS's portion of the penalty should be reduced accordingly, and Mr. Klockenkemper not held liable for that portion RWS cannot effort to pay. *42 USC 300h.* Thus, the finding that the Respondents can afford to "jointly pay the penalty" is error as is the Officer's reliance on *Sunbeam Water Co.*, since that is a PWS, not UIC case, which pierced the corporate veil. See Respondent Klockenkemper's 10/31/08 Appellate at Sec. IV.D.2.c.iv.D and elsewhere therein. Breif Thus, given that RWS was not afforded a reduction or elimination of the penalty, the Officer erroneously ignores and again reads statutory factor 5 out of the statute as to the permittee RWS.

H. Statutory Factor 6 - Other Matters: Force majeures and other exigencies and legal risks not properly taken into account by EPA/Officer and erroneously not credited to Respondents

The UIC penalty allows for reduction of the penalty to serve equity for "other matters" as justice requires. *Decision at 18.* Respondents assert that the $10,200 (9%) reduction applied by the Officer is insufficient to account for the "other matters" that prevented and delayed RWS's compliance, which were aggravated by EPA's delayed and prolonged prosecution of this "no harm" matter, and which imply that EPA has significant litigation risk in this matter. As evidenced by caselaw, there is a wide range of discretion for the Presiding Officer in regard to "other matters", and issues such as the small size of a Respondent, the general compliance of the facility and other operationally-related matters indicating a Respondent's "good environmental citizenship" may be considered in this regard. *In The Matter of F. C. Haab Company, Inc*., Docket No. EPCRA-III-154 (6/28/98)[18].

Respondents incorporate by reference here their arguments from their brief and findings of fact related to the "other matters" arrayed for each well. *See Brief at Secs. II.B.1.c (Wohlwend), II.B.2.c (Twenhafel), II.B.3.c (Atwood), II.B.4.b-c, (Harrell), II.B.5.c., (Huelsing),[19] II.B.6.c. (Zander)* (and corresponding citations to the caselaw, findings of fact and record contained therein). Respondents also incorporate the "other matters" cited in Section III of its Brief, summarized as follows:

> -EPA failed to elicit any facts showing that the lack of an MIT on any of the six wells seriously or otherwise endangered the environment or a USDW or that they were flagrant;

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[18] Citing *In re Spang & Co.* EPCRA Appeal Nos. 94-3 & 94-4, slip. op. at 23 (EAB Oct. 20, 1995), the *Haab* court stated: "The EAB has stated...It is...within the presiding officer's prerogative to consider what type of environmental citizen...[any...Respondent] has been in deciding upon an appropriate penalty to assess...Pursuant to the EAB's rationale, Respondent's actions as a responsible "environmental citizen," warrant some reduction in penalty.....While Respondent is not excused from its failure to comply with EPCRA, a distinction should be made between Respondent, who generally complies with its environmental obligations and cooperates with local and federal authorities, and other violators who completely disregard any environmental requirements. *Id.*

[19] "Huelsing" is inadvertently referred to as "Harrell" in the text of this section.

-EPA failed to elicit testimony as to the name or even location of the alleged USDW;

-EPA failed to adduce evidence in the hearing record demonstrating EPA's alleged "programmatic harm" deterrence basis for the proposed penalty;

-EPA failed to calculate and propose a separate penalty, and failed to apply the statutory factors to each particular violation at each particular well (as done by Respondents above);

-EPA failed to account for the litigation risk that one or more of Respondents' rejected (especially the lack of procedural and substantive jurisdiction, improper imposition of personal liability on Mr. Klockenkemper and the violation of 28 USC 2462 statute of limitations/laches) will win out on appeal;

-Prejudice occurred to Respondents' defense from the passage of time due to the fact that under Illinois law, a business such as Rocky Well, and businesses RWS did business with, are not required to keep records longer than 3 years (*805 ILCS 410)*

1. Respondents exhibited "good corporate citizenship" by way of substantial compliance with SDWA

As a general matter, Respondents assert that the "good faith" efforts detailed in the prior section, along with EPA's lack of citation to any past history of repeated MIT violations or other serious UIC violations, allows a finding that RWS was a corporate entity that "generally complie[d] with its environmental obligations and cooperate[d] with local and federal authorities," rather than a violator "who completely disregarded any environmental requirements.". *In The Matter of F. C. Haab Company, Inc., Supra*.

2. Weather Regularly and Severely Impeded Access: The Officer erred in finding that inspectors were able to access wells without difficulty since several admitted access problems even for a light car or pickup, and in ignoring documents and testimony of RWS contractors, and of landowners/farmers, indicating that access was in fact impeded on regular basis by weather and other matters, since access RWS required was for heavy equipment, not Jeep or on foot

Officer Toney erred in misconstruing and ignoring plentiful, credible testimony that, while possible to walk up to the wells at any time, access for heavy equipment and vehicles was in fact regularly inhibited and not present a substantial amount of the time at most of the wells, due to

the weather and soft farm-field site conditions. *Decision at 18-19.* EPA and the Officer make the erroneous and unwarranted assumption, that since an inspector could walk or drive a pickup or jeep up to a well on a certain day, that RWS should have been able to get a grader, drilling rig, heavy water trucks, earthmoving equipment (to dig workover pits) and other related heavy equipment onto the well site on a different day, where in fact the process takes several different days and step-wise sequencing of contractors over time to complete., weather and equipment availability and other factors permitting. *See e.g. R. Exh 179* (Zander invoices 1997-2002).[20]

a. Officer erred by making findings regarding Respondents' weather-related access arguments as to only 2 wells rather than all 6, and even then she addressed them only as to the least accessed, vandalized, inoperable, Harrell and Atwood wells

As with the prior discussed factors, rather than focusing on RWS's access claims for each of the six wells, Officer Toney myopically focused only on the light-traveling inspector's isolated access experiences for two of them without even naming the inspectors or specific well, allowing her finding to be couched as if she had made findings as to each well:

> "Credible evidence at the hearing establishes that IDNR inspectors were able to access the wells without any "extraordinary' measures. [*fn 47 - citing 4/24/07 Tr. at 142 (Matlock - Zander) , 4/25 Tr. at 9 (Anita Brown - Atwood)*]. One inspector noted in his inspection report that it was "possible to gain access to [the] well to temporarily abandon at any time" [*fn 48 citing C. Exh. 71a and 4/24 Tr. at 227 (Cunningham - Harrell)*]. Similarly, the record does not support a finding that muddy, impassable lease roads prevented access to the wells. [*fn 49 - Id.*] In fact, Respondents argue that their contractors accessed the wells on numerous occasions during the relevant time period in order to "work the wells" to support their argument that they expended good faith efforts to comply with the UIC regulations [*fn 50 citing Respondent's Brief at 13; 4/26 Tr. at 133-152, 154, 161-162 (Klockenkemper)*]

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[20] With regard to the type of heavy vehicles needed for MIT, Cunningham testified:

Q. With regard to the fluid that's put in a well for an MIT test, where do you get the fluid from?
A. Various places. I mean, it could be in a tank truck. You can hire a tank truck to come out." *4/24 Tr. at 218.*

It is a reasonable inference that if a 4 WD blazer cannot access when the roads are muddy, a tank truck, drill rig or other necessary heavy equipment would not be able to do so. *See Also R. Exh. 47* (2001 Prior Oil letter to RWS stating work on Twenhafel dependent on access for heavy equipment, in turn dependent on condition of muddy marshy soft Twenhafel #2 lease road during fall-winter).

Officer Toney's failure to make findings as to the violations and RWS access to each of the six wells is error since the SDWA requires that each particular violation, and hence each well, be addressed by the factors. Further, her findings conveniently ignore the credible testimony of both Matlock and Cunningham and others that the lease roads were often muddy and that they too encountered access problems.

i. Matlock testimony miscited, since he testified that there were occasions where he could not access the <u>Zander #2</u> with a light 4-WD vehicle at all due to the muddy dirt access road, that it became "very" muddy when it rained, that it would not be possible to get well working equipment thereon in such condition, that it rained a lot in spring and fall in the area, and tenant Paul Flood confirmed that Zander #2 road was routinely impassable when it rained

Ms. Toney entirely misconceives Mr. Matlock's testimony as to access, since he stated that he in fact had encountered severe access problems making it impossible to drive a vehicle into the lease and forcing him to walk the nearly 1000 foot access road:

Q. BY MS. McAULIFFE: Mr. Matlock, could you describe the condition of the access road to Zander #2 well during your visits to the Zander lease?
A. The Zander #2 lease road is just an earthen road with a ditch on each side of it, and when it's raining a lot, it's very muddy, and I usually, when it's raining and I have to go in there, I usually walk from the road.
Q. And how far from the road is it?
A. It's 660 feet if you go straight to it, but if you follow the road, it's about 990 feet.
Q. And were you ever prevented from gaining access to Zander #2?
A. Just when it's muddy, and then I walk in, so I'm really not denied any access to it.
Q. And do you ever drive on that road?
A. Yes. When it's dry, I drive in.
Q. And what do you drive in on?
A. I drive in a four-wheel drive Blazer.
4/24 Tr. at 142-143

On cross, Inspector Matlock also admitted that it rained frequently in that area in the fall and spring, and that there would be no way to get a drilling or well rig on there when the road was muddy:

Q. You mentioned the access road to Zander 2 is very muddy when it's raining.
A. When it's raining, it's very muddy.
Q. And when it's in that condition, you stated you wouldn't even drive a vehicle on there, didn't you?
A. Pardon?

Q. You stated you would walk on that lease road?
A. Yes.
Q. And that's because your vehicle would get stuck if you drove it?
A. Yes.
Q. So there would be no way to get a well rig onto that property at that time, would there?
A. At that time, no.
Q. All right. Does it rain a lot down here during the spring?
A. During the spring, yes.
Q. And are there other times of the year also where wet conditions can prevent vehicles from --
A. Occasionally in the fall if it rains quite a bit.
4/24 Tr. at 188-189.

Ms. Toney's finding is also contradicted by Paul Flood*'s* acknowledgment that the Zander dirt lease road routinely became impassable with rainfall. *C. 60.14.a at para 12. (See Proposed Findings at p86, Sec. VI.A.11.).* Finally, the fact that RWS contractors accessed the Zander well on certain days does not comport with a finding that they could not access the well on others, and even then there were other circumstances such as vandalism of the well bore which prevented workovers and delayed MIT. *4/26 Tr. at 120 (Klockenkemper* - rebutting same EPA assertion).

Consequently, Ms. Toney had no basis for her finding that Matlock's testimony and the contractor's access "establishes" access was always present as to Zander #2, let alone the other 5 wells, and in fact the cited witnesses' testimony buttresses Respondents' claims as set forth at Section II.B.6.c. of its Brief. *Id. Decision at 18, fn 47.*

ii. Unmentioned by Officer, Matlock also testified that the <u>Huelsing #1</u> access road was of "very poor" traveling condition due to having been plowed over by farmer and its becoming muddy when it rained

Ms. Toney's attempted use of Matlock's testimony against RWS's access problem claims is even more inappropriate given he also testified that the Huelsing #1 access road was extremely difficult to access even with a 4-wheel blazer when it rained and due to having been plowed by the farmer:

Q. And with regard to the Huelsing lease, could you describe the access road to Huelsing #1 well?
A. You come off the township road through a landowner's driveway past his house and across a

field to the well.

Q. And, sir, approximately how many times have you gone out to Huelsing #1?
A. Probably a dozen times in the last two years.
Q. And, sir, during your inspections, did you notice the condition of the access road to the Huelsing #1 well?
A. The access road is very poor travelability. It's rough with concrete chunks and holes and virtually impassable for a normal vehicle.
Q. And, sir, do you know where these chunks of concrete came from?
A. Mr. Klockenkemper, Rocky Well Service put those in because the farmer plowed up his lease road several times is what I've been told by Mr. Klockenkemper.

* * *

Q. And have you ever had trouble getting access to Huelsing #1 well during any of your inspections?
A. Yes. It's difficult to make, to travel the road when it's muddy or raining daily or something like that. It's just a bad road to travel.
Q. And, sir, what do you use to travel on the Huelsing #1 road?
A. I use a four-wheel drive Blazer.

4/24 Tr. at 173-174

iii. Cunningham testified that <u>Harrell #1</u> lease road "rutted up pretty bad", that he did not access Harrell #1 with 4-WD but rather #2, that his access did not prove RWS unable to access on a different day than that day in 1997, and in fact his 2000 inspection report states that there was no lease road at that time

When asked if he had observed plowing of the lease roads, Inspector Cunningham stated that he had not and that it might help improve the access road to Harrell #1 from the County road:

> "No, I did not, especially the one lease road that when you came in the entrance from the county road and you would have turned south along the fence row, at times, that was hard to get through because I think I remember it being rutted up pretty bad, and so more than likely, if there would have been a little disk or something running across there, it would have been a little better to get in.
>
> *4/24 Tr. at 223.*

Cunningham also testified that he had accessed the Harrell #2 well with his vehicle, not Harrell #1, located an eighth of a mile further away from the area he accessed with his 4-WD. *Id. at 233-234.* Finally, the Officer's overall requested inference here is improper, since Cunningham admitted that the fact that he was able to access the well that day wouldn't necessarily prove or disprove that RWS wasn't able to access it on a different day. *4/24 Tr. at 259; Decision at 18, fn 48, 49.* Cunningham's own inspection report confirms that on another day (10/6/00) inspector

Cunningham reported that there was no lease road into the Harrell #1 well. *C. Exh. 72.b.* (10/06/00 OG-22). Thus, it is possible for an individual to access a road on foot or in a light truck where a heavy truck or rig could not, and Officer Toney's inference is not warranted.

iv. Twenhafel #2 and Wohlwend #6 had similar weather-related access problems impeding compliance once RWS obtained legal rights after MIT deadline, and RWS vehicles were documented to have become stuck on their lease roads

The Twenhafel lease had similar access issues caused by plowing of lease roads, vandalism, and weather related access obstructions as encountered at the neighboring Wohlwend lease which interfered with compliance attempts. *See Respondents' Brief at 16, Sec. II.B.2.c. (Twenhafel) and Brief at 14, Sec. II.B.1.c (Wohlwend).* For instance, on 4/30/98, Charles Fisher motioned the trial court in *Klockenkemper v Fisher*, 77-L-24, for an additional 45 days, to 7/2/98, beyond that given him by court order of 4/2/98, to remove equipment from the Wohlwend and Twenhafel leases prior to turning it over to RWS, due to rain and overly soft ground conditions at the leases, praying:

> "1. That because of the rains and forecast for like rains for several more weeks, ground conditions are too soft to support the heavy equipment and trucks needed to remove the equipment from the subject leases...and would not allow Plaintiff Klockenkemper to place equipment on the lease..."
>
> *R. Exh. 138b (4/30/98 Fisher Post Trial Motion)*

Relatedly, on 12/30/00, the Clinton County Sheriff documented the plowed up lease road and muddy conditions which had caused a RWS light duty vehicle to again become stuck when trying to access the Wohlwend wells. *R. Exh. 60.12.i* (12/30/00 Sheriff's Report).[21]

[21] *See Also: 4/26/07 Tr. at p179, L18 to p180, L6 (Klockenkemper* - stuck in muddy Wohlwend road*); C. Exh. 60.12.p - 4/30/99 Sheriff's Report (*Rocky Well vehicle stuck "on the lease road", which Officer reported had been plowed over and planted*).*

v. Officer erred since Respondent has demonstrated that all 5 of these wells had weather-related access issues, aggravated by repeated plowing of the fields prior to the rainy season, rendering their lease roads impassable to the varying heavy vehicles required to prepare an injection well for an MIT, which in fact adversely contributed to RWS's abatement efforts being delayed and frustrated

In combination with the human interference, especially the lease road plowing-over and the recurring and pervasive vandalism described below, the weather and the nature of the leases contributed to RWS's prolonged compliance, contrary to the Officer's finding. *Decision at 18-19.*

3. Officer erred in refusing to recognize that vandalism and other interference from landowners and tenant farmers contributed to access/repair problems and both RWS's failure to MIT by deadline, as well as extending time span until compliance was achieved

Officer Toney dismisses the various and numerous well-specific incidents and interferences portrayed by Respondents by characterizing them as "squabbles over the years" that did not "in any way" prevent RWS timely MIT. *Decision at 19.* Such characterization is contrary to the great weight of evidence painstakingly outlined in Respondents' Brief and in laid out in great detail in their Proposed Findings of Fact ("FOF"), that vandalism and other forms of interference inhibited RWS's compliance efforts at the several of the wells. *See Brief at Secs. II.B.1.c., II.B.2.c, II.B.3.c., II.B.4.c, II.B.5.c and II.B.6.c.*

a. Wohlwend #6 pattern and type of well interference incidents were longstanding, material, numerous, admitted by Von Der Haar, and repeatedly documented by County Sheriff

Like EPA, Officer Toney ignored the numerous admitted and documented interferences by the Vonder Haars with RWS's operations and good faith attempts to comply at the Wohlwend lease, including active barricading of wells, plowing of the lease road, harassment of RWS

workers, and theft of RWS equipment needed to work the wells, both before and after the MIT deadline.[22] These and other similar events subsequent to the 1998 granting of rights to RWS caused the MIT to be delayed until 4/21/01. The Vonder Haar interference continued through 2006. *FOF at p12, Sec. I.B.29.* Under cross, Vonder Haar finally admitted that his and his family's intent was to "prevent" Rocky Well and Mr. Klockenkemper from accessing the wells and to interfering with RWS operations, and that he was motivated by his personal opinion that Respondents "had no business" being on their surface lease, despite his admitted knowledge that Rocky Well was entitled by law to access and use the area around the wells *4/24/07 Tr. at p119, L24, and p120, L1-13: 4/24/07 Tr. at p133, L14-18. See FOF at pp20-31, Secs. I.F.44, 45, 48-55, 57-60, and 66.*

b. Adjacent Twenhafel #2 had similar problems as Wohlwend with vandals/ lack of electrical power, plowing under of lease roads by farmer

The Twenhafel lease had similar access issues caused by plowing of lease roads, vandalism, and weather related access obstructions as encountered at the neighboring Wohlwend lease, which interfered with compliance attempts. Aside from the fact operating rights were in litigation and RWS did not have operating rights to the leasehold, force majeures included tools

[22]Documentation/evidence of lack of access, interference and vandalism includes:

R. Exh. 152 - 1994 Photos of Vonder Haar damage to C. Fisher equipment needed to prepare and operate well and lease; *See Also 4/24 Tr. at 134-138*; (FOF p4, Sec. I.B.5)

R. Exh. 92 - 9/98 IDNR/RWS/Fisher stipulation providing for RWS to take possession by 12/18/98

4/26 Tr. at 168- RWS testimony that no lease roads existed in **1998** when RWS took over, that RWS had lease roads graded in, and that Vonder Haars plowed them under

C. Exh. 60.12.p- 4/99 Sheriff Report documenting RWS vehicle stuck on muddy, plowed over lease road; (FOF p8, Sec. I.B.17)

R. Exh. 87.c - 2/00 RWS reports plowing of lease roads preventing heavy equipmemnt access for MIT prep; (FOF p9, Sec. I. B.20)

C. Exh.60.12.j- 2/00 Sheriff report documenting RWS's report of vandals placing foreign items or pipes into well shaft, rendering MIT impossible prior to arrangements for contractors to remove (FOF p10, Sec. I.B.21)

R. Exh. 87.d - 6/00 RWS report additional vandalism and foreign objects thrown into well delaying and preventing MIT until removed (FOF p10, Sec. I.B.21)

C. Exh. 60.12.i- 12/00 Sheriff Report documenting lease road had been plowed up causing RWS vehicle to be stuck in the mud while attempting to access lease (FOF p10, Sec. I.B.21)

needed to do any preparatory work being stolen (*C. Exh. 60.12.r* - 11/1/97 Sheriff Report of theft of Twenhafel tools), and lease roads were routinely plowed under and planted over by the farmer, rendering them often too muddy for heavy equipment (*R. Exh. 138b* -1998 Fisher motion to court for more time due to lack of Twenhafel access due to muddy roads); *C. Exh. 60.13 at p 2* (1998 Huels statement that lease road routinely plowed/planted, no electricity on lease*).*

c. Heulsing #1 farmer interfered with RWS according to Matlock and RWS's witnesses, and prevented 1995 MIT attempt

RWS endured a pattern of interference related to the Huelsing lease farming activity which delayed eventual compliance, including repeated plowing up and planting of the lease road dating back to the late 1980's which variously prevented heavy vehicle access to the wells. *4/26/07 Tr. at 142-144, 149-151, 177-178 and R. Exhs 126* and *161* (RWS photos of broken hoe disc and resulting from plowing and destruction of graveled lease road). Frank Goff and Mr. Gentles testified to a pattern of the Harrell farmer routinely plowing and tearing up the lease road, and that this practice was common in these situations in this area. *4/25 Tr. at 61-63 (Gentles); 4/25 Tr. at 93-95 (Goff)(FOF at p78, Sec. V.A.3; FOF at p78, Sec. V.B.11; FOF at p79 Sec. V.B.13).*

Inspector Matlock also corroborated RWS claims, stating that lease road was nearly impassable under normal conditions and was worse when it rained, and that he had observed that RWS had upgraded and installed drainage for the lease road, only to have the farmer plow it up, a practice that he also testified was common in these situations in this area. *4/24 Tr. 149, 173-176, 189 (FOF at p81, Secs. V.C.20 and V.C.21).* Matlock also testified that he had observed that Respondent Klockenkemper and the farmer often butted heads, and that the farmers had the habit of calling the IDNR and the Sheriff at the mere appearance of RWS. *4/24 Tr. at 176 (FOF at pp81-82, Secs. V.C.23 and V.C.24.*

As noted above, Respondent Klockenkemper also testified RWS's good faith 1995 attempt to MIT Huelsing #1 but were run off by the Huelsing's at the order of the Sheriff, and that the RWS had attempted in vain to reestablish the lease road to allow equipment in to the wells on several occasions. *4/26/07 Tr. at 170-177.* Consequently, RWS's compliance efforts

were thwarted and delayed at the Huelsing #1 well by the Huelsings and their associates prior to and subsequent the MIT deadline. *Id.*

d. Harrell #1 equipment vandalized and lease roads plowed over by Lyle Allen delaying MIT/plugging

At Harrell #1, RWS was subjected to a direct prohibition from the farmer, Lyle Allen, against RWS storing oil and gas equipment on the lease and from accessing the Harrell #1 well after RWS got stuck on the muddy, plowed under lease road, during RWS's good faith attempts to get to the Harrell well and RWS supplies. *C. Exh. 60.14.g* (Allen Declaration). RWS also took, testified to and presented photos depicting Allen's repeated bulldozing and destruction of Harrell well equipment and plowing of lease roads starting in the late 1980's and running through the 2000's. *R. Exh. 160* (1988 RWS letter to IDMM); *4/26 Tr. at 105-107, 139-150 (Klockenkemper); R. Exhs. 161, 162 (*Photos of damaged equipment).[23] Inspector Cunningham also encountered access problems due to the lack of a lease road, and confirmed that RWS equipment had been damaged or vandalized. *C. Exh. 72.b* (12/00 Cunningham OG-22)*; C. Exh. 77.a.* (9/01 Cunningham Photos*).*

e. Zander #2 vandalized and farmer plowed lease roads

As evidenced by the Zander #2 invoices, vandals had opened the well and thrown foreign objects into the shaft, severely delaying and complicating the pre-MIT work-over. *R. Exhs. 179t, 179u.* The well equipment was also vandalized and destroyed in the 1990's. *R. Exh. 157* - Photos of wrecked pump/equipment). The damages were such that it took RWS an extended period to prepare the well for MIT. *4/26/07 Tr. at 149.* Inspector Matlock stated that Zander lease road was periodically repaired by RWS due to it being plowed and muddy, and that it was periodically impassable to heavy equipment and vehicles, to the point where he has been forced to walk onto the Zander lease. *4/24 Tr. at 141-142, 188-189.*

[23]Also see proposed facts at Respondents' *FOF at pp60-62, 67-70, 73.*

f. Atwood #1 equipment and electrical vandalized beyond repair such that MIT not possible, well had been ordered plugged by IDNR prior to EPA issuance of 9/8/00 NOV requiring MIT

As EPA, the Officer did not acknowledge other matters related to the Atwood lease that inhibited RWS's good faith efforts and ability to comply with MIT requirements, especially the fact that the electrical boxes, meters, transformer, phase converter and related electrical equipment needed to work on and operate the well had been literally blasted apart by numerous gun shots and blasts. *4/26 Tr. at 187-191 and R. Exhs. 178.a-c* (1993 RWS photographs of destroyed Atwood #1 equipment). RWS also testified that surface estate holder Donald Pierce filled in the Atwood #1 MIT workover pit with debris, removed the MIT tubing from the well, an destroyed or stole various pieces of equipment needed for the MIT process. *4/26 Tr. at 192-195.*

Subsequently, as of 3/6/00 IDNR had ordered the well plugged, making an MIT fruitless, and explaining in part why RWS could not MIT this destroyed oil lease an injection well. *R. Exh. 28* (3/6/00 IDNR Plug Order). Consistent with that order, IDNR would only allow RWS to plug the well, thus MIT'g it made no sense, and yet RWS could not put in temporarily abandonment/future use status it either per IDNR internal policy. *R. Exh. 49* (4/26/02 Bengal/IDNR Letter to EPA that "plugging is the only regulatory option available" for Atwood No.1); *R. Exh. 41* (3/5/01 IDNR memo stating inactive wells cannot be put in future use status). Inspector Brown confirmed that prior to the plug order, the status of the Atwood No. 1 had been in dispute, and that RWS had been unable to MIT the well at all because plugging was the only option. *4/25 Tr. at 33-35.*

Given the circumstances, including the fact that Mr. Klockenkemper feared for his safety at the Atwood lease due to the gunplay, Respondents should be allotted a downward adjustment due to the impossibility of complying by MIT'g Atwood No. 1, especially since it had been ordered plugged by the State in 2000.[24] *4/26 Tr. at 196-197*

[24] These conflicting requirements (EPA ongoing penalties against RWS for not MIT'g and IDNR telling him not to operate but rather plug it) is what RWS was complaining about when it referred to the "agencies' requiring duplicating costly and expensive work...and conflicting alleged...requirements." *R. Exh. 87.b; Decision at 14.*

4. Officer erred in misconstruing Wohlwend litigation as granting RWS right to operate prior to MIT deadlines where deadlines had passed prior to issuance of appealed 1994 state court order initially determining rights and since by law Fisher's appeal stayed the 1994 order until at least April 1997, and was not resolved until even longer after that, so no penalty should have been assessed for this well

Finally, Officer Toney dismisses Respondents' arguments that RWS was unable to MIT the Twenhafel and Wohlwend wells in September of 1995 because the rights to possession, and operation of these leases were in litigation that did not grant operational rights until years after the 1995 due date. *Respondents' Brief at p14, Sec. II.B.1.c and at p16, Sec. II.B.2.c.* The Officer stated:

> "Of significance to *this* matter is the 1994 judgment of the Fourth Judicial Circuit which held, *inter alia*, that "Fisher remained in possession of the Woh1wend lease after January 16, 1980, used the equipment and produced oil for his own benefit *until the present time* (emphasis added)," the date of that decision being December 5, 1994. [*fn 54 - citing to R. Exh. 18 - 1994 Order*] This decision is significant because it was rendered only nine months before the deadline for the mechanical integrity test of the Wohlwend well and thus represents the status of the litigation at the time Respondents were to have complied. The court further held that Mr. Fisher had abandoned his property that was left on the lease and noted that Mr. Klockenemper had paid property taxes on the lease while Fisher was in possession. The court awarded Mr, Klockenkemper damages to put his lease in operable condition, for loss of oil production and for his share of equipment removed from the leases. [*fn 56*] In my view, this decision put Mr. Klockenkemper on notice that the right to operate the wells was now his, and with a regulatory deadline facing him nine months ahead, the prudent course would have been to prepare the well to conduct the necessary mechanical integrity test before the regulatory deadline. An internal mechanical integrity test on this well was not completed until April 21, 2002."
>
> *Decision at 19-20.*

a. Officer Toney erred in finding that the 1994 court order awarding damages to Klockenkemper "represents the status of the litigation" on 9/1/05, since Rule 305 automatically stayed enforcement of the 1994 order upon Fisher's filing of his appeal, freezing the parties at the status quo <u>prior</u> to issuance of the 1994 order, leaving Fisher in possession until at least the 4/22/97 Rule 23 Order granting rights to Klockenkemper

Officer Toney's analysis positing the 1994 Clinton County order was in force on 9/1/95 is simply incorrect at law and in fact, since it ignores that Illinois SCR 305 automatically stayed the

1994 award pending resolution of Mr. Fisher's appeal. *Illinois SCR 305.* Consequently, that order was of no effect on 9/1/95, and Fisher remained in possession of the lease and no funds were provided to RWS or Mr. Klockenkemper to "prepare the well" for MIT thereunder. *Id.*

b. Wohlwend #6 was in possession of and "operated" by C. Fisher from 1977 until court ordered removal of Fihser's equipment and Respondents' taking possession in December 1998, thus it was "impossible" for RWS to MIT prior to 1999 and IDNR recognized this status on 4/17/97 by deferring RWS submission of annual reports until appeals of 1994 Clinton County order and other orders were exhausted

Officer Toney's reading of the 1994 order acknowledges that Fisher, and not RWS, had possession of the Wohlwend lease due to ongoing litigation from the 1970's until at least the 1994, and thereafter due to the appellate stay under SCR 305. *Decision at 19-20, fn 56.* Such status continued at least until the 4/22/97 Appellate Court order reversing the stayed 1994 Clinton County order and finally establishing that Fisher, who remained in possession, must vacate the lease, and that RWS was now the lease holder. *R. Exh. 19 (*1997 Rule 23 Order). Due to the stay, the 1994 order determined nothing other than Fisher had been and for now remained in possession. *Id.*

IDNR recognized this status in a 4/17/97 letter to RWS wherein IDNR deferred RWS submittal of annual reports for Wohlwend #6 (and Twenhafel #2) until the above-referenced litigation was resolved. *R. Exh. 17 (*4/17/97 IDNR Letter to RWS*).* Thereafter, Fisher received additional time from the court to remove his equipment due to the weather-related inaccessibility of the Wohlwend lease roads. *R. Exh. 138.b.* (Fisher Motion for Time). To expedite Fisher's efforts, a stipulation was entered on 9/4/98 between Fisher, Klockenkemper and IDNR allowing Fisher until 9/18/98 to remove his equipment and directing that Respondents' possession be commenced by 12/18/98. *R. Exh. 92* (9/4/98 Stipulated Order). Consequently, while the 1994 Clinton County order is certainly relevant, it does not prove the RWS should have MIT'd the Wohlwend #6 when Fisher's equipment was on the well and the courts had flipped flopped on who was the operator of the lease, leaving Fisher in possession as of 9/1/95.

c. 8/8/02 Clinton County Court consent order with IDNR allowed Respondents until 11/15/02 to bring Wohlwend #6 into compliance, thus, MIT having been performed on 4/23/01 (not 2002), no penalty should be assessed for MIT or Annual Reporting Violations on this well

Subsequent to the legal transfer of possession on 12/18/98, IDNR and Respondent entered an agreed state court order in the state abandonment proceeding that allowed Respondents until 11/15/02 to bring the lease into compliance. *C. Exh. 60.3.b. (*8/8/02 Consent Order in Klockenkemper v. IDNR, 98-MR-72).[25] RWS had already MIT'd the well by 4/23/01 (not 4/21/02 as stated by Officer Toney). *R. Exh. 45* (4/23/01 OG-13 MIT Form). Consequently, the Officer's analysis is incorrect and RWS should be assessed or, alternatively if a penalty has to be assessed, a substantially reduced penalty for this well (assuming that it can be determined what portion of the award applied to and should be applied to this well, if any). *Decision at 19-20, and fn 56.*

5. Officer erred in misconstruing Twenhafel litigation as allowing RWS right to operate Twenhafel wells prior to MIT deadline where deadline had passed prior to resolution of Twenhafel litigation in 2001 and where Fisher was in possession until at least issuance of 4/22/97 Rule 23 Order

Similar to Wohlwend #6, Officer Toney erroneously determined, relying on a 12/7/00 Clinton Count Order, that RWS had "possession or the ability to operate" the Twenhafel #2 well on 9/1/95, and thus should have MIT'd it, despite the 4/22/97 Rule 23 Order finding to the contrary and despite the fact that the Order she cited was not issued until 2000, five years after the MIT deadline:

> "Respondents also ask the Presiding Officer to find that from 1992 to 1998, the Twenhafel well was also the subject of litigation and "Rocky Well did not have possession or the ability to operate." and that neither Rocky Well nor Mr. Klockenkemper operated the Twenhafel lease between 1987 and at least 1998." While it is true that the Twenhafel well was the subject of

[25] It should be noted that, contrary to EPA's past assertions, the fact that Mr. Klockenkemper's name appears as plaintiff is due to the fact the he was the lessee for and "owner" of the oil ad gas leases being litigated, and not because he was the "operator" of the leases or injection wells on the lease, which wells are operated by "permittees" who can be the oil and gas owner or can be an assignee of the right to operate the lease, such as RWS. *225 ILCS 725.10* (Definitions of Owner and Permittee)

> litigation, this does not lead to the conclusion that Respondents did not have "possession or the ability" to operate the well. What is clear is that Mr. Klockenkemper "had the right to operate the lease since 1987 and , [that he] failed to do so *[fn 59 - citing 12/7/00 Order - R. Exh. 33*]. Mr, Klockenkemper was found by the trial court to have abandoned his leasehold due to nonproduction. Such circumstances, however, do not afford Respondents the right to abandon their obligation to comply with the Illinois UIC regulations. In sum, nothing in these Illinois court decisions or the facts surrounding the litigation leads me to determine that the penalty in this matter should be adjusted any further downward in the interests of justice."
>
> *Decision at 20-21, and fns 58, 59.*

a. Twenhafel permit involuntarily transferred to RWS by IDMM in 1988, Fisher remained in possession of leasehold

On or about July 28, 1988, the permit to the Twenhafel Lease was unilaterally involuntarily transferred by IDMM from Charles Fisher to Rocky Well Service, Inc., but Fisher remained in possession of the lease and wells thereafter. *R. Exh. 181 at para. 11* (RWS Declaration)**.** Fisher acknowledged this transfer and status in 1992. *R. Exh. 79h* (5/25/92 Fisher IDMM Completion Report).

b. Fisher ordered to plug Twenhafel in 1990 and admittedly operated Twenhafel well from 1992-1997

On 4/18/90, an IDMM Inspector ordered Fisher to plug or produce the Twenhafel wells within 30 days (which had he done, this section, at least, would not be being written). *R. Exh. 79.f* (4/18/90 IDNR OG-22 FI). On 5/25/92, Fisher signed and submitted to IDMM a Well Data Sheet for Twenhafel #2 indicating that Fisher was in possession and that the right to operate the Twenhafel lease was in litigation in the matter *Fisher v. Klockenkemper, 77-L-24. R. Exh. 79h* (5/25/92 IDMM Completion Report). Thus. like Wohlwend, Fisher, not RWS, was in possession of the Twenhafel #2 during the litigation, in which the initial order was not issued until 4/22/97, which order Mr. Klockenkemper promptly appealed, thus staying that order under Illinois SCR 305. *R. Exh. 19 - 4/22/97 Rule 23 Order*.

c. IDNR recognized indeterminate status of operator of lease on 4/17/97 by deferring RWS submission of annual reports until Twenhafel appeal resolved

On 4/17/97, after a meeting between Rocky Well's President Mr. Klockenkemper and IDNR's Larry Bengal on compliance issues, Mr. Bengal wrote in confirmation to Rocky Well, stating, in part, that IDNR "will defer submission of an OG-18 [annual reporting] form for the injection wells on the Twenhafel and Wohlwend leases pending resolution of your appeal in Case #77-L-24.". *R. Exh. 17* (4/17/97 IDNR letter). Thus, IDNR was not seeking either an MIT or reporting at this time, further supporting Respondents defense that RWS could not MIT the well in 1995 because Fisher was on it. *Id.*

d. On 4/21/97 Ruth Ann Maschhoff filed suit to void whatever lease RWS had to the Twenhafel field, separate from *Fisher v. Klockenkemper* , and Maschhoff acknowledges that RWS was not the operator

On 4/21/97, Ms. Maschhoff filed suit against Mr. Klockenkemper to attempt to void the May 1977 Twenhafel lease to him, in a matter styled *Maschhoff v. Klockenkemper*, 97-CH-7. *R. Exh. 33* (12/02/00 Ill. App. Ct Order in 97-CH-7). Ms. Maschhoff is also on record stating that neither Mr. Klockenkemper nor RWS operated the Twenhafel lease between 1987 to at least 1998, and that her Twenhafel litigation with Mr. Klockenkemper did not end until 2004. *C. Exh. 60.14.c* (10/17/05 Maschhoff Statement at paras. 5 and 9).

e. On 4/22/97 the Illinois Appellate Court found Fisher in possession, ordered Fisher to vacate his equipment, and awarded right to lease to Mr. Klockenkemper

On 4/22/97, the Illinois Appellate Court, 5th District, reversed and remanded the 12/5/94 Trial Court Order in 77-L-24 (See Wohlwend No. 6 Findings), finding in its Rule 23 Order that the trial court had miscalculated the ownership interests between the parties, that Klockenkemper had acquired no interests in the lease, and that, because the Twenhafel lease had not been worked by Rocky Well or Respondent after Fisher, Fisher remained in possession of the Twenhafel lease

during the litigation. *R. Exh. 19 at pp 6-8* (4/22/97 Ill. App. Ct. 5th Dist Order re Twenhafel and Wohlwend leases & lack of operation of Twenhafel by RWS,).

On 4/22/97, the Illinois Appellate Court in *Fisher v. Klockenkemper* remanded solely for recalculation, reversed the damage award to Klockenkemper, and then put the parties "back to the [previously vacated] 1980 judgement", and ordered that Fisher be allowed to remove his equipment, whereafter Mr. Klockenkemper was given production rights to the Twenhafel Lease. *R. Exh. 19 at 8.*

f. Maschhoff litigation not resolved until 2002, and Respondents were found to have no interests in lease

On 12/02/00, the Illinois Appellate Court found that the 1980 order granting Klockenkemper production rights had in fact been retroactively vacated by the court that issued it, and that the Klockenkemper lease had terminated prior to 1995 due to non-production during the years the *Fisher v. Klockenkemper* litigation was ongoing. *R. Exh. 33, at pp1-2 and p8*.

g. Officer erred in rejecting Twenhafel reduction since RWS did not have actual or legal right to possession or a valid lease for this well in 1995 or thereafter prior to 2002 second involuntary transfer (to Ed Huels).

Given the fact that RWS did not in fact have either title or actual possession to the lease or well in 1995, and that IDNR recognized this and deferred enforcement/compliance, the Officer erred by failing to eliminate or at least afford a reduction for this well to whatever portion of the lump sum penalty applies to same. *Decision at 21*.

6. Officer erred in ignoring other "Other Matters" set forth by Respondents

As evidenced by the Respondent's Brief and Proposed Findings/Conclusions Officer Toney ignored a number of other "Other Matters" which Respondents' believe should have contributed to the elimination or downward adjustment of the penalty in this matter. *FOF at p141-146, Sec. XI (Additional Other Matters).* Listing by topic, these additional "Other Matters" are found at Section XI.:

a. EPA Opening Statement: Actual need for deterrence not established at hearing (*FOF at p144*)

b. **IDNR refusal to consider RWS request for temporary abandonment under 62 IAC 1130(c)(1998 Oil & Gas Rules), as codified at time of RWS's request, was contrary to law, deprived RWS of a statutory right, and forced RWS into longer violation period (***FOF at p141-143***)**

c. Small size discount was not enough since Perenchio/EPA admitted that "RWS not Shell Oil" and could not afford to pay commensurately (*FOF at p144*)

d. No economic benefit and no funds available to RWS due to non-production of inactive leases (*FOF at p144-145***)**

e. Prejudice: RWS/Contractor Recordkeeping - Length of delay in EPA prosecuting this matter and applicability of 805 ILCS 410 three year record retention requirement in Illinois caused loss of evidence and records by RWS and potential witnesses (*FOF at p145***)**

Rather than reargue all the unaddressed "Other Matters" to the EAB in this already lengthy brief, Respondents incorporate herein as their arguments the proposed facts and conclusions presented in Section XI.A. of their 12/21/07 Proposed Findings of Fact. *FOF at p141-146.* In addition, the following discussion of Mr. Klockenkemper's inability to hear questions of counsel and testimony at hearing, and the apparent malfunction of the computerized transcription equipment and/or court reporter, which resulted in a record of transcript that Respondents assert did not accurately record what was actually stated by Mr. Klockenkemper, also is an "Other Matter" requiring review.

7. Officer Toney's 7/23/08 and 11/29/07 Orders should be vacated for foregoing reasons, and findings 5-11, 13-16, 19-16, and 28 reversed, and opposite findings of fact should be made to those vacated, and the penalty should be eliminated

IX. 7/12/07, 8/27/07, and 10/2/07 TONEY ORDERS ON MOTIONS TO CONFORM

Respondents assert error denying them to a fair hearing based on a combination of lack of accommodation at hearing for Mr. Klockenkemper's auditory deficiency, the highly irregular transcription and then withdrawal of a certified transcript and reediting of same by the EPA-contract court reporting service, and Ms. Toney's subsequent failure to grant conformations requested by Respondents. Such conformations were made necessary and appropriate by the cited lack of accommodation and the irregular and highly inaccurate transcription, as set forth in the lengthy briefings of the Respondents' 6/18/07 and 8/24/07 Motions to conform, and summarized below.

A. Posture Below: Mr. Klockenkemper was hard of hearing and could not clearly hear questions at the hearing in Mt. Vernon appellate courthouse, and only a minimal accommodation was provided by EPA of allowing him to read real-time output on computer despite availability of amplification and/or smaller conference room

EPA was initially made aware of Mr. Klockenkemper's hearing problems well in advance of the hearing by way of eyewitness statements given to EPA investigators and to EPA, and by way of direct negotiations with him. *C. Exh. 60.13 at p8* (6/17/03 Arkell Memorandum summary of 2003 Dale Heitman statement). On 11/13/06, upon being informed by Ms. Toney during a status conference call that this matter might be or would be heard in the Appellate Courthouse in Mt. Vernon, IL., Mr. Klockenkemper's undersigned and RWS counsel Mr. Day informed the Officer that the high-ceilinged courtroom might aggravate Mr. Klockenkemper's hearing impairment, and it was left that an accommodation would be reached at the time of hearing depending on whether Mt. Vernon was selected and the acoustics of the room selected. *4/26 Tr. at 85-87 (Day)*; *11/27/06 Toney Order*.

During the initial 4/24/08 hearing in this matter , it was determined that Mr.

Klockenkemper was unable to hear many of the questions and witnesses' responses from his spot at the defense table, and, rather than utilizing the built-in microphones and audio amplification equipment the room was already wired with, with a temporary accommodation was made whereby Mr. Klockenkemper was allowed to sit next to the court reporter so as to read the real time text of the hearing on her computer in conjunction with hearing the testimony.[26] *4/25/ Tr. at 52-53 (McAuliffe).*

While the accommodation seemed to work initially while observing, at the beginning of Mr. Klockenkemper's cross-examination and redirect on April 26, 2007, Mr. Klockenkemper encountered difficulties hearing the questions of the EPA attorneys and trying to read the screen at the same time, at which time the Presiding Officer stated on the record that she had not known that Mr. Klockenkemper was hard of hearing prior to the hearing, or she would have made accommodations.[27] *4/26 Tr. at 83-85 (Toney).* Although Mr. Day indicated that Mr. Klockenkemper could hear better in the conference room (such as the appellate chambers where Ms. Perenchio's cross examination from 4/25/07 was completed just prior to moving to the main courtroom for Mr. Klockenkemper's testimony), and despite the Officer's observation that the room had 25 foot ceilings and did have microphones, and despite her observation that the real

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[26]On 4/25/07, the court reporters' computer was unavailable, and witness Inspector Brown allowed her computer to be used to allow Mr. Klockenkemper to follow along, who was then thanked by EPA counsel: "McAULIFFE: Miss Toney, may I make a very brief statement for the record, please, on behalf of U.S. EPA? PRESIDING OFFICER TONEY: Sure. MS. McAULIFFE: I on behalf of EPA would like to thank Inspector Brown for allowing us to use her--the State's computer on behalf of Mr. Klockenkemper who is very hard of hearing. Thank you, very much." *4/25 Tr, at 52-53.*

[27]"PRESIDING OFFICER TONEY: Mr. Klockenkemper, I'm going to come down here and talk to you about this a second. (WHEREUPON, a short recess was taken.) PRESIDING OFFICER TONEY: Back on the record please. I would like to make a statement for the record. We're having some difficulties here because Mr. Klockenkemper is hard of hearing. I was not advised of this prior to this hearing that that was going to be an issue and that his ability to hear questions from Counsel would be a problem at this hearing. If I had been apprised, I might have been able to make accommodations. I don't know, because I was not apprised of this difficulty and therefore was unable to determine whether any accommodating accommodations could be made. Both court reporters in this proceeding have been extremely patient and kind and have allowed Mr. Klockenkemper to view the screen of their laptop computer which contains their initial draft of the text of the proceeding here today. However, because of the nature of the court reporting operations many of the words that appear on the screen are completely inaccurate, especially when it comes to proper nouns, because I understand the machinery that the court reporter uses does not directly translate proper nouns. So we are having some difficulty withMr. Klockenkemper understanding individual names and the names of these six wells that are at issue in this case. I just wanted to put that on the record..."

time reporter's output screen appeared to be jumbled and inaccurate to her, no further accommodation was made by the court beyond that provided.[28] *Id. at 85-88.* Given that the reporter was seated next to Mr. Klockenkemper, there was no reason to be concerned with the reporter's ability to hear, but it appears the arrangement may have impaired her ability to hear others, given her position furthest from the counsel's tables and with Mr. Klockenkemper between her and the questioners.

B. Sullivan Reporting released a certified transcript of the 4/26/07 hearing on 5/17/07, which Respondent Klockenkemper and counsel found to be incomplete, erroneous and not reflective of his actual testimony as reflected in Respondents' initial 6/18/07 Motion to Conform

On May 17, 2007, the Regional Hearing Clerk notified the parties that the transcript of the proceeding had been officially filed. The Presiding Officer set a briefing schedule by order dated June 4, 2007, the first deadline in that order being the filing of motions to conform the transcript pursuant to 40 C.F.R. § 22.25. Respondent timely filed their joint motion to conform (6/18/07) and response to EPA's motion (7/9/07), with EPA seeking numerous corrections to the transcripts for all three days of the hearing and Respondents seeking numerous corrections, additions of material that was omitted, and modifications to the 4/26/07 transcript only.

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[28]MR. DAY: Miss Toney, it's my recollection that whenever there was mention made, it was in the appellate courtroom here. We indicated that because of the size there may be some difficulty in Mr. Klockenkemper's hearing. And my understanding was we were going to see what we got here, what the situation was, whether he could hear or not. If that's not your recollection, that's what I recall. It was in one of the telephone conversationsWe did not make a formal motion or do anything of that nature, because we didn't know exactly what the circumstances were going to be how well he can hear ceilings and that, along with other factors, makes it more difficult. In a small room, conference room, Mr. Klockenkemper can hear much better because of the acoustics. So under the circumstances, we understand the difficulty here. We appreciate the court reporters' having provided us with this, and we would simply indicate that Mr. Klockenkemper has - is doing his best, as we all are. And if Counsel feels they need to be closer to make sure he understands that, we have no objection to Counsel standing up there in closer proximity to Mr. Klockenkemper in order to ensure that he hears the questions accurately, along with the -- the screen that the court reporter has provided. Perhaps, that might be better because, obviously, he can't hear Miss McAuliffe. Her voice doesn't -- doesn't carry to that extent. So if that would be possible, then we might be able to ensure that he hears the questions accurately and that his responses are to the questions that are -- that are asked. PRESIDING OFFICER TONEY: I would like the record to reflect that this courtroom does have very high ceilings. I mean, I'm estimating 25-foot ceilings, perhaps....and we are not using microphones. I just want the record to reflect that. But if Miss McAuliffe would like to stand closer to the witness, that may help. Mr. Klockenkemper, if you do not understand a question or you don't hear a question or you do not understand what is written on the screen, then, please, ask Counsel to repeat the question.

Respondents 6/18/07 Motion arrayed numerous omissions, errors and misstatements of Mr. Klockenkemper's testimony contained in/not contained in the initial 4/26/07 transcript.[29] *6/18/07 Motion.* Mr. Klockenkemper claimed that Sullivan had entirely misreported his testimony as indicated in his errata sheets attached to the 6/18/07 Motion to Conform.

C. On or about July 12, 2007, Sullivan Reporting "withdrew" the certified 4/26/07 transcript as not having been proofread, and to check against audiotape for missing portions due to transcription equipment malfunctions occurring in hearing room

On or about July 3, 2007, the Presiding Officer held a status conference wherein the parties were informed that Sullivan had withdrawn the 4/26/07 transcript because the court reporter had "inadvertently released an unproofread transcript" from the April 26 hearing. *10/2/07 Decision at 1*. Sullivan stated that reediting of the transcript of that hearing date was needed in order "to remove misspellings, duplicate words and correct the punctuation," and that a proofreader would then compare the transcript to the tapes the court reporter made at the 4/26/07 hearing to check for missing portions, and that this edited version would be certified and distributed to all parties no later than July 23, 2007. *Id. Also See 7/12/07 Toney Order*.

D. Sullivan indicated that the reporter's transcription computer was malfunctioning on 4/26/07, contributing to erroneous and possible incomplete 4/26/07 transcript, corroborating Respondents' claims of missing and misstated testimony

Based on discussions with Sullivan, EPA and undersigned counsel, it was indicated that one of the 4/26/07 reporters had informed Sullivan that, as observed by Ms. Toney on the record that day, her transcription computer appeared to be intermittently malfunctioning or turning on

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[29]Respondents incorporate herein by reference the arguments and points in their initial *6/18/07 Motion to Conform*, their *7/05/07 Joint Motion for Time*, their *7/9/07 Response to EPA's 6/18/07 Motion to Conform*, their *8/22/07 Status Report*, their *8/24/07 second Motion to Conform*, their *9/07/07 Response to 8/22/07 EPA Status Report*, their *9/17/07 Reply to EPA's 9/7/07 Response*, and their *10/30/07 Joint Notice of Filing of Corrected Transcript*, as part of this Brief and in appeal of and objection to the entire botched matter of the inadequate hearing accommodations, reporter's equipment failure, the inadequate 4/26/07 transcript and the Officer's failure to grant portions of Respondents' eventual final 8/24/07 Motion to Conform.

and off, resulting in problems with the recordings on the CD/ROMs, and quite possibly affecting the accuracy and completeness of the transcription of the testimony. *See 7/5/07 Respondents' Joint Motion for For Additional Time, at Appx. B* (7/3/07 Letter re: Sullivan). Sullivan reports corroborated Mr. Klockenkemper's claims that the transcript was riddled with errors (6/18/07 Motion), and Ms. Toney's statements that she observed that the real-time text being diplayed on the screed was often inaccurate. *4/26 Tr. at 82-84.*

E. Officer erred in 7/12/07, 8/27/07 and 10/2/07 Orders by denying Respondents' 7/5/07 and 8/24/07 Motions requesting that she order EPA-contract reporter Sullivan to release any additional recordings to EPA, depriving Respondents of the opportunity to ascertain the accuracy of the revised transcript and of their requested conformations, since the audio files provided to both Respondents and to EPA for 4/26/07 hearing thus far were garbled and largely inaudible, as claimed by Sullivan

As confirmed in the Respondent's 7/3/07 letter to Sullivan, Sullivan reported that the CD/ROM audio of the hearing was "messed up" and largely inaudible (a fact confirmed by EPA and Respondents), but that analog microcassettes made by the reporter on 4/26/07 with clearer recording supposedly existed that were being transferred to MP3's. *7/5/07 Motion at Appx. B (7/3/07 Letter to Sullivan requesting MP3's).* Respondents' assert their 7/5/07 and 8/24/07 Motions that the Officer order the tapes to be released to EPA and then be provided to RWS were erroneously denied. *7/12/07 and 8/27/07 Toney Orders.*

With regard to the 10/2/07 Order, Ms. Toney's statements that she offered to allow Respondents to review the "electronic audio files" are misleading and irrelevant, since Respondents had already received and listened to the same wav. files EPA had gotten, and was seeking a different, separate analog recording the reporter had allegedly made, which had not been released to either EPA or Respondents. *10/2/07 Order at 2 (para. "(2)"); 8/24/07 Motion.* Officer Toney's assertion that she "saw no reason" to order the RHC to obtain the tapes misses the unmentioned fact that the current electronic files she offered were inadequate, or else Respondents would not have been asking for a different recording. *Id.*

The claim that the government does not have the authority to require a contractor to provide EPA copies of whatever work product was produced under the contract is doubtful. *Id.*

Also, ordering Sullivan to provide same to Respondents was not necessary, since the prayer of the 8/24/07 Motion was to provide them to "all parties" thus including EPA, regardless of whether the release could be ordered to a respondent. *Id.* Finally, the prejudice is obvious, since, given the irregular transcripts and reporting process, the parties' conformations could have been easily confirmed or denied by comparison to a viable recording, avoiding the need for this part of the appeal and ensuring a fair process and accurate record.

F. Sullivan released a revised 4/26/07 transcript on 7/23/07, which side-by-side differed materially and in over 100 instances from initial 5/17/07 transcript, was 10 pages longer, and included at least 20 of Respondent Klockenkemper's requested 6/18/07 conformations to the initial unedited transcript, further corroborating Respondents' claims of erroneous transcription

Sullivan subsequently revised and reissued the 4/26/07 transcript on 7/ 20/07, and Respondents filed their 8/24/07 Motion to Conform. *10/2/07 Order*. Based upon a side-by-side comparison of the two transcripts, the revised transcript reveals that entire exchanges between speakers, and numerous phrases uttered by same, especially by Mr. Klockenkemper, were in fact not reported in the original transcript, but were in fact entirely omitted or misreported, a fact that is initially evidenced by the fact that the revised transcript is approximately 10 pages longer than the first. *See 8/24/07 Joint Motion to Conform at Atts. A, B and C.*

For examples of the fact that testimony and statements were mis-recorded or misunderstood at the initial hearing, and that statements were omitted, Respondents counted over **100** instances where prior testimony and reports of proceedings were contained in the revised transcript which were absent in the initial, or where the initial reported testimony was incorrect or incomplete, including over 25 instances which Respondents consider directly material and substantial. Such instances and comparison of other pertinent omissions and errors are set forth in Attachment C to the *Respondents' 8/24/07 Motion to Conform*.

Additionally, at least 20 of Respondents' prior 6/18/07 Motion's requested conformations did in fact prove to be accurate and justified, as exemplified by the fact that the new transcript contained, **verbatim**, Mr. Klockenkemper's former requested 6/18/07 conformation Nos. 14,

15, 17, 18, 20, 22, 25, 26, 27, 27.5, 28, 29, 31, 32, 33, 34, 36, 42, 45, 48, 50, and 64, to his own testimony, indicating that Mr. Klockenkemper's memory as to his testimony and the proceedings is more reliable than was the first transcript. *(See* numbered requests in *Attachment A to Respondents' 6/18/07, Motion to Conform* and compare to *revised transcript and Attachment A of 8/24/07 Motion to Conform).*

G. Respondents' requested changes met standard for 40 CFR 22.25 as interpreted by Ms. Toney's 7/12/07 Order

The changes in the pre-conformation 7/23/07 revised transcript corresponding to Respondent's asserted omissions also indicate that, consistent with Ms. Toney's asserted standard for 40 CFR 22.25 revisions in her July 12, 2007, order based on *In Re Tennessee Valley Authority*, 9 E.A.D. 357 (E.A.B. 2000), the requested changes were indeed intended to conform the transcript to the actual testimony, and not to add things that were not stated, and thus Respondents' prior and current conforming requests were and are proper and justified under the proffered alleged standard. *See 7/12/07 Toney Order at fn 1.*

H. Officer Toney erred in granting only a portion of Respondents' conformations, and also because she did so without explanation or basis, and totality of hearing problems and errors amounted to denial of a fair hearing for Mr. Klockenkemper and RWS, thus the conformations should be ordered and no penalty should be assessed due to lack of a fair and accurate hearing for Mr. Klockenkemper

Despite the proven inaccuracy of the 4/26/07 transcripts, and the related audio and computer equipment problems at the 4/26/07 hearing, Officer Toney granted only 31 of 96 requested conformations (1, 2, 3, 4, 5, 6, 7.5, 8, 9, 9.5, 10, 12, 14, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 37.1, 47.1, 49, 50, 60, and 61). *8/24/07 Order at 3.* However, she rejected the remaining requests without any explanation other than a blanket statement that she would not allow "Attempts by the parties to add substantive language that changes the meaning of testimony, that amplifies testimony, or that goes beyond the mere correction of an obvious mistake or omission". However, Officer Toney granted all but 2 of EPA's numerous requests. *Id.*

Respondents assert that the rejections were made in error, and that it was error that the rejections were not substantiated by the Officer, and that the result was a denial of a fair hearing. Given the circumstances described above and the fact that the 4/26/07 transcript is public record that was and can again be used against Mr. Klockenkemper, the EAB should order the requested conformations to be made for the record, regardless of the outcome of this appeal

X. 5/17/06 TONEY ORDER STRIKING AFFIRMATIVE DEFENSES - FIRST AND EIGHTH AFFIRMATIVE DEFENSES IMPROPERLY STRICKEN AND NOT CONSIDERED

On 5/17/06, Officer Toney erroneously struck certain of Respondents' affirmative and properly retained the remaining defenses, of which the first and eighth are at issue. *5/17/06 Order at 1-9.*

A. First Affirmative Defense, that EPA has no subject matter jurisdiction over Mr. Klockenkemper since is not the "Permittee" under the Illinois UIC program, is raisable anytime, may not be stricken, and must be considered by the court when raised

Respondent Klockenkemper appeals the striking of the first part of his First Affirmative defense, that EPA has no jurisdiction because he is not the "permittee" under the Illinois SDWA. *5/17/06 Toney Order at 4.* The reasons for error are that this was and is a viable jurisdictional defense, which can be raised at any time, and cannot be waived, and in fact is an attack a court must always consider. *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"). *225 ILCS 725/8a***.** *See Discussion at Section VI, infra (re 5/3/05 Order).* Given that Officer Toney struck this defense based on her finding that Officer Kossek dismissed this claim in her 5/5/05 order, Respondent incorporates herein his discussion and arguments set forth in Section VI above (regarding the errors of the 5/5/05 Order in dismissing this argument) as his reasons that the "permittee" defense should not have been stricken and must be considered in view of the facts in front of the Officer each time it is raised. *5/17/06 Order at 4.*

B. Eighth Affirmative Defense - IDNR denial of hearing and statutory process for temporary abandonment/future use status is "Other Matter" that should be considered under SDWA statutory penalty factor 6

Respondents appeal the dismissal of their Eighth affirmative defense. *5/17/06 Order at 7-8.* Respondents assert that EPA should consider a reduced penalty assessment in view of the defense that IDNR denied Respondents due process and right to a hearing by refusing to allow RWS to place any of the six wells on the hearing docket for a temporary abandonment/future use approval, thus preventing RWS from taking advantage of the law as it existed at the time of the RWS request. *62 IAC 240.1130(c) - (1998 Oil and Gas Rules).* In short, the defense asserts that where such approval was requested by RWS several months prior to the 7/9/01 EPA complaint, timely docketing and approval would have obviated the need to MIT the wells, avoided the EPA complaint, and shortened the time of non-compliance overall. *12/21/07 Findings of Fact at 141-144, Sec. XI.B.*[30] IDNR, by way of an informal internal policy, made compliance impossible and forced RWS into a situation where it could not comply with the SDWA despite good faith attempts to comply the wells. *R. Exh. 41* (3/5/01 IDNR memo banning RWS from temporary abandonment). Given the gravity and impact of this denial of the right to a federally- mandated procedure and hearing, which if granted might have resulted in the compliance of all wells prior to EPA's 7/9/01 complaint, Respondents assert that the defense should have been retained, and ask that the penalty, if not already waived, be waived by EAB based on same.

XI. CONCLUSION

For the foregoing reasons, Respondents pray that the EAB vacate the challenged portions of the above-referenced orders, and reverse the findings of liability and assessment of penalty as to each Respondent for all Counts, and dismiss this entier cause with prejudice, or such other relief in Respondents' favor as is just under the circumstances.

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[30] Respondents presented this defense in detail as an "Other Matter" in their post-hearing findings of fact, and incorporates those facts here as their arguments as to the viability of the defense for purposes of defeating a motion to strike and for consideration by the EAB as an "Other Matter" in reviewing this matter. *Findings of Fact at 141-144, Sec. XI.B*

XII. PROPOSED FINDINGS OF FACT AND LAW

A. EPA's 1/25/02 NOV and 2/20/02 amended complaint fail to plead jurisdictional facts, and thus fail to confer jurisdiction to EPA over Mr. Klockenkemper under 225 ILCS 725/8a, and as a result the and the Officer's Order of 12/27/06 is declared null and void as to Mr. Klockenkemper, and the Orders of 2/6/03 and 5/3/05 are reversed and vacated as to non-Respondent Klockenkemper for lack of facial and subject matter jurisdiction as pleaded in 2/20/03 amended complaint.

B. EPA failed to plead or prove a prima facie 40 CFR 22.24 case against Mr. Klockenkemper under 225 ILCS 725/8a, 42 USC 300h-2 for the violations alleged, and did not attempt to pierce the corporate veil of Rocky Well Service, Inc. , thus the 12/27/06 Order is in error and null and void, and vacated as to Mr. Klockenkemper, and he is found not jointly and severally liable under the SDWA and otherwise not liable for the violations alleged.

C. EPA failed to meet its 40 CFR 22.24 burden as to the proposed penalty assessment against either Respondent, no harm was shown, no USDW was shown to be threatened, and there was insufficient evidence to support the Officer's own assessment, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent.

D. EPA and the Officer failed to properly apply 42 USC 300h-2 statutory penalty factors to each violation at each well, and failed to recognize numerous good faith efforts and other matters, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent.

E. The Officer committed reversible error in striking Respondent's affirmative defenses, and in the conduct of the April 24-26, 2007, hearing and post hearing procedures, that denied Respondents due process, proper disability accommodations for Mr. Klockenkemper, a fair trial and an accurate record thereof, and the Officer's orders of 5/17/06, 7/12/07, 8/27/07 and 10/2/07 and 11/29/07 where in error and are vacated and reversed as to both Respondents, and this matter is dismissed with prejudice/remanded for further hearing as directed.

Respectfully Submitted By:_____*s/: Felipe N. Gomez*_____ Date: October 30, 2008

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APPENDIX 1

TABLE OF AUTHORITIES

(for Part 2/2)

FEDERAL CASES

ENVIRONMENTAL APPEALS BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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