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

In Re:	)	
	)	
Rocky Well Service, Inc. &	)	SDWA Appeal Nos. 08-02 & 08-03
E. J. Klockenkemper	)	
	)	
Docket No. SDWA-05-2001-002	)	
	)	

APPELLEE'S BRIEF IN RESPONSE TO APPELLANT E. J. KLOCKENKEMPER'S REVISED BRIEF IN SUPPORT OF HIS AMENDED NOTICE OF APPEAL

I. AUTHORITY

Pursuant to 40 C.F.R. § 22.30(a)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (*"Consolidated Rules"*), Appellee, the United States Environmental Protection Agency, Region 5 files the instant Brief in Response to the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper (*"Appellee's Response"*).

II. BACKGROUND

On September 8, 2000, Appellee issued a federal Notice of Violation (*"NOV"*) to Rocky Well Services, Inc. (*"Appellant RWS"*), and sent a copy of the NOV to the Illinois Department of Natural Resources (*"IDNR"*), notifying the State of Appellee's finding that RWS was in violation of the Safe Drinking Water Act, 42 U.S.C. § 300f to 300j-26 (*"the SDWA"*), and the Illinois Well Construction, Operating and Reporting Requirements for Class II Underground Injection Control Wells, Ill. Admin. Code Title 62, Subpart G (*"the Illinois UIC Program"*). (Complainant's

Prehearing Exchange Exhibits ["*C's PHEXs*"] 34, 35). IDNR did not commence an enforcement action within 30 days following its receipt of the federal NOV. Thus, on July 9, 2001, pursuant to Section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c), Appellee filed its original Complaint against Appellant RWS. (C's PHEX 37). The Complaint alleged that Appellant RWS committed three separate violations of the SDWA, 42 U.S.C. § 300h-2, and the Illinois UIC Program, when it failed to timely perform mechanical integrity tests on its six Class II wells, as required by Ill. Admin. Code Title 62, § 240.760 ("*the Illinois MIT regulations*"), and failed to submit annual well status reports for these wells, as required by Ill. Admin. Code Title 62, § 240.780(e), ("*the Illinois Well Reporting regulations*"). *Id.* On that same day, Appellee provided public notice of the Complaint, and invited public comment on the case, but none were received. Appellant RWS filed its Answer on or about August 23, 2001. (C's PHEX 36). About five months later, on January 25, 2002, Appellee issued a federal NOV to Appellant E. J. Klockenkemper ("*Appellant EJK*"), and sent a copy of the federal NOV to the IDNR, notifying it of Appellee's finding that Appellant EJK was in violation of Section 1423 of the SDWA, 42 U.S.C. § 300h-2, and the Illinois UIC Program (C's PHEXs 39, 40). IDNR did not commence an enforcement action within 30 days following its receipt of the federal NOV. On March 13, 2002, U.S. EPA sent a pre-filing notice letter to Appellant EJK, again notifying him of his alleged violations and providing him with an opportunity to present Appellee with any information regarding the matter that he wished to be considered by Appellee. (C's PHEX 41).

On May 1, 2002, Appellee filed a Motion to Amend the Complaint, seeking, among other things, to add Appellant EJK as an additional Respondent in this case. No objection was filed to Appellee's motion, and on May 21, 2002, Regional Judicial Officer ("*RJO*") Kossek granted

Complainant's Motion and deemed the Amended Complainant officially filed. Thereafter, on June 3, 2002, Appellant EJK filed a Motion to Reconsider. On June 7, 2002, the RJO granted his motion, vacated her May 21, 2002 order and provided additional time for the Respondents to respond to Complainant's Motion to Amend the Complaint. On June 27, 2002, Appellant EJK filed a Memorandum in Opposition to Appellee Motion to Amend the Complaint, arguing that he could not be held personally liable under the Illinois UIC regulations that imposed well testing and reporting requirements on the "permittee." On July 11, 2002, Appellee filed its Reply to his Memorandum. On February 6, 2003, the RJO rejected Appellant EJK's arguments and granted Appellee's Motion to Amend the Complaint, and ordered the Amended Complaint filed by February 20, 2003. (C's PHEX 42).

On February 20, 2003, Appellee filed the Amended Complaint in this case, naming Appellant EJK as an additional Respondent in this matter, and alleging that Appellants RWS and EJK violated Section 1423 of SDWA, 42 U.S.C. § 300h-2, and the Illinois UIC Program requirements at Ill. Admin. Code Title 62, §§ 240.760(e), 240.760(e)(6), and 240.760(f), with regard to the wells at issue. (C's PHEXs 43 and 76).

On March 20, 2003, Appellant EJK filed a Notice of Appearance of New Counsel and a Motion for Extension of Time to Respond to the Amended Complaint until April 15, 2003. On March 31, 2003, the RJO granted Appellant EJK's Motion, providing him with an extension of time, through April 15, 2003, to answer the Amended Complaint.

On April 15, 2003, in lieu of filing an Answer, Appellant EJK filed a Motion to Dismiss, again arguing that he could not be held individually liable because he was not the named "permittee" of the wells at issue. The parties subsequently filed several responses and replies

regarding this motion. On May 3, 2005, the RJO denied Appellant EJK's Motion to Dismiss Amended Complaint, and ordered him to file his Answer to the Amended Complaint by May 25, 2005. (C's PHEX 44). On July 11, 2005, after requesting and receiving an extension of time to file, Appellant EJK filed his Answer that contained ten "affirmative defenses," and a request for hearing. (C's PHEX 46).

On December 5, 2005, recently-assigned RJO Toney issued a Prehearing Order, directing the parties to file their respective prehearing exchanges on or before January 23, 2006, and instructing them on the required contents of the prehearing exchanges. On January 23, 2006, the parties filed their respective initial prehearing exchanges of information. Subsequently, during 2006 and 2007, both parties supplemented their prehearing exchanges on several occasions.

Between February 13, 2006 and May 5, 2006, the parties filed a quantity of motions, responses, and replies on a variety of issues, including, but not limited to Appellee's Motion to Strike Appellant Klockenkemper's affirmative defenses in his Answer (among other things). On May 17, 2006, the RJO issued an order, disposing of the pending motions that had been filed in this case. The RJO granted in part and denied in part Appellee's Motion to Strike Affirmative Defenses; granted Appellee's Motion to Compel Appellants to Submit a Joint Prehearing Exchange that Complied with the December 5, 2005 Prehearing Order; denied Appellants' Motion to Compel Response to Requests to Admit; denied Appellants' Motion to Compel Complainant to Supplement its Prehearing Exchange with Regard to Appellant EJK; granted in part and denied in part, Appellant EJK's Motion to Amend his Answer to Add Proposed Affirmative Defenses; and denied Appellant EJK's Motion to Strike Complainant's Exhibit 31. (C's PHEX 82).

On July 21, 2006, Appellee filed its *Motion for Partial Accelerated Decision as to the Liability of Respondent RWS and Respondent EJK*, with accompanying memorandum in support. Appellee subsequently filed a Response and a Reply to Appellants' Motion for Accelerated Decision on August 28, 2006 and September 18, 2006, respectively. On December 27, 2006, approximately four months prior to the hearing in this case, RJO Toney issued her Partial Accelerated Decision ("*PAD*"), finding that Appellant RWS, a corporation, and Appellant EJK, an individual, were each liable for violating Section 1423 of the SDWA, 42 U.S.C. § 300h-2(c) and the Illinois UIC Program's requirements at Title 62 IAC §§ 240.760 and 240.780, for: 1) failing to successfully conduct mechanical integrity tests on the Huelsing #1 and Zander #2 Class II UIC wells by at least December 19, 1996; 2) failing to successfully conduct mechanical integrity tests on the Atwood #1, Harrell #1, Twenhafel #2 and Wohlwend #6 Class II underground injection wells by at least September 1, 1995; and 3) failing to submit annual well status reports for calendar years 1996, 1997 and 1998, regarding each of the six Class II wells. (PAD at 11, 15). Thus, the issue of Appellants' liability was not the subject of the April 2007 hearing, and the sole purpose of that hearing was to present evidence regarding the appropriateness of Appellee's proposed $105,600 civil penalty. [1]

A hearing in this matter was held in Mt. Vernon, Illinois on April 24, 2007 through April 26, 2007, and a hearing transcript was subsequently produced. In accordance with the RJO's October 2, 2007 order, Appellants and Appellee reviewed this transcript and made modifications to it on October 30, 2007. Thereafter, the modified corrected transcript of the hearing was filed

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[1/] Lisa Perenchio testified that she calculated the $105,600 proposed penalty in this matter in preparation for the hearing and determined that this amount was consistent with (but less than) Jeffrey McDonald's original calculated proposed penalty, and that U.S. EPA would seek imposition of the lesser, $105,600 proposed penalty upon Appellants. (CE 141 ¶¶ 19-20, 55 and TR 4/25 at 155-156).

in this case. On December 17, 2007, the joint stipulations that were signed by the parties at hearing on April 24, 2007, were filed. On December 3, 2007, Appellee filed its Post-Hearing Brief, and, subsequently, filed a Response and a Reply to Appellants' Post-Hearing Brief and Response, on January 22, 2008 and February 21, 2008, respectively.

On July 23, 2008, RJO Toney issued her Penalty Decision in this case, finding that Appellants were jointly and severally liable for a $105,590 penalty in this matter for their violations of the SDWA and the Illinois UIC Program.

On July 28, 2008, Appellants each filed a Notice of Appeal in this matter with the Environmental Appeals Board ("*the EAB*" or "*the Board*"). On October 31, 2008, Appellant EJK filed an Amended Notice of Appeal, pursuant to the EAB's October 14, 2008 order. On March 2, 2009, the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper was filed in this matter.[2] Appellant RSW filed its Revised Brief on or about March 7, 2009. Appellee's Response is being filed with the EAB on March 30, 2009, consistent with the Board's 2/25/09 order in this case.

III. STATEMENT OF THE ISSUES ON APPEAL

1. Can a corporate officer be found directly, individually liable for violations of the SDWA and a state UIC regulatory program, authorized under the SDWA?

2. Did Regional Judicial Officer (*"RJO"*) Kossek correctly grant Appellee's Motion for

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[2]On December 15, 2008, the Environmental Appeals Board rejected Appellant EJK's first 221-page appeal brief that was "unnecessarily verbose and redundant, resulting in a lack of clarity and an excessive page count," and ordered him to file a shortened, revised brief to ensure the efficient use of Agency resources. After requesting and receiving an extension of time, Appellant EJK filed his Revised Appeal Brief, (*'EJK's Rev. Brief'*) that is shorter in length than his initial rejected brief, but no less confusing. Appellant lists seven specific orders on page 3 of his Revised Brief, but presents his general issues and arguments in a fashion that makes it difficult to consistently follow which described issue and argument corresponds to a particular order under appeal. To mitigate some of the confusion inherent in the EJK Rev. Brief, Appellee has structured this response brief (with two exceptions explained at the beginning of its Argument section), to focus on each order under appeal, and address Appellant's issues regarding each order (to the extent that Appellant is able to discern the same).

Leave to Amend the Complaint in her 2/06/03 Order?

3. Did RJO Kossek correctly deny Appellant EJK's Motion to Dismiss the Complaint in her 5/3/05 Order?

4. Did RJO Toney correctly grant Appellee's Motion for Partial Accelerated Decision, finding Appellant EJK liable for his violations of the Illinois UIC Program and the SDWA, in her 12/27/06 Partial Accelerated Decision? [3]

5. Did RJO Toney correctly determine that Appellants were jointly responsible for a $106,500 civil penalty for their violations of the SDWA, and the Illinois UIC Program requirements in her 7/23/08 Penalty Decision?

6. Was Appellant EJK denied a fair hearing because of RJO Toney's 10/2/07 Order regarding the parties' Motions to Conform Transcripts?

IV. STANDARD OF REVIEW

Section 22.30 of the Consolidated Rules, 40 C.F.R. § 22.30, governs the scope of this appeal, and sets forth the standard for review by the EAB. The Board may "adopt, modify or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed." 40 C.F.R. § 22.30(f). The Board conducts a *de novo* review of the Presiding Officer's factual and legal conclusions. *In re LVI Envtl. Servs.*, 10 E.A.D. 99, 101 (EAB 2001); 40 C.F.R. § 22.30(f); *In re Larry Richner, Nancy Sheepbouwer & Richway Farms,* 10 E.A.D.

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[3] With regard to RJO Toney's 12/27/06 Partial Accelerated Decision, Appellant EJK, *inter alia*, challenges her rejection of six specific affirmative defenses that he first raised in his Answer and/or Amended Answer to the Amended Complaint. The affirmative defenses that were rejected in that Order are as follows: Lack of Jurisdiction, (Affirmative Defense #2); Equitable Estoppel/Estoppel en Pais, (Affirmative Defense #3); Laches, (Affirmative Defense #4); Statute of Limitations, (Affirmative Defense #11); Selective Enforcement (Affirmative Defense #12); and Impossibility (Affirmative Defense #14). *See* EJK Rev. Brief at 15, 18, 50, 52-53. Appellant also challenges the RJO's 5/17/06 Order, and for support, refers back to the portion of his revised brief that challenges the RJO's 12/27/06 Order, and contains a discussion that appears to be organized by numbered affirmative defenses. *Id.* at 15, 18, 50, 52-53, and Exhibit A to EJK's Rev. Brief. Appellee is uncertain why Appellant EJK is appealing RJO Toney's 5/17/06 Order because she did not strike these defenses in that Order. If Appellant EJK is appealing the 5/17/06 Order for RJO Toney's rejection of his other affirmative defenses, he has provided no evidence in the EJK Rev. Brief to support such position. To the extent that the EAB may wish to entertain such an argument, Appellee respectfully directs the Board to review RJO Toney's 5/17/06 Order, as well as Complainant's Motion for an Order Striking Respondent Appellant's Affirmative Defenses, and supporting memorandum; and Complainant's Reply to Respondent Appellant's Response to Motion to Strike Affirmative Defenses.

617, 619 (EAB 2002), citing *In re City of Marshall, Minnesota,* 10 E.A.D. 173, 180 (EAB 2001); *In re Billy Yee*, 10 E.A.D. 1, at 10 (EAB 2001), *pet. dismissed* No. 01-2627 (8th Cir. Jan. 24, 2002).

In an administrative case, the standard of proof is "preponderance of the evidence." 40 C.F.R. § 22.24(b); *In re Roger Antkiewicz & Pest Elimination Products of America*, 8 E.A.D. 218, 227 (EAB 1999). Under this standard the proponent must show that the evidence as a whole establishes that the fact sought to be proven is more probable than not, (i.e., more credible or convincing to the mind). *In re The Bullen Companies., Inc.*, 9 E.A.D. 620, 624, n.7; 632 (EAB 2001) (*quoting*, *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. 522, 530 (EAB 1998). The complainant has the burden of going forward with and of providing evidence that the violation occurred. 40 C.F.R. § 22.24(a); *In the Matter of Sandoz, Inc.*, 2 E.A.D. 324 (CJO 1987). The respondent has the burden of presenting any defense to the allegations set forth in the complaint, and has the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a). The Board has elaborated on the burden of proof, stating:

> The term "burden of proof" * * * encompasses two concepts: the burden of production, and the burden of persuasion. The first of these to come into play is the burden of production -- that is, the "duty of going forward with the introduction of evidence." This burden may shift during the course of litigation; if a complainant satisfies its burden of production, the burden then shifts to the Appellant to produce, or go forward with the introduction of, rebuttal evidence. The burden of persuasion comes into play only "if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced." This burden refers to what a "litigating proponent must establish in order to persuade the trier of facts of the validity of his claim." Importantly, this burden does not shift.

In re City of Salisbury, 10 E.A.D. 263, 278-79 (EAB 2002), citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-37 n.16 (EAB 1994). The EAB has consistently deferred to the Presiding Officer's findings of fact where the witnesses' credibility was at issue because, absent some

compelling reason to the contrary, the Presiding Officer who made the factual determinations was the one who conducted the hearing, and was in a unique position to observe the witnesses' demeanor and assess their credibility. *See In re Bil-Dry*, 9 E.A.D. 575, at 588 n.15 ("Although the Board generally reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis, the Board may apply a deferential standard of review to issues such as the Presiding Officer's findings of fact where the credibility of witnesses is at issue"); *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000); *In re Chempace Corporation*, 9 E.A.D. 119, 134; *In re Ocean State Asbestos Removal*, 7 E.A.D. 522, 530 ("the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility"). *See also*, *In re Boliden-Metech, Inc.*, 3 E.A.D. 439, 446 (CJO 1990), citing *In re Mexico Feed and Seed Company, Inc.*, TSCA Appeal No. 85-2 (February 28, 1986), at 7; *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 392 n.17 (EAB 2002), *appeal voluntarily dismissed,* No. 02-1868 (7th Cir. May 21, 2003); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994) (*citing In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 372 (EAB 1994)).

V. ARGUMENT

A. The Regional Judicial Officers Had Subject Matter Jurisdiction Over Appellee's Claim Against Appellant EJK For His Violations of the SDWA and The Illinois UIC Program Authorized Under the SDWA

Throughout his revised brief, Appellant EJK contends that the RJOs did not have subject matter jurisdiction over Appellee's claim against him for his violations of the SDWA and the Illinois UIC regulations. Therefore, RJOs Kossek and Toney allegedly erred in issuing the orders under appeal that did not favor Appellant EJK. Appellant's jurisdictional objections are based on his theory that only a *permitee* under the Illinois UIC Program, authorized under the SDWA, can

be subject to a claim for violations of the SDWA and the state regulations, authorized under the SDWA. See EJK Rev. Brief at 1, 4, 6-10, 15-18, 33-34). His perennial argument is without merit, however, and Appellee will discuss the jurisdictional basis for its claim against Appellant EJK, as a preliminary matter, because such discussion supports the validity of more than one of the RJOs' orders under appeal.

Appellant EJK insists that only a formal *permittee* under the Illinois UIC Program can be subjected to an enforcement action for violations of the SDWA and the state regulations, authorized under the SDWA, and, therefore, the RJOs were without subject matter jurisdiction over this matter.[4] *See EJK Rev. Brief* at pp 6-11. Appellant's argument is without merit.

The Supreme Court examined the issue of what constitutes a jurisdictional element under a federal statute, and established a bright line rule that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006).[5] The EAB has also analyzed the issue of what constitutes a jurisdictional defense, and has found that, consistent with the Supreme Court's decision in *Arbaugh*, the "farm road defense" under the Clean Water Act was not jurisdictional because the Act's jurisdictional provision at 33 U.S.C. § 1319(g)(1) did not provide for such exemption. *See In re: J. Phillip Adams*, 13 E.A.D. ___ , 14 (EAB 2007).

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[4] Appellant EJK also contends that Appellee allegedly tried to hold him liable for Appellant RWS's violations as a "defacto permittee." *See EJK Rev. Brief* at 10. This is an incorrect assumption because Appellee alleged facts in the Amended Complaint that illustrated Appellant's direct liability as an operator who carried out the day-to-day well operations, (as well as the violations) for the corporation; his liability was not dependent on formal or "de facto permittee" status.

[5] The Supreme Court found that the "numerosity" requirement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), was a component of the claim, but not a jurisdictional element because Congress did not specify it as such in Title VII's jurisdictional provisions. *Arbaugh*, 546 U.S. at 514-516.

In this matter, the applicable jurisdictional sections of the SDWA are found in Section 1423 of the SDWA, and provide in pertinent part, as follows:

> **(a) Notice to State and violator; issuance of administrative order; civil action**
> (1) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources (within the meaning of section 300h-1(b)(3) of this title or section 300h-4(c) of this title) that any *person* who is subject to a requirement of an applicable underground injection control program in such State is violating such requirement, . . . if beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order under subsection (c) of this section requiring the *person* to comply with such requirement or the Administrator shall commence a civil action under subsection (b) of this section.
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> **(c) Administrative orders** . . .
> (2) In any case in which the Administrator is authorized to bring a civil action under this section with respect to any regulation, or other requirement of this part relating to —
> (A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production, . . . the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $5,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both. . . .

42 U.S.C. § 300h-2(a) and (c). The SDWA's jurisdictional provisions authorize an enforcement action against a *person* who violates a requirement of a state UIC program that has been approved by U.S. EPA, under the SDWA. Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12), defines the term "person" as "an *individual*, corporation, company, association, [or] partnership, . . . *(and includes officers, employees, and agents of any corporation*, company [or] association . . .). *(Emphasis added)*. There is no language in these provisions that limits enforcement actions under the SDWA to *permittees*. Thus, the SDWA's jurisdictional provisions discussed above illustrate the broad enforcement reach of the statute that includes, but

is not limited to *permittees*. [6]

Consistent with the SDWA's jurisdictional provisions discussed above, the Illinois UIC Program, as approved by U.S. EPA under the SDWA, is similarly expansive, and does not limit enforcement of its provisions to *permittees* only.[7] The Illinois Oil and Gas Act,[8] incorporated by reference into the approved Illinois UIC Program, states that it is a violation of the State program for a permittee or " . . . *any person* engaged in conduct or activities required to be permitted under the . . . [UIC Program], to violate any requirement of the Illinois UIC Program." *See* 40 C.F.R. § 147.701(a)(1), and 225 Ill. Consol. Stat. § 725/8a. Section 240.10 of the Illinois UIC Program, Ill. Admin. Code Title 62, § 240.10, defines *person* broadly as "any natural person, corporation, association, partnership, governmental agency or other legal entity, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind. (Section 1 of the Act)." Further, the Illinois UIC Program, at Ill. Admin. Code Title 62, § 240.150, provides that when ". . . *any person* engaged in conduct or activities required to be permitted under the Act is in violation of any requirement of this Act or the rules adopted hereunder . . ., a notice of

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[6] The Ninth Circuit evaluated and rejected a similar claim that the court did not have subject matter jurisdiction over the United States' action, (on behalf of U.S. EPA), for injunctive relief and civil penalties under Part B of the SDWA, 42 U.S.C. §§ 300g through 300g-9, that applied to public water systems. *See United States v. Alisal Water Corporation*, 431 F.3d 643 (9th Cir. 2005), *cert denied*, 547 U.S. 1113 (2006). In analyzing the SDWA's jurisdictional provisions, the 9th Circuit noted that the Act contained certain narrow exceptions to the district court's jurisdiction that were found at 42 U.S.C. §§ 300g-1(b)(1)(B)(i)(III) and ***300h-2(c)(7)***, but that the applicable jurisdictional provision at 42 U.S.C. § 300g-3(b) did not expressly create a special exception to the court's jurisdictional authority to hear the suit. *Id.* at 651. *(Emphasis added).*

[7] In discussing *permittees* under the provisions of Illinois UIC Program here, Appellant is not suggesting, in any way, that such status is a jurisdictional element for claims of violations of the SDWA and the authorized Illinois UIC Program. This discussion merely demonstrates that the Illinois UIC Program, in an of itself, does not allow those who are not permittees to evade prosecution for violations of the state program.

[8] 225 Ill. Consol. Stat. § 725/26 (formerly, Ill. Rev. Stat. Ch. 96 ½, Section 5456), also provides that ". . . any person who violates any provision of this Act or any valid rule, regulation, permit or order of the Department made hereunder, or who repeats or continues the violations thereof, shall be subject to a civil penalty not to exceed $1,000 a day for each and every act of violation."

violation shall be completed. . . ." [9] (*Emphasis added*). Therefore, akin to the enforcement provisions in the SDWA, the authorized Illinois UIC Program applies to a broad range of *persons*, and does not contain language that restricts enforcement of its provisions to *permittees*.

Appellee properly alleged facts in the Amended Complaint, consistent with the provisions of the SDWA, as set forth above, that demonstrated that the RJO had subject matter jurisdiction over the claim against Appellant EJK in this case. Appellee alleged that Appellant EJK was an individual who served as the President, Secretary, Treasurer, and Agent for Appellant RWS, and who conducted the day-to-day operations of the corporate Appellant; that Appellant EJK was a "person" as that term is defined in Section 1401(12) of the SDWA, 42 U.S.C. § 300f(12); that Appellant RSW was the owner and/or an operator of the wells involved in the case; that Appellant EJK is or was the operator and/or the person who conducted the majority of the corporate appellant's day-to-day well maintenance and production operations with regard to the wells; that the State of Illinois issued permits to Appellant RWS that allowed Appellants RWS and EJK to place injection fluid (salt water and/or water) into each of the wells involved in this case; that at all times relevant to the Amended Complaint, Appellants performed or were authorized to perform the injection of salt water and/or water into the wells, in connection with the production of oil and/or natural gas; that Appellee found that Appellant EJK was subject to the Illinois UIC requirements found in Title 62 of the Illinois Administrative Code, and had violated the regulations' mechanical integrity testing and reporting requirements under Ill. Admin. Code Title 62, §§ 240.760, 240.780(e) and the SDWA; that Appellee provided the State

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[9] This provision focuses on the *conduct of the person*, and not his/her/its status as a "permittee" in describing who can be prosecuted for violations under the Illinois UIC Program.

of Illinois and Appellant EJK with notice of Appellant EJK's violations; and that the State did not commence its own enforcement action against Appellant EJK for the violations in the notice. *See C's PHEX 43* at ¶¶ 1, 6, 14-15, 17, 22-23, 25-26, 30, 35-37. The allegations in the Amended Complaint demonstrate that the RJOs had subject matter jurisdiction over Appellee's claim against Appellant EJK in this case – – the allegations establish that Appellant EJK, as the individual who functioned, *inter alia*, as the operator (i.e., the person who conducted the majority of the day-to-day well maintenance and production operations regarding the wells), was a person who violated the Illinois UIC Program's requirements and the SDWA, and, therefore was subject to this enforcement action. Therefore, Appellant EJK's recurrent objections to RJOs Kossek and Toney subject matter jurisdiction over Appellee's claim against him are without merit.

B. Corporate Officer Can Be Found Directly, Individually Liable for Violations of the SDWA and Regulations Authorized Under the SDWA

In conjunction with his perennial objection regarding subject matter jurisdiction, Appellant EJK frequently repeats his argument that there is no legal principle under which Appellee can hold him liable for his violations of the Illinois UIC Program's requirements and the SDWA. This position is similarly without merit. Appellee will discuss the legal basis for Appellant EJK's liability here, as it supports the validity of more than one of the RJOs' orders under appeal.

1. Federal Case Law Illustrates That Corporate Officers Who Act As Operators Can Be Found Directly, Individually Liable For Violations of the SDWA and Its Regulations

Federal courts have consistently rejected the proposition that corporate officers may evade liability for statutorily proscribed activity in which they have personally participated; instead, holding that such individuals can be found liable for violations of environmental laws

regardless of whether they were allegedly acting on behalf of the corporation.[10] *See United States v. Bestfoods*, 524 U.S. 51, 71-73 (1998); *Browning Ferris Industries of Illinois, Inc. v. Ter Maat*, 195 F.3d 953, 955-56 (7th Cir. 1999), *modified on remand*, No. 92 C 20259 (N.D. Ill. Nov. 8, 2000), 2000 LEXIS 16805 [*4], *cert. denied*, 529 U.S. 1098 (2000); United *States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 937-938 (N.D. Cal. 2000), *aff'd*, 431 F.3d 643 (9th Cir. 2005), *cert. denied*, 547 U.S. 1113 (2006). *Alisal* is directly applicable to this case. In *Alisal*, the district court was presented with the issue of whether two individuals who were officers, directors and majority shareholders of the corporations involved in the violations, could be held directly, personally liable for their violations of the SDWA. 114 F. Supp. 2d at 937. In analyzing the SDWA, the court found that some of the regulations under the statute used the terms *owners or operators*, and, therefore, concluded that the regulations under the SDWA were directed, *inter alia*, at owners or operators. *Id.* The terms, *owners or operators*, are not defined in the SDWA, however, so the court followed the Supreme Court's plain language analysis of *operator* liability, as articulated in *Bestfoods*, 524 U.S. at 71-73. Recognizing that the two corporate officers directed the workings of, managed and/or conducted the day-to-day affairs of the public water systems that were owned by their corporations, the court concluded that the two individuals were "operators," and, therefore, were directly, personally liable for violations of the SDWA. *Alisal* at 114 F. Supp. 2d at 938. Further, the court focused on the SDWA's mandate for direct individual

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[10] Appellant EJK relies heavily on an older administrative decision from Region 8, *In Re J. Magness, Inc.*, Docket No. UIC-VII-94-03, 1996 RJO LEXIS 9 (October 29, 1996), that failed to hold a corporate officer individually liable for violations of the SDWA. *See EJK Rev. Brief* at 11-12, 15 fn 12. The decision in the 1996 *Magness* case, however, has since been overruled by more recent, well-reasoned decisions, discussed above. These decisions from the U.S. Supreme Court, the Seventh Circuit, and the U.S. District Courts of California and Illinois, as well as an ALJ decision, found that corporate officers who participated in the day-to-day operations of corporations that are also charged with violating environmental statutes can be found individually, directly liable for the violations.. Therefore, the RJOs were justified in not relying on the *Magness* decision, in favor of more current case law.

liability and noted, as follows:

> The plain language of the SDWA . . . makes clear that Congress intended to impose liability on the "violator" of the statute–that is, the person or entity directly responsible for violating the applicable statutory provisions and regulations. Nothing in the SDWA or in cases interpreting environmental statutes suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of the corporation which actually owned the water system.

Id. at 939.

In *Browning Ferris Industries*, 195 F.3d at 956, the Seventh Circuit also relied on the Supreme Court's decision in *Bestfoods*, 524 U.S. at 71-73, and reasoned that a corporate president could be found directly, individually liable for cleanup costs incurred under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675, ("*CERCLA*"), if he personally operated the business of the corporation. *Id.* On remand, the district court found the corporate president individually, directly liable for cleanup costs under CERCLA, based on "overwheming" evidence that he had engaged in the types of activities that the Seventh Circuit specified as evidence that one had crossed the line from merely acting on behalf of the corporation to personally acting as an operator.[11] *See Browning Ferris Industries,*

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[11] The court observed that ". . Ter Maat personally negotiated almost every (if not every) contract between MIG [corporation] and the waste haulers that used the site while MIG was leasing it, including setting the pricing. . . . Although others participated in the negotiations, none of the contracts would have been signed without Ter Maat's approval. He also negotiated nearly all waste hauling contracts for AAA [corporation], and negotiated the site leases with the owners of the property. Ter Maat personally participated in negotiations with the city of Belvidere, Boone County, and the State of Illinois regarding permit requirements, expansion initiatives, efforts to address site environmental issues in the late 1980s, and efforts to keep the site open after June 1988. He was also a key figure in the set up of site operations. For example, he developed, arranged for the proper permits, and constructed AAA's transfer station, where semi-truck loads of waste were hauled to the site when the site was accepting waste. Ter Maat was also directly involved in pollution control measures. For example, he personally involved himself with accepting and rejecting loads from the waste haulers . . . He was the point man for dealing with IEPA [, the state regulatory agency,] insisting that he be present during any IEPA inspection. He was also personally involved in dealing with methane gas management, site expansion, access road management, and implementing a bioremediation program to address a problem involving volatile organic compounds ("VOC"). . . . He personally sent several letters to the IEPA. He also sent a letter to the Illinois Division of Land Noise Pollution Control pertaining to an operating permit for the site which was also signed by him. In fact, every piece of correspondence on MIG letterhead which was

No. 92 C 20259 (D.C. Ill. Nov. 8, 2008), 2000 LEXIS 16805, [*4].

The issue of whether a corporate officer can be found directly liable for his violations of the SDWA has also been decided in the administrative forum. In *In the Matter of Sunbeam Water Company*, Docket No. 10-97-0066; 1999 EPA ALJ LEXIS 93, the ALJ found that two corporate officers were directly liable for their violations of the SDWA. The noted that Congress has expressly included officers, agents, and employees of corporations within the definition of "persons" for liability purposes of the SDWA. *See Sunbeam* at [*19]. He found that respondents, Rodney and Michael Parrish, were corporate officers who acted as agents of Sunbeam during the pertinent period and had personally participated in and had actual knowledge of Sunbeam's failure to comply with the September 1996 Order; Rodney Parrish received much of the correspondence from the federal and state regulators concerning the water system, and was fully aware of its continuing problems; and Michael Parrish conducted the day-to-day operations at the facility and was aware of Sunbeam's failure to comply. *Id.* at [*20-21]. Accordingly, the ALJ found that both corporate officers were each directly, individually liable for violations of the SDWA as corporate agents and officers who participated in the violations.[12] *Id.* at [*22-23].

2. The Illinois UIC Program, Approved Under the SDWA, Must Include *Operators* as *Persons* Who Can be Found Liable for Violations of the Approved State Regulations and the SDWA.

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listed as a trial exhibit was signed by Ter Maat. In short, Ter Maat was an operator of the landfill on a daily basis. *Id.* at [*4-7].

[12] Appellant EJK presents a confusing footnote in the EJK Rev. Brief that inaccurately suggests that Appellee and/or the RJO interpreted the ALJ's finding of individual liability for violations of the SDWA in *Sunbeam*, as one based on a derivative liability theory. *See* EJK Rev. Brief at 12, fn 8. This is an incorrect interpretation of Appellee's position, as well as the ALJ's analysis of the *Sunbeam* decision.

The federal UIC regulations that were promulgated under the SDWA expressly apply to a broad range of persons, including, but not limited to *operators*. The Illinois UIC Class II well regulations, that were based on the federal UIC regulations and approved under the SDWA, are at least as stringent as the federal UIC regulations. Therefore, the Illinois UIC regulations, necessarily, include *operators* as a category of persons who can be found liable for violations of the state's regulations and the SDWA.

The federal UIC Program, 40 C.F.R. Part 144 *et seq.*, was promulgated under Part C of the SDWA, and contains requirements that set forth the minimal requirements for state regulatory programs that are authorized under the SDWA. In particular, the federal regulation regarding the prohibition of movement of fluids into underground sources of drinking water, applies, *inter alia*, to owners or *operators* of Class II wells. This provision that must be part of any approved state program, provides as follows:

> No owner or *operator* shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 or may otherwise adversely affect the health of persons.

40 C.F.R. § 144.12(a). *(Emphasis added).* Similarly, 40 C.F.R. § 144.51, which also must also be part of any approved state program, specifies the duty to establish and maintain mechanical integrity, as follows:

> (1) The owner or *operator* of a Class I, II, or III well permitted under this part shall establish prior to commencing injection or on a schedule determined by the Director, and, thereafter maintain mechanical integrity as defined in § 146.8 of this chapter. . . .

40 C.F.R. § 144.51(q). *(Emphasis added).*

40 C.F.R. Part 145 *et seq.*, specifies, *inter alia*, the elements that must be part of a state's

submission to U.S. EPA for approval of the state's program under the SDWA, and the substantive provisions that must be present in a state's proposed program for it to be approved by U.S. EPA. 40 C.F.R.§ 145.1(f) and (g)(1) provide that any state program approved under the SDWA must be conducted in accordance with the (minimal) requirements as set forth in that part and contained in the federal regulatory program, but that such state program can be more stringent or extensive than the minimal requirements of the federal program. 40 C.F.R. § 145.1(c) indicates that an authorized state program must contain certain substantive provisions, including, but not limited to requirements for permitting and enforcement. In particular, 40 C.F.R. § 145.11(a) provides that a state seeking enforcement authority under the SDWA for its UIC program must produce regulations that are in conformance with, *inter alia*, the federal regulations found 40 C.F.R. §§ 144.5(b)-8, 144.11-144.14, 144.21-144.26, 144.31-144.36, 144.38-144.40, and 144.51, "except that States are not precluded from omitting or modifying any provisions to impose *more stringent requirements*." (*Emphasis added*).

With regard to the requirement that an approved state program contain substantive enforcement provisions, 40 C.F.R. § 145.13(a) states as follows:

> (a) Any State agency administering a program shall have available the following remedies for violations of State program requirements: (1) To restrain immediately and effectively *any person* by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or environment; Note: This paragraph requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment.

The Illinois UIC Program was approved by U.S. EPA, and the state was granted primary enforcement authority for this program, on February 1, 1984. 40 C.F.R. § 147.701. As the Illinois UIC Program was approved by U.S. EPA under the SDWA, the state program is no less

stringent than the federal program that provides for, as discussed above, the liability of *operators*. Therefore, Illinois' UIC Program, necessarily, includes *operators* as a class of persons who can be held liable for violations of the Illinois UIC regulations, and the SDWA.

Moreover, the provisions of the SDWA also illustrate that *operators* cannot be excluded from the class of persons who could be found liable under an approved state program. Section 1423(d) of the SDWA, 42 U.S.C. § 300h-2(d), provides that no approved state UIC program ". . . shall relieve any person of any requirement otherwise applicable under . . . [the Act]." Section 1421(b)(1)(D) of the SDWA mandates that an approved state program for the prevention of underground injection that endangers drinking water sources must, at a minimum, apply "to underground injections by any other *person* whether or not occurring on property owned or leased by the United States." Thus, the SDWA provides further evidence that the Illinois UIC Program does not exclude *operators* as a class of persons who can be found liable under the SDWA for violations of the state's approved regulatory program.

Therefore, the federal UIC regulations, as well as the provisions of the SDWA, illustrate that the Illinois UIC Program, approved under the SDWA, is at least as stringent as the federal UIC program, and, thus, includes *operators* as a category of persons who can be found liable for violations of the approved Illinois UIC regulations and the SDWA.

C. RJO Kossek Correctly Granted Appellee's Motion to Amend the Complaint In Her 2/6/03 Order.

1. RJO Kossek Had Subject Matter Jurisdiction Over Appellee's Claim Against Appellant EJK.

Appellant EJK argues that RJO Kossek did not have subject matter jurisdiction over Appellee's claim against him, and, therefore, erred in granting Appellee's Motion to Amend the

Complaint in her 2/6/03 Order. EJK Rev. Brief at 6. Subject matter jursidication was not lacking in this case, however, and RJO Kossek properly granted Appellee's Motion to Amend the Complaint in her 2/6/03 Order for the reasons set forth earlier in this Response.[13] *See* Appellee's Response at 9-20. Thus, Appellant EJK's contention is without merit.

2. Amendment of Complaint Was Appropriate, as Appellee's Claim Against Appellant EJK Was Not Futile.

a. Permissive Amendment Policy Under Fed. R. Civ. P. 15(a), As Modified by Factors in the Supreme Court's *Foman* Case.

Appellee raised a colorable claim against Appellant Klockienkemper in its Motion to Amend the Complaint, Proposed Amended Complaint, (and Supporting Memorandum, and Reply to E. J. Appellant's Memorandum in Opposition to the Motion to Amend the Complaint). Accordingly, RJO Kossek found that the claim was not futile, and granted Appellee's Motion to Amend the Complaint in her 2/6/03 Order.

Section 22.14(c) of the Consolidated Rules, 40 C.F.R. § 22.14(c), provides that a complaint may be amended once, as a matter of right, at any time before the answer is filed, and, thereafter, only upon motion granted by the Presiding Officer. The Consolidated Rules do not, however, specify additional criteria for granting a motion to amend a complaint. Therefore, the EAB has looked to the Federal Rules of Civil Procedure and federal case law for direction in determining the appropriate circumstances under which the Presiding Officer should grant a

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[13] Contrary to Appellant EJK's claim, RJO Kossek properly considered all pertinent issues before issuing her 2/6/03 Order. Appellant EJK did not object to the motion to amend the complaint based on a lack of subject matter jurisdiction, and, instead, (more appropriately) argued his position based upon traditional motion to dismiss standards under Fed. R. Civ. P. 12(b)(6). *See* July 1, 2002 Memorandum of Appellant EJK in Opposition to Complainant's Motion to Amend the Complaint at 1, 9-10. Regardless of the timing of Appellant EJK's subject matter jurisdiction objection, however, his argument is without merit.

motion to amend a complaint after an initial answer has been filed.[14] *See In re Carroll Oil* Company, Docket No. 8-99-05, 2002 EPA App. LEXIS 14, (July 31, 2002), *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819 (EAB 1993); and *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170 (EAB 1992) (**72-74). In pertinent part, the applicable federal rule regarding amendment of pleadings states as follows:

> Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action had not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; *and leave shall be freely given when justice so requires*. . . .

Fed. R. Civ. P. 15(a). (Emphasis added). In examining the scope and applicability of Fed. R. Civ. P. 15, the U.S. Supreme Court noted that, "[i]n the absence of any apparent or declared reason–such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, [or] *futility of amendment* . . . – – the leave sought should, as the rules require, be *freely given*." *Foman v. Davis*, 371 U.S. 178, 182 (1962). (Emphasis added). The EAB has previously recognized the U.S. Supreme Court's and other federal courts' permissive amendment policy, and the importance of the factors articulated in its *Foman* decision, in evaluating whether to allow amendment of pleadings in U.S. EPA enforcement proceedings.[15] *See In re Carroll Oil* Company,10 E.A.D. 635, 649-650 (EAB

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[14] The Federal Rules of Civil Procedure are not binding on administrative agencies but can provide useful and instructive guidance in applying the Consolidated Rules. *See In the Matter of Wego Chemical & Mineral Corporation*, 4 E.A.D. 513 (February 24, 1993) [*26].

[15] Subsequently, administrative law judges who have evaluated whether to allow amendment of a complaint in environmental enforcement matters have consistently relied upon the EAB's policy of permissive amendment, as qualified by the factors specified in *Foman*. *See In the Matter of: City of St. Charles, Illinois, a Municipal*

2002); *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827-829 (EAB 1993); and *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205-206 (EAB 1992). The Board has noted that the most significant *Foman* factor for many courts is whether the amendment would cause *undue prejudice to the opposing party. See Carroll Oil*, 10 E.A.D. at 650. The only critical *Foman* factor that Appellant EJK has raised with regard to this appeal, however, is that of *futility of the amendment*. Therefore, the applicable law regarding *futility* will be discussed herein.

b. Futility of Amendment Examined Under Motion to Dismiss Standards

A proposed amendment to a complaint is not futile if it presents a colorable claim – – one that can withstand a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6). *See Crestview Village Apts. v. U.S. Dept of Housing & Urban Dev.*, 383 F.3d 52, 558 (7th Cir. 2004); *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Com'n*, 377 F.3d 682, 687 (7th Cir. 2004); *Duthie and Condron v. Matria Healthcare,* Inc., 2008 U.S. Dist. LEXIS 84203 (N.D. Ill E.D. 2008); *In the Matter of: Service Oil, Inc.,* Docket No. CWA-08-2005-0010; 2006 EPA ALJ LEXIS 15 [*12, 20-22] (April 10, 2006).

Pursuant to Section 22.20(a) of the Consolidated Rules, 40 C.F.R. § 22.20(a), the Presiding Officer, upon motion of the respondent, may dismiss a proceeding on the basis of failure to establish a *prima facie* case or other grounds which show no right to relief on the part of the complainant. The EAB has analyzed motions to dismiss under 40 C.F.R. § 22.20(a), and

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Corporation operating as St. Charles Wastewater Treatment Facility, Respondent, Docket No. CWA-04-2008-5192, 2008 EPA ALJ LEXIS 15, (April 8, 2008); *In the Matter of: Service Oil, Inc., Respondent*, Docket No. CWA-08-2005-0010, 2006 LEXIS ALJ 15 (April 10, 2006); *In the Matter of: Minnesota Metal Finishing, Inc., Respondent*, Docket No. RCRA-05-2005-0013, 2006 EPA ALJ LEXIS 8 (March 17, 2006); and *In the Matter of Wayne Vaughn, Sr., Wayne Vaughn, Jr., and Carriage Homes, Respondents*, Docket No. CWA-9-2001-0002, 2002 EPA ALJ LEXIS 43 (July 25, 2002).

has indicated that the standards for motions to dismiss under the Federal Rules of Civil Procedure, while not applicable to U.S. EPA administrative enforcement actions before the Board, are instructive in analyzing such motions under the Consolidated Rules. *See In re: Commercial Cartage Company, Inc.*, 5 E.A.D. 112 (EAB 1994); *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993).

Under Fed. R. Civ. P. 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief." *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *General Electric Capital Corporation v. Lease Resolution Corporation*, 128 F.3d 1074, 1080 (7th Cir. 1997); *Marks v. CDW Computer Centers, Inc.*, 122 F.3d 363, 367 (7th Cir. 1997). In evaluating whether to dismiss a complaint, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer*, 416 U.S. at 236. Put another way, "the purpose of a [motion to dismiss under Fed. R. Civ. P.] 12(b)(6) . . . is to test the legal sufficiency of the complaint, not to decide the merits." *United States of America v. LaSalle Bank*, 2008 U.S. LEXIS 60756 (July 29, 2008). Further, in assessing a motion to dismiss, the allegations in a plaintiff's complaint must be taken as true, and all inferences must be construed in favor of the plaintiff. *Scheuer*, 416 U.S. at 236; *McMillian v. Collection Professionals,* Inc., 455 F.3d 754, 758 (7th Cir. 2006); *Marks*, 122 F.3d at 367; *Corbell v. Southern Illinois Healthcare,* 2008 U.S. Dist. LEXIS 101386 (December 16, 2008). *See also Commercial Cartage*, 5 EAD at 117 (in evaluating a motion to dismiss, all facts alleged in the complaint are taken as true and all reasonable inferences are drawn in favor of the complainant). A complaint "need only contain a short and plain statement

of the claim showing that the pleader is entitled to relief," to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Glazer v. Abercrombie & Kent, Inc.*, 2007 U.S. Dist. LEXIS 78337 (October 23, 2007), *citing Equal Employment Opportunity Comm'n v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007). Such a *short and plain* statement of the claim need not be extensive, but must give the defendant *fair notice* of the claim and the grounds upon which it rests, and plausibly suggest to the reader that the plaintiff has a right to relief, the possibility of which is above a *speculative level. Id. See also Beauty of Flowers v. City of Des Plaines, Illinois*, 2007 U.S. Dist. LEXIS 37544 (May 22, 2007).

c. Appellee Raised a Colorable Claim Against Appellant EJK, Alleging Direct, Individual Liablity As An Operator For His Violations of the SDWA And the Illinois MIT Regulations

Although Appellant EJK does not frame his overall protest against the RJO's order, granting Appellee's Motion to Amend the Complaint, as one based on the concept of *futility*, Appellee presumes he is making that exact argument. *See* EJK Rev. Brief at pp 6-18. Appellee surmises that Appellant EJK's position is based on his perennial argument that only a formal "permittee" under the Illinois UIC Program can be found liable for violations of the state regulations and the SDWA; and inferring that amendment of the complaint was allegedly futile. *See EJK Rev. Brief at pp* 7-15. Such suggestion is incorrect.

As discussed previously in this response, federal courts have consistently rejected the proposition that corporate officers may evade liability for statutorily proscribed activity in which they have personally participated, instead, holding that such individuals can be found liable for violations of environmental laws regardless of whether they were allegedly acting on behalf of the corporation. *See* Appellee's Response at 14-17. RJO Kossek relied upon the ALJ's decision

in *Sunbeam*, 1999 EPA ALJ LEXIS 93 (1999) [*22-23], where two corporate officers were found directly liable for violations of the SDWA as persons who had participated in the violations. *See* 2/6/03 Order at 10. The RJO then found that the proposed amended complaint was not futile or frivolous, and that it sufficiently set forth a colorable claim against Appellant EJK.[16] *Id.* at 10-11. Although the *Sunbeam* decision predated the Seventh Circuit's and district court's decisions in *Browning Ferris Industries* and the district court's decision in *Alisal*, it is consistent with those later federal court decisions that found corporate officers individually, directly liable, under environmental statutes, as *operators*. Therefore, as discussed above in this response, under the reasoning and analysis of direct operator liability expressed by the ALJ in *Sunbeam*, the Seventh Circuit in *Browning Ferris*, and the district court in *Alisal*, Appellee properly set forth a valid claim in its proposed amended complaint that was not futile. *See* Appellee's Response at 14-17. Thus, RJO Kossek did not err in granting Appellee's Motion to Amend the Complaint, in her 2/6/03 Order.

D. RJO Kossek Correctly Denied Appellant EJK's Motion to Dismiss the Amended Complaint in Her 5/3/05 Order Because Appellee/Complainant Presented a Colorable Claim Against Appellant.

RJO Kossek found that Appellee had set forth a "bare bones" *prima facie* case against

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[16] Although RJO Kossek indicated in her order that Appellee was "attempting to pierce the corporate veil," such statement was not pivotal because the *Sunbeam* decided the corporate officers' liability under the SDWA, based on a theory of **direct, not derivative** liability and Appellee properly alleged facts in the proposed amended complaint that established a *prima facie* claim for Appellant EJK's direct liability. Appellee alleged facts that illustrated that Appellant EJK was an *operator* who conducted and/or controlled the majority of the corporation's day-to-day well maintenance and production-related activities with regard to the wells involved in this matter, at all times relevant to this complaint. *See Philadelphia's Church of Our Savior v. Concord Township*, No. 03-1766; 2004 U.S. Dist. LEXIS 1941 [*8] (D.C. Pa.) (February 4, 2004) (legal sufficiency of a proposed pleading to withstand a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6), is "not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support [his] claims"). Appellee alleged facts to establish a claim for Appellant EJK's direct operator liability under the SDWA that were more than adequate to show that it was entitled to offer evidence in support of such claim. Thus, it was not error to grant the Motion to Amend the Complaint.

Appellant EJK in the Amended Complaint that put him on notice that Appellee would seek to hold him directly individually liable, as an *operator*, for his failure to conduct mechanical integrity testing on, and submit annual monitoring reports for the wells involved in this case, in violation of the SDWA, and the Illinois UIC Program. *See* 5/3/05 Order at 9. In addition, she found that Appellee had set forth sufficient allegations to invoke statutory jurisdiction. *Id.* Accordingly, the RJO found that Appellee's claim against Appellant EJK was not subject to dismissal, under Fed. R. Civ. P. 12(b)(1) and (6), and properly denied Appellant EJK's Motion to Dismiss the Amended Complaint in her 5/3/05 Order. *Id.* at 9-10. For a more detailed discussion of the legal basis underlying subject matter jurisdiction regarding Appellee's claim against Appellant EJK, and the legal standards for denying a motion to dismiss for failure to state a claim upon which relief can be granted, please see Appellee's Response at 23-24, respectively.

E. RJO Toney Correctly Granted Appellee's Motion for Partial Accelerated Decision, Finding Appellant EJK Liable for SDWA and Illinois UIC Program Violations, in Her12/27/06 Partial Accelerated Decision.

1. Appellant EJK's Challenges to the Basic Facts Cannot Defeat RJO Toney's Finding of Appellant Klockenkenkemper's Direct Individual Liability.

Under the Consolidated Rules of Practice at 40 C.F.R. Part 22, an accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). The Board has indicated that the standard for granting a motion for an accelerated decision is similar to the standard for granting summary judgment, as set forth in Fed. R. Civ. P. 56. *See In re Clarksburg Casket Company,* 8 E.A.D. 496 (EAB 1999); *In re Green Thumb Nursery, Inc.* 6 E.A.D. 782, 793 (EAB 1997). The primary purpose of summary judgment is to avoid a useless trial and to promptly dispose of actions where a trial is unnecessary and would result in delay and expense. *See* J. Moore, W. Taggart & J. Wicker,

Moore's Federal Practice, paragraph 56.15 [1.0] (2d. ed. 1987).

The U.S. Supreme Court has issued several decisions regarding summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986) (objection on a motion for summary judgment under Fed. R. Civ. P. 56 would be based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, submitted in support or opposition to the motion); *Matsushita Electric Industrial Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (to defeat a motion for summary judgment, an opposing party must present factual claims that are not only material and controverted but plausible and reasonable as well); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (mere existence of some alleged factual dispute between the parties will not defeat the otherwise properly supported motion for summary judgment; only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; and factual disputes that are irrelevant or unnecessary will not be counted). The nonmoving party, under a Fed. R. Civ. P. 56 motion, may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial. *See Anderson*, 477 U.S. 242, 248. The nonmoving party must, necessarily, present "affirmative evidence"; he cannot defeat the motion without offering "any significant probative evidence tending to support" the pleadings. *Id.* at 256, *citing* First *National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 290 (1968). Fed. R. Civ. P. 56(e) requires the nonmoving party to go beyond the pleadings, and consistent with Fed. R. Civ. P. 56(c), present "specific facts showing that there is a genuine issue for trial." *Celotex* at 324. Lower federal courts have noted that, while courts must resolve all evidentiary ambiguities and "draw all factual inferences in favor of the nonmoving party," *Wathen v.*

General Electric Co., 115 F.3d 400, 403 (6th Cir. 1997), the "nonmoving party is not entitled to a trial merely on the basis of allegations." *Kraft v. United States,* 991 F.2d 292, 296 (6th Cir. 1993). Indeed, no genuine issue of material fact exists "when the 'record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.'" *Goins v. Ajax Metal Processing, Inc.*, 984 F. Supp. 1057, 1060 (E.D. Mich. 1997) (quoting *Matsushita Elec . Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The EAB has adopted the position of federal courts with regard to motions for summary judgment/accelerated decision. Specifically, the EAB has stated as follows:

> A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. . . .
>
> A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. . . . If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the nonmoving party, is such that no reasonable decision-maker could find for the non-moving party, summary judgment is appropriate.

In re Mayaguez Reg'l Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993) (citations omitted), *aff'd sub nom. Puerto Rico Aqueduct & Sewer Auth. v. EPA,* 35 F.3d 600 (1st Cir. 1994), *cert denied*, 513 U.S. 1148 (1995). In accordance with these precepts, the EAB has held that a party opposing summary judgment must "raise an issue of material fact" and demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence." *Green Thumb,* 6 E.A.D. at 793; *In re Dos Republicas Resources Co.*, 6 E.A.D. 643, 669-70 (EAB 1996); *Mayaguez*, 4 E.A.D. at 782.

Here, RJO Toney found that Appellee had established Appellant EJK's direct, individual liability for the violations at issue in this case, based on the facts and evidence in the prehearing exchanges that were before her at that point. In particular, she focused on Appellants' Answers

to the Amended Complaint that showed that Appellant EJK was the President, Treasurer and Secretary and Agent for Appellant RWS. Amended Administrative Complaint at ¶¶ 16, 17, 22; Appellant RWS's Amended Answer at ¶¶ 16, 17, 22; Appellant EJK's Answer at ¶¶ 17, 22. In addition, she relied upon the declarations from lessees and farmers in the areas of the leases involved in this case that demonstrated that Appellant EJK directly participated in the operational activities of Appellant RWS's oil production business by personally performing work at the wells, hiring others to perform maintenance and operational work at the wells, seeking access to the wells from the property owners of the leases, supervising and directing the work being performed by others at the wells, and acting as the person in charge of corporate Appellant RWS who made all decisions for the daily operations of the corporation. *See* 12/27/06 Partial Accelerated Decision ("*PAD*") at 15. *See also* Complainant's Hearing Exhibit ("*CE*") 60.14(a) through (g).

Appellant EJK suggests that the RJO improperly made credibility determinations with regard to these declarations, but fails to support his suggestions with any evidence whatsoever. EJK Rev. Brief at 32-33. The RJO made no credibility determinations regarding the declarations in her order. *See* 12/27/06 PAD at 14-15. Appellant EJK also argues that the RJO erred in relying on the declarations because he could not cross-examine the declarants. EJK Rev. Brief at 33. The Supreme Court has recognized, however, that a motion for summary judgment contemplates the use of affidavits, along with pleadings and other forms of evidence, and therefore, the RJO was justified in relying on the declarations. *See Celotex*, 477 U.S. at 323-324. Moreover, the federal court decisions discussed above indicate that Appellant EJK must "go beyond the pleadings" and provide his own evidence that sets forth specific facts to demonstrate a genuine issue for trial. *See Anderson*, 477 U.S. 242, 248. Appellant EJK failed to

present his own evidence to establish that there are material issues for hearing. Instead, Appellant EJK attempts to cast suspicion upon the declarations by complaining of a number of alleged "problems" with them, based on his subjective interpretation of the declarations and motives of the declarants. *See* EJK Rev. Brief at 35-50. Unfortunately for Appellant, his *mere allegations* about the declarations and declarants cannot serve to create a issue of material fact, and were ineffective in this regard.[17] Appellant EJK also attempts to discredit the declarations by contrasting individual statements in the declarations with a narrative description of the declarants' interviews, conducted by U.S. EPA Civil Investigator, Reginald Arkell, in 2003. *See* EJK Rev. Brief at 39-40, 42. This exercise does not, however, demonstrate any statements in the witnesses' declarations that are directly contradicted by Mr. Arkell's narrative. The fact that the words in the witnesses' declarations and Mr. Arkell's narrative do not precisely mirror each other does not invalidate either the declarations or the narrative.

The RJO also relied upon a plethora of evidence from **Appellants'** prehearing exchanges that showed that Appellant EJK was the person who made all critical well and business decisions and controlled the operations of the corporate Appellant RWS. *See* 12/27/06 PAD at 14. When Appellant RWS "wrote" letters to either the state or U.S. EPA with regard to alleged violations of the Illinois UIC Class II Well Program, and/or the SDWA that had been attributed to it, Appellant EJK was the only individual who wrote and signed such letters on behalf of the corporation.[18] In those letters regarding violations of the Illinois UIC Class II Well Program

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[17] It is paradoxical that Appellant challenges the declarations and yet claims in his revised brief that **"b. Declarations do not Contain Relevant Material Facts . . ."** EJK Rev. Brief at 33.

[18] Complainant is excluding any correspondence that was authored by legal counsel, and is referring only to non-legal correspondence authored by Appellant Rocky Well.

and/or the SDWA, Appellant EJK provided the governmental regulators with detailed responses regarding the alleged circumstances surrounding why the corporation was allegedly unable to come into compliance with the regulations. Respondents' Prehearing Exchange Exhibits ("*Rs' PHEXs*") 32, 40, 43, 45, 54, 57, 60) . In particular, in his October 13, 2000 letter to Ms. Jo Lynn Traub, Director of the Water Division for U.S. EPA, Appellant EJK demonstrated his understanding of the violations alleged against the corporation; his knowledge of an alleged conversation he, on behalf of the corporation, had with the state, with regard to Appellant RWS's violations, detailed knowledge of the physical status of the wells involved in the violations; and alleged reasons why the corporation could not comply with the Illinois UIC Class II well regulations. (Rs' PHEX Exhibit 32). Therefore, Appellant EJK's own correspondence, purportedly written on behalf of Appellant Rocky Well, when read in conjunction with the third-party correspondence addressed to him, shows that he is the only individual who responds and makes decisions for the corporation, Appellant RWS, especially with regard to violations of the Illinois UIC Program. This evidence demonstrated that Appellant EJK was an *operator* of Appellant RWS, as that term is contemplated by the SDWA and the Illinois UIC Program, promulgated under the SDWA. Appellant EJK was unable to produce a single fact to support a contrary finding. Appellant EJK failed to satisfy the burden of production requisite to responding to a motion for accelerated decision. Therefore, RJO Toney was entitled to rely upon Appellee's evidence in finding Appellant EJK directly, individually liable for the violations in this case, and issuing her 12/27/06 PAD.[19]

19/ In addition, Appellant EJK's role as the individual who controlled the operational activities of the oil leases that were formally owned by Appellant RWS can be found in the pleadings that he filed in a number of state cases that he initiated as an individual plaintiff. (C's PHEXs 78, 79, 79.a, 79.b, 79.c, 79.d, 79.e, 80, 80.a, 80.b, 80.c, 81, 81.a, 81.b, 81.c). In one of the cases, Appellant EJK filed an Amended and Supplemental Complaint on **May 17, 1995;** Second Amended and Supplemental Complaint on **October 4, 1995**; Plaintiff's Amendment By Interlineation

2. Affirmative Defenses Cannot Defeat RJO Toney's Finding of Appellant EJK's Direct Individual Liability.

Appellant EJK argues that RJO Toney erred in rejecting his affirmative defenses of lack of jurisdiction, untimely filing of claims/statute of limitations, equitable estoppel/estoppel en pais, laches, selective enforcement, and impossibility of compliance, and, thereafter, issuing her Partial Accelerated Decision, finding him individually, directly liable for his violations of the Illinois UIC regulations and the SDWA. EJK Rev. Brief at 15-30, 50, 52-53. This argument is without merit.

RJO Toney was justified in rejecting Appellant EJK's affirmative defenses and finding him liable because Appellant EJK failed to meet his burden of presentation and persuasion regarding his affirmative defenses. He presented no legal arguments or genuine issues of material fact that could defeat his being found directly, individually liable, as an operator, for violations of the SDWA, and the Illinois UIC Program, promulgated under the SDWA.

a. Proper Federal Notice of Violation Issued To Appellant EJK; Second Affirmative Defense Based on Alleged Lack of Subject Matter Jurisdiction, Properly Rejected By the RJO

Appellant EJK contends that Appellee's notice to him was defective for lack of subject matter jurisdiction, and, therefore, RJO Toney's 12/ 27/06 Order was invalid. This is the same defense he earlier raised in his Answer as Affirmative Defense #2. *See* EJK Rev. Brief at 15-18.

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to Second Amended and Supplemental Complaint on **March 18, 1996**; and Plaintiff's Third Amended and Supplemental Complaint on **February 11, 1997;** and continued to admit in his pleadings that he was "an individual engaged in the business of oil and gas production and operation of oil and gas wells." (C's PHEXs 79.a, 79.b, 79.c, 79.d, 79.e. *See also* C's PHEXs 80.a, 80.b). On **October 1, 1998**, Appellant EJK, individually, filed a complaint in the case styled, *Edward J. Appellant v. Illinois Department of Natural Resources, Office of Mines and Minerals*, No. 98-MR-72, in the Circuit Court of the Fourth Judicial Circuit, Clinton County, Illinois, seeking reversal of the State's September 2, 1998 administrative decision regarding the Twenhafel #2 and Wohlwend #6 wells. (R's PHEX 25). Appellant EJK, the plaintiff in that case, admitted in his circuit court complaint that ". . . Plaintiff intends to operate both the Wohlwend and Twenhafel leases which are the whole purpose of the above-referenced lawsuits." (*Id.*). These pleadings and state court documents again illustrate that Appellant EJK was an *operator* who directed and participated in the oil production activities and related business activities of Appellant RWS.

His argument is incorrect. Appellee met all mandatory notice requirements under Section 1423(a) of the SDWA, 42 U.S.C. § 300h-2(a)(1) for a federal administrative case. The SDWA contains specific notice requirements that, in pertinent part, state as follows:

> Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources (within the meaning of section 300h-1(b)(3) of this title or section 300h-4(c) of this title) that any person who is subject to a requirement of an applicable underground injection control program in such State is violating such requirement, he shall so notify the State and the person violating such requirement. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order under subsection (c) of this section requiring the person to comply with such requirement.

42 U.S.C. § 300h-2(a)(1). On January 25, 2002, Appellee issued a federal Notice of Violation ("*NOV*"), to Appellant EJK with a copy to the state, in accordance with the SDWA's notice provision set forth above. Thus, it satisfied the SDWA's statutory notice requirements.

Appellant EJK contends, however, that the NOV is defective, and, in support, resurrects his argument that only a *permittee* under the Illinois UIC Program can be found liable for violations of the state program and the SDWA. *See* EJK Rev. Brief at pp 15-18. As discussed earlier in this response, Appellant's subject matter jurisdiction argument is without merit. *See* Appellee's Response at 9-21. Appellant also misstates the notice requirement for federal administrative cases by citing the Illinois UIC Program's notice requirements for state cases, and indicating that Appellee was required to issue a NOV under these requirements. *See* EJK Rev. Brief at 16-17. The state's notice requirements at Ill. Admin. Code Title 62, § 240.150, however, only apply to the state, prior to its commencement of a state enforcement action against a violator of its regulations. As the Illinois UIC Program's notice requirements do not apply to Appellee in

this federal case, Appellee did not err in not issuing a "state NOV."[20] Therefore, in issuing her decision, finding Appellant EJK directly, individually liable for his violations of the Illinois UIC Program and the SDWA, RJO Toney properly rejected Appellant EJK's contention that Appellee's underlying NOV to him, under the SDWA, was defective.

b. Claims Against Appellant EJK For Violations of the Illinois Mechanical Integrity Testing Requirements and the SDWA Not Barred By Statute of Limitations; Eleventh Affirmative Defense Properly Rejected by RJO

Appellant EJK contends that Appellee's claims based on his violations of the Illinois mechanical integrity testing ("MIT") requirements were barred by the general federal five year statute of limitations, and, therefore, RJO Toney erred in finding him liable for these violations in her decision. This the same defense that he raised in his Answer as Affirmative Defense #11. EJK Rev. Brief at 18-30. Appellant bases his statute of limitations challenge on the theory that the Illinois MIT requirements are discrete, discontinuous obligations that expired on a date certain. *Id.* Therefore, Appellee's case against him for violations of these obligations are allegedly barred by the applicable statute of limitations. Appellant EJK's argument is wrong because his failure to comply with the Illinois MIT requirements and the SDWA were continuing violations. Applying the special accrual rule for continuing violations, the statute of limitations did not begin to run until such time when he ceased violating the requirement (for each well), as appropriately recognized by RJO Toney. *See* 12/27/06 PAD at 3-9. Accordingly, Appellee timely filed its Complaint and Amended Complaint in this matter. *Id.*

i. Continuing Violations Extend the Statute of Limitations Time Period

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[20] Appellant also misstates the Illinois UIC Program's notice requirements by implying that the state can only issue a NOV to a *permitee* or a person who operates without a permit. This is incorrect, as the Illinois notice provision focuses on the conduct of the violator, and not his status (or lack of it) as a *permittee*. Thus, the Illinois UIC Program's notice requirements contemplate a broader group of violators, well in excess of the two specified by Appellant.

28 U.S.C. § 2462 presents the applicable five-year statute of limitations in this SDWA case. In pertinent part, the statute states as follows: "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first *accrued* . . . ." (Emphasis added). The meaning of the term *accrual* is the key to interpreting this provision, and the EAB has extensively examined it in the context of evaluating continuing violations and their effect on statute of limitations issues. *See In re: Lazarus, Inc.*, 7 E.A.D. 318, 364 (EAB 1997); *In re: Harmon Electronics, Inc.*, 7 E.A.D. 1, 45 (EAB 1997). The Board found that the doctrine of continuing violations provides a special rule for determining when a violation first accrues, and, if applicable, essentially extends the limitations period. *See Lazarus*, 7 E.A.D. at 364, *citing Toussie v. United States*, 397 U.S. 112, 115 (1970). Further, the Board observed that the special accrual rule provides that the limitation period for continuing violations does not begin to run until an illegal course of conduct is completed; thus, "if the doctrine of continuing violations applies to . . . counts at issue . . . , an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased." *Lazarus*, 7 E.A.D. at 364-365. *See also In re: Harmon Electronics, Inc.*, 7 E.A.D. 1, 21.

To determine whether a violation is *continuing* in nature, the Board will examine the language of the statute that serves as the basis for the specific violation, as well as the specific regulation at issue, to see if either contemplates continuing courses of conduct rather than discrete acts. *See Lazarus, 7 E.A.D.* at 366-367, 379; *Harmon, 7 E.A.D.* at 32-43. In *Harmon*, the EAB reviewed Section 3004 of RCRA, 42 U.S.C. § 6924, and the legislative history of the statute and determined that "the nature of the [groundwater monitoring] requirements . . . [were]

such that Congress must assuredly have contemplated continuing obligations. . . . [to address] groundwater contamination from hazardous wastes . . . that were 'perhaps the most pernicious effect' of unregulated waste disposal. . . . [; b]ecause the threat from a land disposal facility is ongoing, the need to monitor the groundwater for contamination also is ongoing. . . . [and, therefore,] it is reasonable to assume that Congress contemplated an ongoing obligation to monitor the groundwater." [21] *See Harmon*, 7 E.A.D. at 33-34. In *Lazarus*, the EAB found that violations are continuing in nature if the statute that underlies the violations presents a permanent prohibition on certain activities that is subject to exceptions (i.e. use authorizations), that are authorized by U.S. EPA, and contained in the regulations at issue under the statute. *See Lazarus*, 7 E.A.D. at 369-370 (regulations promulgated by U.S. EPA under TSCA Section 6(e)(2)(B), were use authorizations that provided exceptions to TSCA's permanent PCB ban, and, thus, were continuing obligations). The conditions of the use authorizations (i.e. regulatory exceptions), necessarily, must be continuing obligations in order to carry out a statute's permanent prohibition.[22] *Id.* at 369-370 (permanent PCB ban under 15 U.S.C. § 2605(e)(2)(A), is subject to transformer use authorizations that are contained in the TSCA regulations, which must be continuing in nature to effectively carry out the ban).

ii. The SDWA Contains A Permanent Prohibition on Underground Injection That is Subject to Continuing Regulatory Use Authorizations To Enforce The Ban

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[21] The EAB found that the language of Section 3004 of RCRA also contemplated continuing obligations with regard to the regulations that required one to obtain a permit before operating a hazardous waste landfill, establish financial assurance, and provide timely notification and/or register as a hazardous waste generator. *Id.* at 33-39.

[22] Appellant EJK invokes a tortured reading of the ALJ's and EAB's decisions in *Lazarus* to argue that the determination of whether a requirement is continuing in nature is somehow dependent on the characterization of it as a "post-permit" requirement. EJK Rev. Brief at 24. In addition, consistent with his reading of the two decisions in *Lazarus*, he theorizes that *Lazarus* stands for the finding of a one-time violation, and that RJO Toney misread and/or misapplied the law of the case. *Id. at 24-25.*

The SDWA does not contain explicit language regarding "continuing violations," but the relevant language of the Act, and its legislative history, demonstrate that Congress contemplated the continuous protection of sources of groundwater through a statutory/regulatory scheme that prohibits underground injection except in limited circumstances as prescribed by regulations authorized under the Act. In particular, Sections 1421(b)(1)(A), (B), (C), and (D) of the SDWA, 42 U.S.C. § 300h(b)(1)(A), (B), (C), and (D), articulate the statutory/regulatory scheme, as follows:

> **Minimum requirements; restrictions**
> (1) Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. **Such regulations shall require that a State program, in order to be approved under section 300h-1 of this title –**
>
> > **(A) shall prohibit, effective on the date on which the applicable underground injection control program takes effect, any underground injection in such State which is not authorized by a permit issued by the State;**
> >
> > **(B) shall require . . . in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject must satisfy the State the underground injection will not endanger drinking water sources,** . . . ;
> >
> > (C) shall include inspection, monitoring, record-keeping, and reporting requirements; and
> >
> > **(D) shall apply . . . to underground injections by . . . any . . . person** whether or not occurring on property owned or leased by the United States. . . .

42 U.S.C. §§ 1421(a)(1), (b)(1)(A), (B), (C), and (D). (*Emphasis added*). The SDWA's language above illustrates that Congress intened to protect underground sources of drinking water by permanently prohibiting underground injection, after the effective date of approved regulations, except under certain continuing exceptions (including, but not limited to MIT

requirements), as prescribed by the regulations approved under the SDWA.[23] Indeed, the SDWA's permanent prohibition on underground injection, subject to continuing use authorizations provided by the authorized Illinois MIT requirements, is similar to the permanent PCB ban in Section 6(e)(2)(A) of TSCA, 15 U.S.C. § 2605(e)(2)(A), discussed in *Lazarus*, that was subject to the continuing transformer use authorizations. *See Lazarus*, 7 E.A.D. at 368-369.

Moreover, the legislative history of the SDWA provides additional evidence that Congress was concerned with groundwater contamination from the underground injection of brine, and intended to continuously protect underground sources of drinking water by implementing changes to the SDWA and its regulations.[24]

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[23] The SDWA's language above is similar to the RCRA provision in *Harmon*, that demonstrated the continuing nature of the RCRA permit requirement. The EAB analyzed Section 3004 of RCRA, 42 U.S.C. § 6924, and recognized that it called for the promulgation of regulations requiring certain persons to have a permit to dispose of hazardous wastes, and that when such regulations became effective, disposal of hazardous wastes without the permit was prohibited. *Harmon,* 7 E.A.D. at 25, 32. Thus, after the effective date of the regulations, the obligation to obtain the permit was continuing and non-compliance with the permit requirement was a continuing violation. Appellant EJK complains that the RJO erred in relying on the EAB's decision in *Harmon* because that decision discussed a permitting requirement and, in this case, Appellant is not charged with violation of a SDWA permitting requirement. *See* EJK Rev. Brief at 26. Appellant's argument conveniently ignores the gist of the EAB's decision in *Harmon*, which is its detailed analysis of continuing violations under a statute. Indeed, the EAB analyzed the case and found three additional continuing RCRA violations that were not "permit-related." *Harmon*, 7 E.A.D. at 33-43.

[24] In discussing the proposed amendments to the SDWA of 1974, Congressman Dennis Eckart focused on the dangers of contaminated groundwater from *inter alia*, injection of brine. In pertinent part, he stated as follows:

> [N]early 11 years ago when we originally embarked on the course of regulation and improvement of the Nation's drinking water [by enacting the Safe Drinking Water Act of 1974,] we gave EPA a broad regulatory mandate . . . that frankly they have never exactly lived up to. Bitter experiences have been developed in numerous States. . . all of which underline the fact that the Nation's drinking water is rapidly becoming a cesspool filled with organic contaminants, natural contaminants, the net result of which is that chemical contamination in ground water supplies has now been found in each of our 50 States. . . . Safe drinking water is a fundamental right of every human being. . . . Our colleagues . . . have worked very hard to enact and enable this committee to present the proposal to have States have plans to protect underground sources of drinking water. **Clearly what we must need to focus on is not only on the remedial action that plagues each and every single State in the United States, but the prevention of the spreading of these contaminants into other areas. We must acknowledge clearly [that] the contamination of ground water does not respect municipal, county, or State boundaries. In fact, in this case, an ounce of prevention is very worth a pound of cure. . . . Of . . . interest to the constituents of my State is the contamination of our ground water supplies by brine.** It is estimated that over 525 billion gallons a year of brine are produced. . . .460 billion gallons are accounted for. That means almost 65 billion gallons of brine unaccounted for, some of which are illegally disposed of into waterways, ground water tables, ponds,

The SDWA's penalty provisions at 42 U.S.C. §§ 300h-2(b) and (c)(2) further suggest that the statute contemplated the possibility of requirements that were continuing in nature. Much like the statutory penalty provisions of Section 3008 of RCRA, 42 U.S.C. § 6928, (evaluated by the EAB in *Harmon*), and the statutory penalty provisions of Section 16(a) of TSCA, 15 U.S.C. § 2615(a) (reviewed by the EAB in *Lazarus*), the SDWA's penalty provisions focus on certain maximum penalty amounts for each day of violation, which suggests the possibility of continuing violations. *See Lazarus*, 7 E.A.D. at 368; *Harmon*, 7 E.A.D. at 22.[25]

Therefore, all of the SDWA's provisions discussed above demonstrate that Congress

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> rivers, and streams of the United States. In recent years, we have discovered that . . . a growing number of States have reported brine contamination in ground water. The consequences of which, to a farmer or to a person living off their own well, is the fact that they do not have any water; their investment in their farm, their land becomes useless. **According to an OTA report on protecting the Nation's ground water (October 1984), we have discovered: Sixty thousand brine injection wells in operation in the 1970's nationwide. Four hundred and sixty billion gallons of brine per year are reinjected into wells (1980). OTA estimate[s] that, currently, 525 billion gallons/year of brine are produced, most of which is reinjected. Brine pits and basins in use in 1980 yield[ed] a potential leachate volume for ground water contamination of 43 billion gallons/year. Eight percent of the brine impoundments have high potential to contaminate ground water, 17 percent have potential to contaminate water wells, and 68 percent have potential to contaminate surface wells. [A] Michigan Department of Natural Resources brine study (August 1984) . . . [found that there were] significant levels of known or suspected human carcinogens (benzene, ethylbenzene, toluene, and xylene) . . . found in a wide range of brine samples from 25 locations throughout Michigan. . . .** Groundwater protection plans, an effective regulatory program for the preclusion of brine into our ground water supplies, updated standards, and regulations to put the EPA on an appropriate road to regulation I think make the Safe Drinking Water Act Amendments . . . an imperative and important part of our environmental retinue.

131 *Cong Rec H* 4290, 99th Cong., 1st Sess., June 17, 1985. (Emphasis added).

[25] The penalty provisions of the SDWA, in pertinent part, read as follows:

> (b) . . . Any person who violates any requirement of an applicable underground injection control program or an order requiring compliance under subsection (c) of this section . . . shall be subject to a civil penalty of not more than $25,000 ***for each day of such violation***.
>
> (c) . . . (2). . . [T]he Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $5,000 ***for each day of violation for any past or current violation***, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both.
>
> 42 U.S.C. §§ 300h-2(b) and (c)(2). (Emphasis added).

intended to institute a permanent prohibition on underground injection that was subject to continuing requirements (or use authorizations) that would ensure that the ban was effective. As the SDWA contemplated continuing regulatory requirements, violations of such regulations would also be continuing in nature.

iii. Federal UIC Regulations Demonstrate the Continuing Nature of MIT Requirements Under the SDWA That Ensure the Effectiveness of the SDWA's Permanent Ban on Underground Injection

The federal UIC regulations promulgated under the SDWA, which set the minimal program requirements for any authorized state UIC program, further demonstrate that Congress intended to institute a permanent ban on underground injection to protect underground sources of drinking water, and, therefore, intended the MIT requirements to be continuing obligations to ensure the protectiveness of the prohibition on underground injection. The pertinent federal UIC regulations state as follows:

> **Prohibition of unauthorized injection.**
> **Any underground injection**, except into a well authorized by rule or except as authorized by permit issued under the UIC program, **is prohibited. . . .**

40 C.F.R. § 144.11. (Emphasis added).

> **Prohibition of movement of fluid into underground sources of drinking water.**
>
> (a) **No owner or operator shall construct, operate, maintain, convert, plug, abandon, or conduct any other injection activity in a manner that allows the movement of fluid containing any contaminant into underground sources of drinking water**, if the presence of that contaminant may cause a violation of any primary drinking water regulation under 40 C.F.R. part 142 or may otherwise adversely affect the health of persons. . . .

40 C.F.R. § 144.12. (Emphasis added).

> **Conditions applicable to all permits . . .**
> **(q) Duty to establish and maintain mechanical integrity.**
>
> (1) The owner or operator of a Class I, II or III well permitted under this part shall

establish prior to commencing injection or on a schedule determined by the Director, and thereafter maintain mechanical integrity . . .

(2) When the Director determines that a Classs I, II, or III well **lacks mechanical integrity . . . , he shall give written notice of his determination to the owner or operator. Unless the Director requires immediate cessation, the owner or operator shall cease injection** in the well within 48 hours or receipt of the Director's determination. . . .

40 C.F.R. § 144.51(q). (Emphasis added).

In a tortured reading of 40 C.F.R. § 144.51(q), Appellant EJK implies that 40 C.F.R. § 144.51(q) applies directly, and when read in conjunction with other Illinois UIC Program's requirements, somehow establishes two separate obligations, each of which is not continuing in nature. EJK Rev. Brief at 27-28. Contrary to Appellant's contention, however, 40 C.F.R. § 144.5(q) implements the federal program requirement to *establish and maintain* mechanical integrity – – language that plainly connotes a continuing obligation. *See* 12/27/06 PAD at 7. The federal UIC regulations discussed above evidence Congress' intent to continuously protect underground sources of drinking water by enacting a permanent ban on underground injection that is subject to regulatory use authorizations. As the federal regulations discussed above set the minimum standards for requirements in an authorized state UIC program, the Illinois requirements can be no less stringent and, therefore, must provide for continuing obligations to ensure the integrity of the SDWA's prohibition on underground injection.

iv. <u>The Illinois MIT Requirements Are Continuing In Nature To Ensure The Integrity of the SDWA's Permanent Ban on Underground Injection.</u>

The requirements of the Illinois UIC Program, approved by U.S. EPA under the SDWA, implement the SDWA's permanent prohibition on underground injection, as well as the continuing nature of the use authorizations (or regulatory conditions) that allow for the underground injection of fluids, despite the SDWA's permanent ban on such injection. The Illinois MIT requirements that apply in this matter provide as follows:

Establishment of Internal Mechanical Integrity for Class II UIC Wells

e) An internal mechanical integrity test shall be performed: . . .

6) at least once every 5 years measured from the date of the last successful test *unless a temporary abandonment is approved in accordance with Section 240.1132.*

f) All Class II UIC wells not subjected to an internal mechanical integrity pressure test as of September 1, 1990 were required to be tested by September 1, 1995, unless Future Use statue was approved prior to July 14, 2000. During the first 4 years, each permittee shall conduct an internal mechanical integrity test each year commencing September 1 on at least 20% of the permittee's total Class II UIC wells of Record as of September 1 as reported to each permittee by the Department. During the fifth year each permittee shall conduct an internal mechanical integrity test on all remaining untested Class II UIC wells that were of record September 1, 1994 or were acquired during the year ending September 1, 1995. Class II UIC wells sold or acquired during the first 4 years shall not affect the total number of wells from which the 20% testing requirement is derived for that year. Wells tested during the year in which they are transferred shall count toward the 20% testing requirement of the permittee who conducted the test. *Class II UIC wells temporarily abandoned, converted to production wells or plugged in accordance with the provisions of Subpart K during any year shall count toward the 20% testing requirement.*

Ill. Admin. Code Title 62, § 240.760(e)(6) and (f). (Emphasis added). The regulatory language cited above, consistent with the federal requirements, illustrates that the Illinois MIT requirements contemplate ongoing obligations. Indeed, these continuing obligations cease at a point in time only under very limited circumstances – – when the state has formally approved a *temporary abandonment* of the well in accordance with Section 240.1132 of the Illinois UIC Program, or when the state has approved *future use* status for the well, prior to July 14, 2000. 12/27/06 PAD at 7-8.

In addition, a different subsection of the Illinois MIT provision discussed above, highlights the SDWA's permanent prohibition on underground injection that is subject to the continuing use authorizations in subsections (e)(6) and (f) of that regulation. It reads as follows:

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

remedial work is commenced and completed and an internal mechanical integrity test is successfully completed. . . .

Ill. Admin. Code Title 62, § 240.760(h).[26] The language in the foregoing regulation demonstrates that the state, under the SDWA, forbids the use of an underground injection well for injection if it has not been timely subjected to a successful mechanical integrity test (under subparts (e)(6) or (f) of the requirement). *Id.* Indeed, under that provision, the state guards against underground injection by requiring that the well that was not timely subject to a successful MIT be shut-in until the well is plugged, or until remedial work is completed on the well *and an internal mechanical integrity test is successfully completed on the well. Id.* Thus, the Illinois MIT requirements contemplate the SDWA's permanent prohibition on underground injection that is subject to the continuing obligation to conduct a timely successful mechanical integrity tests on Class II well, in accordance with the state's schedule as articulated in the regulations.

Appellant EJK argues that the Illinois MIT requirements are "intermittent testing requirement[s] that 'must be fulfilled within a particular time frame.'" *See EJK Rev. Brief at 20.* This argument offers no support to Appellant EJK's appeal. The EAB has found that requirements that demand action within a given time period are not necessarily indicative of a one-time violation. *Harmon*, 7 E.A.D. at 38. In examining the notification requirement set forth in Section 3010 of RCRA, 42 U.S.C. § 6930, the EAB observed that the statute contained a "not later than 90-day" time frame for notification, but also contained a prohibition that provided that "absent such notification, hazardous waste may not be 'transported, treated, stored, or disposed of.'" *Id.* In focusing on the prohibitory language, the EAB concluded that the requirement prohibited the act of disposal without first satisfying the notification provisions and, therefore, the statute provided for continuing violations that did not end until the date upon which

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[26] Appellant complains that it was error to discuss this section because he was not formally charged with a violation of this provision. EJK Rev. Brief at 29. This argument is specious. RJO Toney and Appellee focused on this regulatory provision because it illustrates the permanent nature of the SDWA's ban on underground injection that is subject to the continuing use authorizations in the Illinois MIT requirements.

notification was provided.[27] *Id.* Although the applicable Illinois MIT requirements, found at Ill. Admin. Code Title 62, §§ 240.760(e)(6) and (f)(1), contain specific time frames for the performance of the tests, subsection (h) of that same provision provides a prohibition that bans the operation of Class II UIC wells that have not successfully passed internal mechanical integrity tests when required by subsections (e) or (f). Therefore, contrary to Appellant EJK's contention, the Illinois MIT requirements are continuing obligations, as opposed to time-limited ones.

Appellant EJK next incorrectly suggests that the decision in *In the Matter of Frontier Stone, Inc.*, CAA Docket No. II-95-0105 1997 EPA ALJ LEXIS 131 (March 10, 1997), is instructive in this case. EJK Rev. Brief at 22-23. In *Frontier*, the ALJ found that the requirement for performance testing and reporting within the prescribed time period was not a continuing violation because it was associated with initial startup – – nothing further was required of the facility for initial startup, as that beginning phase of the facility's life was complete. The ALJ likened the violation in *Frontier* to a violation under TSCA for failure to provide U.S. EPA with a pre-manufacture notice at least 90 days before importing a new chemical. Both types of violations addressed by the ALJ in *Frontier* were preliminary requirements that were non-continuous in nature, and are dissimilar from the Illinois MIT

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[27] In *Harmon*, appellant argued that the RCRA permit requirement was not a continuing obligation, but a time-limited obligation. The Board's comment on appellant's position in *Harmon* applies to Appellant EJK's similar argument against continuing violations under the SDWA in this case. The Board noted as follows:

> To accept Harmon's argument leads to a fundamentally absurd result, seemingly contrary to the Act's purposes. Harmon is saying, in so many words, that after the five-year limitations period has run, it can not be subjected to civil penalties for failing to obtain a permit, even if it continues to operate the facility up to – and possibly past – the moment an enforcement action is filed against it. In other words, according to Harmon's reasoning, if it were to continue operating its hazardous waste management facility, it would be immune from the type of pecuniary sanctions that all other owners and operators of hazardous waste management facilities would incur for owning or operating an existing facility without a permit. Thus, even though Harmon was clearly an owner and operator of a hazardous waste management facility in 1987 . . ., it nonetheless cannot be held accountable for its failure to have a permit because the action "first accrued" against it in 1980-82. Accordingly to Harmon's logic, it would be free to repeat its violation of the permitting requirements of RCRA indefinitely, safely beyond the reach of the law's pecuniary sanctions." *Harmon*, 7 E.A.D. at 30-31, n. 34.

requirements at issue in this case. The Illinois MIT requirements in the instant matter are not preconditions tied *solely* to the commencement of operations. As discussed above at great length, the Illinois regulations at issue in this case are a critical part of the statutory and regulatory scheme under the SDWA that provide use authorizations or conditions on the SDWA's permanent underground injection ban. These regulatory use authorizations can only protect underground drinking water sources and meet the SDWA's statutory mandate if they are continuing in nature.

Appellant EJK next contends that "the statutory language here is quite similar to that found to indicate a non-continuing requirement in [*Center for] Biological Diversity [v. United States Fish and Wildlife Service*, 453 F.3d 1331 (11th Cir. 2006)]" and, therefore, the case informs this matter. This argument is without merit. The court in that case found that the language of the Endangered Species Act, 16 U.S.C. § 1533(b)(6)(A), (C)(ii), that required the U.S. Department of the Interior ("DOI") to develop and implement regulations by "not later than" a date certain, was not a continuing obligation. The court noted that the statute, 16 U.S.C. § 1533(b)(6)(C)(ii), also required the government to rely on "such data as may be available at the time," which suggested the one-time nature of the violation; "[i]f the duty were ongoing, it would be anomalous for Congress to require the . . . [DOI] to ignore new information when promulgating the rule." [28] *Center for Biological Diversity* at 1335. Therefore, the court's decision in *Center for Biological Diversity,* finding that DOI's failure to timely promulgate rules under the Endangered Species Act by a certain date, was not a continuing violation, is wholly dissimilar from Appellant EJK's continuing MIT violations, and does nothing to support his position.

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[28] Further, the court noted that its decision to reject the continuing violation doctrine in that case, in favor of DOI, was consistent with statute of limitations and sovereign immunity jurisprudence, and listed a number of cases to illustrate its point including, *United States v. Sherwood,* 312 U.S. 584, 586, 61 S. Ct. 767, 769 (1941) (the United States, as sovereign, is immune from suit save as it consents to be sued); (additional irrelevant citations omitted).

v. Appellant EJK's Violations of the Illinois MIT Requirements and the SDWA Were Continuing In Nature, and, Therefore, Appellee's Claims Against Him For These Violations Were Timely Filed

The statutory language of the SDWA, its legislative history, the federal UIC program, and the Illinois MIT requirements, as evaluated consistent with the EAB's analysis and findings in the *Harmon* and *Lazarus* cases, all illustrate that the SDWA was designed to continuously protect underground sources of drinking water. Toward that end, the SDWA created a permanent prohibition on underground injection, that was subject to continuing use authorizations of the Illinois MIT requirements authorized under the SDWA. As Appellant EJK failed to comply with the continuing MIT requirements, his violations of these requirements were continuing in nature, too. Therefore, RJO Toney did not err in finding that Appellant EJK's violations of the Illinois MIT requirements and the SDWA were continuing in nature, and properly proceeded to evaluate Appellant's statute of limitations challenge to Appellee's claims. 12/27/06 PAD at 8.

Pursuant to Ill. Admin. Code Title 62, § 240.760(e)(6) and the SDWA, Appellant EJK was required to successfully conduct an internal mechanical integrity test on the Huelsing #1 and Zander #2 wells on or before December 19, 1996. Pursuant to Ill. Admin. Code Title 62, § 240.760(f) and the SDWA, he was required to successfully conduct an internal mechanical integrity test on the Lillian Z. Atwood #1, Logan Harrell #1, Reinhold Twenhafel #2, and Wohlwend #6 wells by September 1, 1995.

Because the Illinois MIT requirement at Ill. Admin. Code Title 62, § 240.760(e)(6) and (f), as authorized under the SDWA, were continuing obligations, as found by RJO Toney, Appellant's violations of these regulations and the SDWA were also continuing in nature and did not stop until he came into compliance with the requirements. Appellant EJK successfully tested the Huelsing #1 well on March 14, 2001; the Wohlwend #6 on April 23, 2001; and the Zander #2 well in September 2005. *See* Partial Accelerated Decion at 10, 15; Amended Complaint ¶ 47, and RWS' Amended Answer ¶ 47. The date on which Appellant came into compliance for each

of these wells is the same date that his continuing violations stopped for each well. With regard to the other three wells, Appellant transferred the Reinhold Twenhafel #2 to a new permittee on January 25, 2002 (and that permittee successfully tested by on February 15, 2002); the Logan Harrell #1 was not tested, but was plugged by the state on July 29, 2004; and the Lillian Z. Atwood #1 was not tested, but was plugged by the state on June 7, 2005. *Id.* Therefore, Appellant EJK's continuing violations with regard to each of these wells arguably stopped on the date that each well was transferred to a new permittee or plugged by the state.

Because Appellant's noncompliance with the Illinois MIT requirements and the SDWA were continuing violations, Appellee had five years from the last day of Appellants' continuing violations for each well to bring an action against Appellants for their violations regarding each well. The Huelsing #1 well had the earliest compliance date among the six wells involved in this case and, correspondingly, had the earliest statute of limitations date that applies here. Appellant successfully tested the Huelsing #1 well on March 14, 2001, and, therefore, Appellee had five years from Appellant's last day of violation for the Huelsing #1 – – i.e. through March 13, 2006 – – to bring its claim against Appellant for his violations of the Illinois MIT requirements and the SDWA with regard to the Huelsing #1 well. Appellee filed its initial Complaint against Appellant RWS on July 9, 2001, and its Amended Complaint against Appellants RWS and Appellant EJK on February 20, 2003. Therefore, both the Complaint and Amended Complaint were filed well within the five year statute of limitations period. As the statute of limitations dates regarding Appellant's violations for each of the remaining five wells are later than the statute of limitations date for the violations involving the Huelsing #1 well, Appellee's claims against Appellant for his violations of the Illinois MIT requirements and the SDWA with regard to all six wells involved in this case were timely filed, and are not barred by the five year statute of limitation under 28 U.S.C. § 2462.

c. **The Equitable Doctrine of Laches Does Not Apply To Shield Appellant EJK From Being Found Liable For His Violations of the Illinois UIC Program Requirements and the SDWA; Fourth Affirmative Defense Properly Rejected by the RJO**

Appellant EJK contends that the RJO erred in finding him liable for violations of the Illinois UIC Program requirements and the SDWA because the equitable doctrine of laches applied and provided him with a shield against liability. EJK Rev. Brief at 50. It is Appellant's contention, and not the RJO's decision, however, that is in error.

The doctrine of laches provides that " . . . neglect to assert a right or claim which, taken together with [a] lapse of time and other circumstances causing prejudice to [an] adverse party, operates as [a] bar in a court of equity." *See BLACKS LAW DICTIONARY* 787 (5th ed. 1979). Laches, however, cannot be asserted against the government when it acts in its sovereign and governmental capacity to protect public health and safety. *See Nevada v. United States*, 463 U.S. 110, 141, (1983); *U.S. v. Arrow Transp. Co.*, 658 F.2d 392, 394 (5th Cir. 1981) (citing *U.S. v. Summerlin*, 310 U.S. 414, 416 (1940)), *rehearing en banc denied* (1981), *cert. denied*, 456 U.S. 915 (1982) (denying laches defense against the United States under the Rivers and Harbors Act); *In The Matter of Minnesota Metal Finishing, Inc.*, Docket No. RCRA-05-2005-0013, 2007 EPA ALJ LEXIS 1 [*118] (January 9, 2007); *In The Matter of Crown Central Petroleum Corp.*, Docket No. CWA-08-2000-06, 2002 EPA ALJ LEXIS 1 [*143-145] (January 8, 2002). The equitable defense of laches does not apply here because Appellee was acting in its governmental capacity to protect public health and safety by ensuring that the public's drinking water supply is kept safe through enforcement of regulations under the Illinois UIC Program, authorized under the SDWA, and the SDWA.

Assuming, *arguendo*, that Appellee was somehow not acting in its governmental capacity to protect public health and safety, laches would still not apply because it is an equitable defense that applies to actions in equity. *See Environmental Defense Fund, Inc. v. Alexander*, 614 F.2d 474, 477-78 (5th Cir.), *cert. denied, 449 U.S. 919 (1980); Morgan v. Koch*, 419 F.2d

993, 996 (7th Cir. 1969) (equitable doctrine of laches did not apply where, pursuant to modification of amended complaint, action became one strictly at law); *Crown Central Petroleum Corp.*, Docket No.. CWA-08-2000-06, 2002 EPA ALJ LEXIS 1 [*143-145]. Here, all of the wells involved in this matter were either successfully tested by Appellant, transferred to a new permittee and successfully tested by the new permitteee, or plugged by the state, before RJO Toney issued her decision in on 12/27/06. Therefore, there was no injunctive relief to be had in this case at that point -- only the assessment of a civil penalty under the SDWA. Accordingly, RJO Toney correctly recognized that the action was one strictly at law, not in equity, and found that Appellants had not established laches as a defense in the action. 12/27/06 PAD at 9-10, 15. The equitable defense of laches does not apply in this matter, and, thus, did not shield Appellant EJK from being found directly, individually liable by RJO Toney, for his violations of the Illinois UIC regulations and the SDWA.[29] 12/27/06 PAD at 15.

Appellant EJK can raise no genuine issue of material fact to defeat the RJO's partial accelerated decision with regard to his liability in this matter.

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[29] As discussed above, the equitable defense of laches does not apply in this case, but, assuming,*arguendo*, that it did, Appellant EJK is unable to show that Appellee engaged in unreasonable delay in bringing this case against him. Appellant makes the argument of unreasonable delay by Appellee and presents a chart, in support of this position, that begins with the starting dates of his MIT violations and ends with the date of the hearing in this matter. EJK Rev. Brief at 50-52. His chart does not, however, demonstrate unreasonable delay by Appellee in bringing this case against him. On September 8, 2000, Appellee issued an NOV to Appellant RWS for its violations of the Illinois UIC regulations and the SDWA, and also sent a copy of the notice to the state. On July 9, 2001, Appellee filed the original Complaint in this matter against Appellant RWS. Approximately six months after filing the original Complaint in this matter, on January 25, 2002, Appellee sent an NOV to Appellant EJK for his violations of the Illinois UIC regulations and the SDWA, and also sent a copy of the notice to the state. Following the 30-day waiting period (for the State to file its own enforcement action), Appellee filed a Motion to Amend the Complaint on May 1, 2002, to formally add Appellant EJK to the case. Appellant EJK vigorously opposed the motion, but on February 6, 2003, RJO Kossek granted the motion and Appellee filed the Amended Complaint on February 20, 2003, in accordance with the RJO's order. These plain facts illustrate that Appellee did not unreasonably delay bringing Appellant EJK into the case, contrary to his contention. Moreover, RJO Kossek evaluated this argument and discussed it at great length, before determining that Appellant EJK had not been prejudiced by the timing of the proposed Amended Complaint and that U.S. EPA had not acted in bad faith by failing to name him as a respondent in the original Complaint and seeking to add him to the case six months later. 2/6/03 Orderat 4-8.

d. **Equitable Estoppel/Estoppel en Pais Does Not Apply To Shield Appellant EJK From Being Found Liable For His Violations of the Illinois UIC Program Requirements and the SDWA; Third Affirmative Defense Properly Rejected by the RJO**

Appellant EJK suggests that the concept of Equitable Estoppel/Estoppel en Pais [30] provides him with a defense that shields him from liability in this matter. This argument is misplaced. Estoppel rarely applies to an agency of the United States government when it is performing a regulatory function pursuant to an act and regulations designed to protect or enforce a public interest or right. *See In re: V-1 Oil Company*, 8 E.A.D. 729 (EAB 2000). There is a strong public policy reason for strictly limiting claims of equitable estoppel against the government -- "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *V-1 Oil Company*, 8 E.A.D. at 750 and *In re: B. J. Carney Industries, Inc*, 7 E.A.D. 171, 96 (EAB 1997), *both quoting Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). The public has a particularly compelling interest in restricting the availability of equitable estoppel claims against the government where the protection of public health and/or the environment is at issue. *See B.J. Carney*, 7 E.A.D. at 202, n. 39. Therefore, estoppel has been applied to the federal government only in the most narrow circumstances; to establish estoppel against the government, a party must prove *affirmative misconduct* by the government and detrimental reliance on such conduct. *V-1 Oil,* 8 E.A.D. at 749; *In re Newell Recycling Co.*, 8 E.A.D. 598, 631 (EAB 1999); *B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196 (EAB 1997) ("A party seeking to estop the government bears a heavy burden of demonstrating the traditional elements of estoppel and some 'affirmative misconduct' on the part of the government."). The government's "mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct" sufficient to estop the government. *B. J.*

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[30] "Estoppel in pais" is the "doctrine by which a person may be precluded by his act or conduct, . . . from asserting a right which he otherwise would have had." *See* BLACKS LAW DICTIONARY 483, 495 (5th ed. 1979).

Carney Indus., Inc., 7 E.A.D. at 199, *quoting Board of County Commissioners of the County of Adams v. Isaac*, 18 F.3d 1492 (10th Cir. 1994) n. 38; *United States v. City of Toledo,* 867 F. Supp. 603, 607 (N.D. Ohio 1994), (estoppel not available where the agency has simply acted in an indifferent, passive or negligent manner); *United States v. Arkwright, Inc.*, 690 F. Supp. 1133 (D.N.H. 1988) (government's failure to act was not affirmative misconduct).

The defense of Equitable Estoppel does not apply here because Appellee is an agency of the United States government that, in prosecuting this matter against Appellants is performing a regulatory function pursuant to an act and regulations designed to protect or enforce a public interest or right – – it is enforcing the SDWA and the Illinois UIC Program, approved under the SDWA, that were promulgated to protect underground sources of drinking water essential to human health, safety and the environment. Assuming, *arguendo*, that equitable estoppel applied in this case, Appellant EJK failed to demonstrate that Appellee engaged in *intentional misconduct*, and that he reasonably relied on such activity to his detriment. Therefore, Appellant EJK's third affirmative defense of equitable estoppel fails and RJO Toney was correct in rejecting it and finding him liable as an operator for the violations alleged in the Amended Complaint.

e. Selective Enforcement Does Not Apply To Shield Appellant EJK From Being Found Liable For His Violations of the Illinois UIC Program Requirements and the SDWA; Twelveth Affirmative Defense Properly Rejected by the RJO

Governments are accorded broad discretion in deciding whether, and against whom, to undertake enforcement actions. *In re: B&R Oil Company, Inc.*, 8 E.A.D. 39, 51 (1998). To establish an affirmative defense of selective enforcement, the proponent must demonstrate that he has been "singled out" for enforcement by the government when other similarly situated violators were left untouched, and he was selected for enforcement on the basis of impermissible considerations such as race, religion, or the desire to prevent his exercise of constitutional rights. *See B&R Oil Company,* at 51; *In re: Newell Recycling Company*, Inc, 8 E.A.D. 598, 635 (EAB

1999). *See also U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (E.D. Va. 1997); *U.S. v. Anderson,* 923 F.2d 450 (6th Cir. 1988); *Schiel v. Commissioner,* 855 F.2d 364, 367 (6th Cir. 1988).

Appellant EJK has alleged, but has failed to proffer any evidence whatsoever that he was "singled out" for enforcement by Appellee. In addition, he has also failed to present a single iota of evidence that the present enforcement action against him is "invidiously or based on bad faith." *See Newell Recycling* at 635. Appellant EJK attempts to create suspicion out of thin air by ascribing bad motives to otherwise routine events that occur within governmental regulatory agencies. He does not, however, present any facts that establish his alleged affirmative defense of selective enforcement. Therefore, RJO Toney properly found that such a claim did not apply, and did not protect him from being found liable, as an operator, for the violations of the Illinois UIC regulations and the SDWA. 12/27/06 PAD at 15.

f. Impossibility Defense Does Not Apply To Shield Appellant EJK From Liability For His Violations of the Illinois UIC Program Requirements and the SDWA; Fourteenth Affirmative Defense Properly Rejected by the RJO

Lastly, Appellant EJK argues that the RJO erred in not applying the defense of impossibility in this matter, instead, finding him individually, directly liable for the violations of the Illinois UIC Program and the SDWA. In particular, he contends that Appellants could not comply with the testing requirements regarding the Twenhafel and Wohlwend leases, from 1980 to 1997, because they allegedly did not have legal possession of the leases during this time. Appellant EJK relies upon his unique interpretation of the Illinois appellate court's decision in *Klockenkemper v. Fisher*, No. 77-L-24 (slip op. at 2-3) (Ill. App. April 22, 1997) to suggest that he did not have legal possession of the leases.

This argument, which Appellant EJK has previously unsuccessfully raised to IDNR, and, more recently to the Board, is without merit. The circuit and appellate courts in the *Klockenkemper* case specifically found that Appellant EJK was responsible for operating the

leases involving the Twenhafel and Wohlwend wells in 1987. *Klockenkemper v. Fisher*, No. 77-L-24 (slip op. at 2-3) (Ill. App. April 22, 1997). In fact, the appellate court in that case went through an exhaustive discussion of its prior history, and noted that the circuit court initially granted Appellant all rights of production to the Twenhafel and Wohlwend leases, but vacated the order in 1980. *Id.* The appellate court went on to explain that the case went into an unexplained "litigation hiatus" until 1987, when the circuit court reinstated the 1980 judgment against Fisher and, in 1989, entered another order which, in essence, clarified that title to the leases and the oil produced therefrom belonged to Appellant (while Fisher was awarded the right to remove his equipment placed on the leases). *Id.* With regard to operating/production rights regarding the Twenhafel and Wohlwend leases between Fisher and Appellant EJK, the appellate court noted that ". . . the lack of production from and care of the [Twenhafel and Wohlwend] leases rests with Appellant [Klockenkemper and]. . . any lack of production and/or related costs are attributable solely to Klockenkemper and should not be charged to Fisher." *Id.* at 7-8. Therefore, it is misleading to suggest that Appellant was somehow prevented from operating the Twenhafel and Wohlwend leases because of state court decisions in the *Klockenkemper* case. Indeed, an even casual reading of the case plainly shows that Appellant EJK was responsible for operating and caring for the Twenhafel and Wohlwend wells after the Circuit Court's 1987 decision. Appellant EJK's unilateral decision to not operate and care for the wells on the Twenhafel and Wohlwend leases (at the very latest) after the Circuit Court's decision in 1987, does not change the fact that he was vested with the rights and responsibilities for these wells. Thus, he was responsible for ensuring compliance with all state UIC regulations and the SDWA for the Twenhafel and Wohlwend leases during the period of violation (beginning on September 1, 1995). Appellant EJK simply failed to honor his regulatory responsibilities. Therefore, based

on the state case cited above and relied upon by Appellant EJK, impossibility is not a valid affirmative defense in this matter, and RJO Toney appropriately rejected it and found him directly, individually liable for the violations in this case in her partial accelerated decision. 12/27/06 PAD at 15.

F. RJO Toney Correctly Determined that Appellants were Jointly Responsible for a $105,590 Civil Penalty for Their Violations of the SDWA, and the Illinois UIC Program, Authorized Under the SDWA, in her 7/23/08 Penalty Decision.

1. RJO Toney Assessed The Civil Penalty In This Matter Based Upon the Evidence in the Record And In Accordance With the Penalty Criteria Set Forth In the SDWA

In reaching her penalty decision, RJO Toney indicated that she determined the amount of the civil penalty, as required by the Consolidated Rules, based on the evidence in the record and in accordance with the SDWA's penalty criteria. *See* 7/23/08 Penalty Decision at 4-5. The record included, but was not limited to the pleadings, the transcript of the hearing, all proposed findings, and conclusions and supporting arguments of the parties.[31] *Id.* at 4. She further indicated that she considered the recommendations in the Region 5 UIC Penalty Policy, ("*Penalty Policy*") in calculating and assessing the penalty in this case. *Id.* at 5.

Section 1423(c)(4)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(4)(B), articulates a number of factors that must be considered in assessing a penalty under the statute, including, 1) the seriousness of the violation; 2) the economic benefit (if any) resulting from the violation; 3) any history of such violations; 4) any good-faith efforts to comply with the applicable requirements;

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[31] Appellant EJK attempts to undermine the RJO's decision by accusing her of improperly making her findings and reaching a decision before considering the evidence. EJK Rev. Brief at 68. This suggestion is absurd. The plain language of RJO Toney's penalty decision demonstrates that she methodically considered the evidence prior to making her findings and decision in this case. 7/23/08 Penalty Decision at 4-21.

5) the economic impact of the penalty on the violator; 6) and such other matters as justice may require. RJO Toney methodically evaluated the evidence in this case under each of the SDWA's statutory penalty factors in reaching her final penalty decision. 7/23/08 Penalty Decision at 5-21. Appellant EJK raises a number of objections to the RJO's Penalty Decision that he previously raised in his Post-Hearing Brief, Response, and Reply, *Instanter*, filed prior to the RJO's decision on 7/23/08. These objections were extensively addressed, previously, by Appellee in the 12/3/07 Post-Hearing Brief of the U.S. EPA; 1/22/08 Complainant's Response to Respondents' Rocky Well Service, Inc. and Edward J. Klockenkemper's Proposed Findings of Fact and Conclusions of Law; and 2/21/08 Complainant's Reply to Respondents' Rocky Well Service, Inc.'s and Edward J. Klockenkemper's Reply, *Instanter*, to U.S. EPA's Response to Respondents' Post-Hearing Brief. As these documents may add to Appellee's response to Appellant EJK's objections before this Board, Appellee hereby incorporates its discussion and arguments presented in those filings, into this Response.

a. The RJO Properly Evaulated the High Level of Seriousness of Appellant EJK's MIT Violations

After evaluating the pertinent evidence, the RJO found that Appellant EJK's violations of the Illinois MIT requirements and the SDWA were violations of a high level of seriousness. 7/23/08 Penalty Decision at 6-7. Specifically, the RJO focused upon the information in the Penalty Policy regarding MIT violations, the testimony of IDNR Inspector Gale Matock, as well as the written and oral testimony of Ms. Lisa Perenchio, that indicated that Appellant EJK's MIT violations were of a high level of seriousness. CEs 47, 141 ¶¶ 26-27, TR 4/24 at 205-207, TR 4/25 at 170-171. Appellant EJK challenges the penalty decision, claiming that the RJO erred in

finding that his MIT violations were of a high level of seriousness. This argument is without merit.

Appellant parses out a portion of the RJO's Penalty Decision at 5-6, in an attempt to suggest that, under the Penalty Policy, only violations regarding actual injections are recognized as posing a serious potential threat to underground sources of drinking water ("*USDWs*"), and, therefore, are of a "high level" of seriousness. EJK Rev. Brief at 56-57. This is an incorrect interpretation of the plain language of the Penalty Policy (CE 47 at first 3 unnumbered pages and 1-3; and TR 4/25 at 148-150). Contrary to Appellant's inference, the Penalty Policy unambiguously classifies both a Failure to Demonstrate Mechanical Integrity violation and an Unauthorized Injection violation, as high level violations under *Table I: Seriousness Of The Violation*. *See* CE 47 at 1. Support for the classification of an MIT violation as being of a high level of seriousness can be found in Appendix I of the Penalty Policy that discusses the importance of maintaining mechanical integrity, and the impact that a failure to timely conduct an MIT may have on the environment, as follows:

> [m]echanical integrity is one of the cornerstones of an effective UIC program because it is the simplest and most appropriate method to show mechanical soundness of the well both in construction and operation and lack of migration of fluids to USDWs. A leak in the casing, tubing or packer of a well or any fluid movement adjacent to the wellbore, **may cause contamination of an underground source of drinking water**. Even if a well is not currently operating and is temporarily abandoned, the mechanical integrity must be demonstrated because the well **may be function[ing] as a conduit for injected or formation fluids and has the potential to contaminate a USDW**.

(CE 47 pp. 14-15). (Emphasis added). The RJO focused upon the latter provision as well in her decision. 7/23/08 Penalty Decision at 6.

Appellant EJK next asserts that Appellee was required to demonstrate actual harm in this

case to justify a finding of a high level of seriousness for the violation. In citing the EAB's decision in *Carroll Oil*, 10 E.A.D. 635, Appellant contends that Appellee was required to show case-specific harm before a violation can be classified as a high level of seriousness. EJK Rev. Brief at 57-58. This is incorrect. In *Carroll Oil*, the EAB overruled the ALJ's penalty analysis regarding "actual harm," and, in pertinent part, focused on the potential for harm, as follows:

> We agree with the Region that the ALJ's reasoning is at odds with previous decisions by the Board holding that "seriousness of a violation" is or can be based on *potential* rather than actual harm.. . . see *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-603 (EAB 1996), aff'd, No. 96-1159-RV-M (S.D.Ala., Jan. 21, 1998). In *Everwood*, analyzing a set of statutory penalty factors virtually identical to those at hand, . . . we held that the respondent's failure to adhere to the requirements was a "violation of major significance" meriting an increased penalty because the particular violation raised the *potential* that environmental damage, if it should occur, would go undetected. *Id.*; *see also In re V-1 Oil Co.*, 8 E.A.D. 729, 755 (EAB 2000) (holding in an UST case that "proof of actual harm to the environment need not be proven to assess a substantial penalty").
>
> In light of the foregoing, we cannot agree with the ALJ's statement that the UST program is concerned merely with actual releases that occur during temporary closure of USTs. . . .
>
> Consistent with the Subtitle I's purpose, the Agency has stated that the "principal objective of the UST closure regulations is to *identify* and *contain* existing contamination and to *prevent* releases from UST systems no longer in service." 53 Fed. Reg. 37, 082 (September 23, 1998) (emphasis added). The UST closure regulations thus target UST systems lacking modern upgraded features, which the Agency has identified as posing the greatest risk of release and as constituting the primary cause of the existing UST contamination problems. . . . Here, the ALJ's limited view of the concerns of the UST closure regulations is not commensurate with the scale of the harms and risks associated with releases from USTs – – both current and future – – as described by the Agency, or the regulations' correspondingly broad objectives. . . .

Carroll Oil at 657-658. Therefore, the EAB's decision in the *Carroll Oil* case only reinforces the validity of the RJO's selection of a high level of seriousness for the MIT violation, based on the violation's potential to endanger USDWs.

In a convoluted discussion, Appellant RJK contends that RJO Toney concentrated on "programmatic harm" only, and failed to show actual harm, or a "credible potential" for harm to USDWs from Appellant's MIT violations. RJK's Rev. Brief at 59-66. This argument is also

without merit. As discussed above, the RJO, citing to *Carroll Oil* and other cases, properly determined that a showing of actual harm is not required, and a substantial penalty may be assessed in the absence of such showing. *See In re Phoenix Construction Services, Inc.*, 11 E.A.D. 379, 396-400 (EAB 2004); *In re Predex Corp.*, 7 E.A.D. 591, 601-602 (EAB 1998) (violation of FIFRA's registration requirements is programmatic harm which alone is sufficient to support a substantial penalty). Further, the RJO plainly set forth in the decision her basis for determining the potential for environmental harm that could result from a failure to conduct MITs at the wells. *See* 7/23/08 Penalty Decision at 6. The information in the Penalty Policy regarding MIT violations, the testimony of IDNR Inspector Gale Matock, as well as the written and oral testimony of Ms. Lisa Perenchio, all demonstrated that there was a potential for environmental harm from Appellant EJK's MIT violations. Accordingly, the RJO found that Appellant's MIT violations were of a high level of seriousness. CEs 47, 141 ¶¶ 26-27, TR4/24 at 205-207, TR4/25 at 170-171.

b. <u>The RJO Properly Focused Upon the Correct Method Of Calculating The Penalty In This Case</u>

Appellant EJK contends that the RJO erred in accepting Appellee's penalty calculation because it allegedly "lumped the wells together." EJK Rev. Brief at 55. This argument is specious, particularly since Appellee calculated the penalty in accordance with the SDWA's penalty criteria but used its discretion under the Penalty Policy to afford Appellant EJK every consideration to keep the penalty amount within a reasonable range.

Ms. Perenchio testified that, in reviewing the high seriousness level penalty matrix for Appellant EJK's MIT violations regarding the Huelsing #1 and Zander #2 wells in Count I, and

the Atwood #1, Harrell #1, Twenhafel #2 and Wohlwend #6 wells in Count II, she selected $1,000, as the appropriate penalty number for the MIT violations in both counts.[32] (CE 141 ¶¶ 28, 34). Ms. Perenchio further explained that, even though she was under no obligation to do so, she choose the lowest penalty multiplier within the Penalty Policy's Table II penalty range for high seriousness level violations, after considering the small size of Appellant EJK Rocky Well's business, and the advanced age of Appellant EJK. (TR 4/25 at 167-168; CE 141 ¶¶ 28, 34). She further indicated that she did not select a higher penalty multiplier (which could have been as high as $10,000), even though the Penalty Policy advocated such selection where a violator had more than one well in violation of the same regulation, as in this case, and/or where a violator had several days of violation within a particular month, again, as in this case.[33] (*Id.*) Thus, Appellee's discretionary selection of the lowest possible multiplier within the penalty range for violations of a high level of seriousness provided Appellant EJK with a significant reduction in the amount of the penalty which, under the recommendations of the Penalty Policy, could have been exponentially higher.

For each violation, the Penalty Policy instructs Appellee to multiply the number of months in violation, per well, by the selected multiplier. (CE 47 at 2-3). Although Appellant EJK violated the SDWA and the Illinois MIT requirements for the Huelsing #1 and Zander #2

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[32] This multiplier was increased to $1,100 for violations after January 30, 1997, in accordance with the Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996.

[33] Appellant EJK attempts to discredit RJO Toney's decision by suggesting that she did not know the operating status of Appellant EJK's six wells that were the subject of his violations. In particular, he indicates that "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." EJK Rev. Brief at 67. This trivial comment is of little consequence because the crux of the matter is that Appellant EJK was responsible for the operation, maintenance and compliance activities for these six wells during that time period, whether they were producing oil or not. His decision not to operate his wells does not excuse him from complying with his regulatory obligations under the Illinois UIC Program.

wells as described in Count I of the Amended Complaint, and violated the Act and the regulations for the Atwood #1, Harrell #1, Twenhafel #2 and Wohlwend #6 wells, as presented in Count II, Ms. Perenchio showed extraordinary consideration of the small size of Appellant EJK's operations in purposely selecting only one well under each count to calculate the gravity-based penalty for each count. (CE 141, fn. 2, fn. 5, and ¶¶ 29, 35). Further, she picked the well under each count with the shortest period of violation to calculate the gravity-based penalty, thereby affording Appellant EJK an even greater reduction in the amount of the penalty calculated. (*Id.*). With regard to the MIT violation in Count I, Ms. Perenchio selected the Huelsing #1 well to calculate the penalty because it was in violation for a period of 50 months, (a shorter period of violation than that for the Zander #2 well), and calculated a gravity-based penalty of $54,800 for Appellant's violations under that count. (CE 141 ¶ 29). With regard to the MIT violation in Count II, she selected the Wohlwend #6 well to calculate the penalty because it was in violation for a period of 55 months, (the shortest period of violation out of the four wells involved in that count), and calculated a gravity-based penalty of $60,000 for Appellant EJK's violations under this count. (CE 141 ¶ 35). If Ms. Perenchio had strictly applied all of the recommendations in the Penalty Policy to calculate the portion of the penalty for Appellant EJK's MIT violations, the amount of the gravity-based penalties for Counts I and II of the Amended Complaint would have been increased tremendously.

c. Appellant EJK's "Expert" Witness Did Not Provide Credible Testimony With Regard To An Appropriate Penalty in This Matter.

Appellant EJK challenges the RJO's credibility findings with respect to the two penalty witnesses called at the hearing, Ms. Perenchio and Mr. Morgan. Appellant attempts to discredit

Ms. Perenchio's testimony by claiming that she "was neither a first-hand fact, or expert witness" and cites *Gilbert Martin Woodworking Co. d/b/a Martin Furniture*, Docket No. EPCRA 09-00-0016; 2001 EPA ALJ LEXIS 27, in support of his position. EJK Rev. Brief at 64-65. The cited case does not help him, however, and his argument is without merit. In *Gilbert Martin*, the Agency presented a witness who did not perform the EPCRA penalty calculation, but reviewed the calculation with the penalty policy to determine whether the factors were applied in making the proposed penalty. *Gilbert Martin* at 16. The ALJ admitted her affidavit and accepted her testimony, over the objection of the respondent's counsel. *Id.* In the instant case, Ms. Perenchio testified that she not only reviewed the penalty calculation in the Amended Complaint, but also calculated the penalty (that was lower than the one articulated in the Amended Complaint and served as the operative one) for purposes of the hearing. TR 4/25 at 154-156. Thus, Ms. Perenchio was a "fact witness" with regard to the penalty calculation and the proposed penalty that is at issue in this matter. Moreover, Ms. Perenchio is the Direct Implementation Section Chief in U.S. EPA, Region 5's, UIC Program, and an Agency manager with approximately 20 years of supervisory experience in the UIC Program. (TR 4/25 at 135-137). While she may not have been formally qualified as an expert witness in this case, her experience and credentials speak to her credibility with regard to her penalty testimony provided at hearing.[34]

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[34] Appellant EJK complains about Ms. Perenchio's written testimony, that was authorized under Section 22.22(c) of the Consolidated Rules, because her testimony allegedly "did not include any or reference any supporting exhibits." EJK Rev. Brief at 54. Ms. Perenchio's written testimony, however, made many references to the Penalty Policy that was a formal hearing exhibit. *See* CEs 47, 141. Appellant EJK tries to further dismiss Ms. Perenchio's testimony by comparing it to the written testimony of Appellants EJK and RWS (that were both provided by Appellant EJK). He specifically alleges that they provided written testimony "and provided foundation for and introduced Respondents'

Appellant RJK argues that Appellee cannot refute the testimony of his "expert" witness, John Morgan.[35] His argument is without merit. John Morgan testified that he did not examine any of the six wells at issue in this case and did not have any personal knowledge of the wells after he left the department in the mid 1990s. TR 4/26 at 232. He further admitted that he did not talk to any of the farmers who live near the wells. *Id.* at 234. In addition, although John Morgan was of the opinion that Appellant EJK should be assessed a nominal penalty amount in this case, his opinions were based on unreliable information, such as Respondents' Document 56, a one-page listing of cryptic numbers that were not specifically tied to a particular well, and five pages from a unrelated State hearing that were specifically selected and tendered to him by Appellant EJK's counsel.[36] TR 4/26 at 228-229. Thus, the RJO determined that Mr. Morgan's

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hearing exhibits as a part thereof," while Ms. Perenchio allegedly did not. These "exhibits" and "foundation" heralded by Appellant EJK, that were described in Attachments A, B and C to their declarations, contained incorrect, self-serving, and misleading statements regarding documents for their defense. Indeed, a fair amount of time was spent at the hearing, discussing Appellee's objection to these attachments. TR 4/26 at 24-35, 44-78). RJO Toney struck the fourth column, entitled "Relevance/Comments/Applicability," in both Attachments B and C of Respondents' declarations, because this column presented legal argument and mischaracterized the documents. (TR 4/26 at 33-34). Therefore, RJO Toney was justified in relying upon the testimony of Appellee's witness, Lisa Perenchio, in this case.

[35] Upon answering questions during voir dire by U.S. EPA, John Morgan was exposed as an unlicensed geologist in Illinois and Indiana, contrary to his submitted curriculum vitae ("*CV*"), and only "amended" his CV after his unlicensed status was revealed in open court (TR 4/26 at 114-118, 220).

[36] The RJO indicated at the hearing that ". . . the record will reflect that . . . [John] Morgan reviewed only the [five] pages that were attached to his declaration." TR 4/26 230. Appellant EJK's counsel Gomez subsequently indicated, " and I will note for the record that the entire exhibit – – entire testimony – – the entire deposition [sic] transcript has previously been provided to EPA, but we will submit the whole thing so it's present." *Id.* Rs' PHEX 91, however, that was presented to U.S. EPA before the hearing, was the exact same selective five pages that was presented as Respondents' Document 26 at the hearing. Contrary to counsel's assertion at hearing, Respondents<u>did not</u> provide U.S. EPA with the entire state hearing transcript as part of their prehearing exchange or as a hearing exhibit. RJO Toney requested that Appellant EJK's counsel submit the entire state hearing transcript in the post-hearing brief. TR 4/26 at 29-230. Counsel Gomez agreed to do so. TR 4/26 at 230. To date, however, Appellee has not been provided with a copy of the entire state hearing transcript.

opinions regarding harm from the wells in this case were far from "expert," and his testimony did not inform on the amount of an appropriate penalty in this case. With regard to the penalty calculations provided by John Morgan (including his opinions regarding the "low" level of seriousness of the violations), RJO Toney ruled that "any portion of . . . [John Morgan's] testimony that pertains to what constitutes an appropriate penalty in this case will not be regarded as expert testimony. . . . [and will] come in as the opinion of a layperson." TR 4/26 at 222. Further, the RJO ruled that she had reviewed John Morgan's declaration and found that pages 6-9 of it constituted his opinion of a penalty calculation which would be considered extremely low in probative value.[37] TR 4/26 at 239-240. Thus, John Morgan's testimony regarding the level of harm from the violations and penalty were not probative and, accordingly, were discounted by the RJO. 7/23/08 Penalty Decision at 9-11.

d. <u>Appellant EJK Did Not Display Good Faith Efforts That Warranted A Larger Reduction in the Penalty</u>

Appellant EJK asserts that he is entitled to a deeper discount in the amount of the penalty assessed by the RJO, and that her refusal to reduce the penalty for his alleged "acts of good faith"

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[37] Appellant EJK claims it was error for the RJO to reject Mr. Morgan's penalty calculations because Mr. Morgan made his "findings . . . as required by the UIC policy, based on his first hand experience in assessing such penalties for failure to MIT when he was . . . [in management at the IDNR]." EJK Rev. Brief at 66. What Appellant fails to mention is that Mr. Morgan may have had some experience with calculating *state* penalties, many years ago, for MIT violations, but that experience with state penalties under a different system of calculation does not necessarily translate to this case that is for federal violations of the SDWA and the authorized Illinois UIC regulations. Moreover, it is ironic that Appellant EJK now contends that the lower IDNR penalties that were issued years ago for Appellant's violations are "more appropriate." *Id.* Unfortunately for Appellant EJK, he did not pay these state penalties and did not come into timely compliance, and the state, subsequently, found it necessary to refer the instant case to U.S. EPA.

was error. EJK Rev. Brief at 69. This suggestion is ludicrous. Appellant presented no evidence of behavior that could even remotely be construed as "good faith" under the Penalty Policy; he did not self-report his violations that are the subject of this enforcement action, and did not promptly correct the environmental problems before or after being notified of the UIC violations by the State of Illinois (which referred this case to U.S. EPA after years of Appellant's non-compliance with the state's enforcement attempts regarding these wells). Moreover, Appellant EJK only "complied" with the MIT requirements years after violating the requirements for each well. *See* Appellee's Response at 47-48. For a detailed discussion of Appellant EJK's alleged well by well "good faith" efforts, please see the 1/22/08 Complainant's Response to Respondents' Rocky Well Service, Inc. and Edward J. Klockenkemper's Proposed Findings of Fact and Conclusions of Law at 8-11.

e. The Penalty For Appellant EJK's Failure to Report Violations Was Properly Assessed In This Case.

Appellant EJK asserts that RJO Toney should have dropped that portion of the penalty against him that was attributable to his violations of the Illinois Annual Well Reporting requirements, found at Ill. Admin. Code Title 62, § 240.780(e). EJK Rev. Brief at 67. In support of his position, Appellant selects snippets of Ms. Perenchio's testimony to insinuate that she either did not calculate the penalty for this violation correctly, and/or the violation itself was of little consequence. EJK Rev. Brief at 67-68. Appellant is wrong on both counts. Ms. Perenchio testified that Appellant's failure to submit annual well status reports to the state for calendar years 1996 through 1998 created the potential for harm to human health, and also caused harm to

the SDWA regulatory program. (CE 141 ¶¶ 39-40). Regarding direct harm to the program, Ms. Perenchio explained that there are approximately 8,000 Class II wells in Illinois and not enough state inspectors to ensure compliance with the regulations through inspections alone. (*Id.* at ¶ 39). Thus, "[t]he integrity of the UIC program in Illinois, and the protection of USDWs, depends, in part, upon self-reporting by well operators"; compliance with annual reporting requirements prompts operators to follow UIC Class II well requirements, and, thus reduce threats to human health. (*Id.*). In addition, compliance with reporting requirements allows regulators to quickly evaluate compliance with injection pressure limits and, thus, curtail fractures that could provide pathways for the movement of contaminants into USDWs, and thereby harm human health. (*Id.*).

Although Appellant EJK violated the SDWA and the Illinois Annual Well Status Reporting requirements for each of his six wells for at least 36 months, and the Penalty Policy instructs Appellee to multiply the number of months in violation by the selected multiplier, Ms. Perenchio showed extraordinary consideration of the small size of Appellant's operations and the advanced age of Appellant EJK in purposely choosing to calculate the penalty by multiplying the penalty number by the number of years (instead of number of months). (CE 47 at 3; CE 141 ¶¶ 40-41). This exercise of discretion afforded Appellant EJK a dramatic reduction in the amount of the penalty calculated, as can be seen by the $900 total gravity-based penalty that Ms. Perenchio calculated for Appellant's annual reporting violations in Count III. (CE 141 at 9, fn. 6). Despite this tremendous discount in the amount of the penalty assessed against him for his

reporting violations, Appellant EJK asserts that he deserves an even larger reduction in the penalty amount – a "complete pass" for these violations. EJK Rev. Brief at 67-68. Appellant has provided no credible basis to justify the total negation of the penalty for his reporting violations, and RJO Toney, appropriately, did not provide him with such relief in her penalty decision.

f. A Joint Penalty Was Properly Assessed Against Both Appellants

Appellant EJK claims that the RJO erred in assessing a joint penalty against both him and Appellant RWS, and that such assessment "violates . . . [their] due process rights, since, *inter alia*, the Illinois SDWA [sic], unlike CERCLA, is not a joint and several liability statute, and does not provide for imposition of joint liability . . . or 'joint' penalty assessment . . ." EJK Rev. Brief at 55. This argument is meritless.

Appellant EJK has provided no basis for claiming that the SDWA does not provide for joint and several liability and the assessment of a joint penalty for violations of its provisions, other than his bald assertions. Moreover, joint and several liability has been found under the SDWA, and joint penalties have issued under the Act, in both the federal court and administrative forums. *See Alisal,* 114 F. Supp. 2d 927, 939; *Sunbeam*, 1999 EPA ALJ LEXIS 93 (1999) [*22-23]. Moreover, it is Appellant EJK's burden to prove that joint and several liability does not apply and that he and Appellant RWS are not subject to the joint penalty assessment in this case. *See In re: Grand Pier Center, L.L.C.*, 12 E.A.D. 403, 427-428 (EAB 2005) (petitioner failed to meet its burden that joint and several liability under CERCLA does not apply to it). See also, *United States v. B & W Investment Properties*, 38 F.3d 362, 367-368 (7th

Cir. 1994) (assessment of a joint $1,500,000 civil penalty against an individual and corporation was proper; both found jointly and severally liable for violations of the CAA); *United States v. JG-24, Inc.*, 331 F. Supp 2d. 14, 70-71, (D.C. P.R. 2004) (substantial joint penalty assessed against violators who were found jointly and severally liable under RCRA, was appropriate). Therefore, RJO Toney did not err in assessing a joint penalty against both Appellants for their violations of the Illinois UIC Program and the SDWA.

Appellant EJK contends that the RJO failed to consider Appellant RWS's inability to pay argument, and erred in not reducing or eliminating the penalty against them. EJK Rev. Brief at 69-70. This argument, too, fails. RJO Toney carefully considered the economic impact of the penalty on the violator, and fully discussed Appellant RWS's financial status with regard to this statutory penalty element. 7/23/08 Penalty Decision at 16-17. She determined that a further reduction in the penalty was not warranted, however, because: 1) both Appellants were jointly and severally liable for their violations under the SDWA, and 2) pursuant to Appellants' stipulation, Appellant EJK did not have an inability to pay the full amount of the penalty. 7/23/08 Penalty Decision at 16-17. Therefore, the RJO properly refused to further reduce or eliminate the joint penalty assessed against Appellants. *Id.*

G. Appellant EJK Was Afforded A Fair Hearing.

Appellant EJK attempts to discredit the transcript of the proceedings by suggesting that it was a "highly irregular transcription" EJK Rev. Brief at 70. Appellant also suggests that the RJO's refusal to allow all of his recommended alterations of the transcript was unfair. *Id.* A

review of the pleadings surrounding Appellants' "controversy" regarding the transcripts, however, will reveal that Appellant EJK sought to make many substantive, self-serving alterations of the transcript that were appropriately disallowed by the RJO. *See* 6/16/07 Complainant's Motion to Conform the Transcripts; 7/3/07 Complainant's Response to Respondents' Motion to Conform the Transcripts; 8/22/07 Complainant's Status Report; 9/7/07 Complainant's Revised Response to Respondents' Joint Motion to Conform Transcript Testimony; and 9/17/7 Complainant's Reply To Respondents' Response and Objections To Complainant's Status Report of 8/22/07; and 10/2/07 Order on Motions to Conform. The RJO allowed the parties to reasonably conform the transcripts. *See* 10/2/07 Order at 2-3. Therefore, Appellant EJK's contention that he was somehow denied a fair hearing because the RJO did not allow him to make all of his self-serving recommended alterations of the transcript, is specious.

Appellant EJK contends that he was not afforded a fair hearing because of his "auditory deficiency." EJK Rev. Brief at 70. This contention is without merit. While Appellant now suggests that the hearing was somehow compromised by his "auditory deficiency," he did not request, at the time of the hearing, that it be halted for that (or any other) reason. *See* TR 4/24-4/26. Further, Appellant did not ask that special accommodations be provided, prior to the hearing, to compensate for his "auditory deficiency." TR 4/26 at 84-85. Further, the court reporter allowed Appellant EJK to view her computer screen at the hearing so that he could see the questions on the screen within moments of the words being spoken. TR 4/26 at 84. Therefore, it is ludicrous for Appellant EJK to suggest that he did not receive a fair hearing

because of his "auditory deficiency."

VI. CONCLUSION AND PRAYER FOR RELIEF

For the reasons set forth above in this Response Brief, Appellee respectfully requests that the EAB reject Appellant EJK's appeal arguments, and affirm the RJOs' orders and decisions that are under appeal before this Board.

Respectfully submitted,

March 27, 2009
Date

Cynthia N. Kawakami

In Re: Rocky Well Service, Inc.
& Edward J. Klockenkemper
SDWA Appeal Nos. 08-02 & 08-03

CERTIFICATE OF SERVICE

I certify that, on the date below, I caused to be delivered by Federal Express, Next Business Day Delivery, Morning Delivery, the original of *Appellee's Brief in Response to the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper,* along with this Certificate of Service, for filing with the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board at the address as follows:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board (1103B)
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

I further certify that, on the date below, I sent via electronic delivery through the EAB's Central Data Exchange, a PDF of *Appellee's Brief in Response to the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper* along with this Certificate of Service, to the Clerk of the Board.

I further certify that, on the date below, I caused to be delivered by First Class United States Mail, postage prepaid, a copy of *Appellee's Brief in Response to the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper,* along with this Certificate of Service, to each of the persons as follows:

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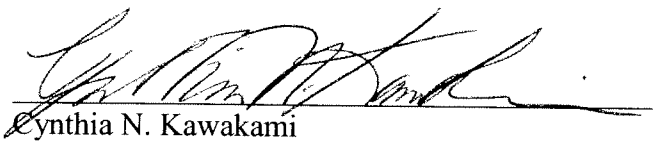

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