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

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

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   b. Officer erroneously rejected RWS's "communication" efforts by equating lack of "good faith efforts" to come into compliance after the date of violation to RWS failed pre-violation efforts to comply with the MIT deadlines, where the instant action and the proposed penalty already account for initial lack of successful good faith efforts, and where Perenchio admitted that post-NOV efforts do count as "good faith" efforts, thus Officer misconstrued and improperly shortened the applicable time span for good faith efforts 182

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D. Huelsing #1 well was MIT'd 3 times by RWS between 1991-2006, an average of once every 5 years, RWS attempted to MIT in 1995, and RWS was observed to be making good faith attempts to comply on this lease by Inspector Matlock 190

E. Harrell #1 and Atwood #1 capped and inactive, damages too great to repair, but RWS still inspected 191

G. Statutory Factor 5 - Economic Impact: EPA/Officer erred by not reducing penalty due to RWS inability to pay where SDWA is not joint and several liability statute, and, in the alternative if joint and several liability is in fact found under the Illinois SDWA, Respondents should be allowed to share "jointly and severally" in RWS's inability to pay reduction. 192

1. EPA found RWS unable to pay proposed penalty 192

2. The SDWA is not a joint and several liability statute, thus RWS should have been

afforded a reduction in penalty, and Mr. Klockenkemper should not be required to pay same, and Officer's reliance on *Sunbeam Water Co.* is in error 192

H. Statutory Factor 6 - Other Matters: Force majeures and other exigencies and legal risks not properly taken into account by EPA/Officer and erroneously not credited to Respondents 193

1. Respondents exhibited "good corporate citizenship" by way of substantial compliance with SDWA 194

2. Weather Regularly and Severely Impeded Access: The Officer erred in finding that inspectors were able to access wells without difficulty since several admitted access problems even for a light car or pickup, and in ignoring documents and testimony of RWS contractors, and of landowners/farmers, indicating that access was in fact impeded on regular basis by weather and other matters, since access RWS required was for heavy equipment, not Jeep or on foot 194

   a. Officer erred by making findings regarding Respondents' weather-related access arguments as to only 2 wells rather than all 6, and even then she addressed them only as to the least accessed, vandalized, inoperable, Harrell and Atwood wells 195

      i. Matlock testimony miscited, since he testified that there were occasions where he could not access the Zander #2 with a light 4-WD vehicle at all due to the muddy dirt access road, that it became "very" muddy when it rained, that it would not be possible to get well working equipment thereon in such condition, that it rained a lot in spring and fall in the area, and tenant Paul Flood confirmed that Zander #2 road was routinely impassable when it rained 196

      ii. Unmentioned by Officer, Matlock also testified that the Huelsing #1 access road was of "very poor" traveling condition due to having been plowed over by farmer and its becoming muddy when it rained 197

      iii. Cunningham testified that Harrell #1 lease road "rutted up pretty bad",] that he did not access Harrell #1 with 4-WD but rather #2, that his access did not prove RWS unable to access on a different day than that day in 1997, and in fact his 2000 inspection report states that there was no lease road at that time 198

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

roads 199

v. Officer erred since Respondent has demonstrated that all 5 of these wells had weather-related access issues, aggravated by repeated plowing of the fields prior to the rainy season, rendering their lease roads impassable to the varying heavy vehicles required to prepare an injection well for an MIT, which in fact adversely contributed to RWS's abatement efforts being delayed and frustrated 200

3. Officer erred in refusing to recognize that vandalism and other interference from landowners and tenant farmers contributed to access/repair problems and both RWS's failure to MIT by deadline, as well as extending time span until compliance was achieved 200

a. Wohlwend #6 pattern and type of well interference incidents were longstanding, material, numerous, admitted by Von Der Haar, and repeatedly documented by County Sheriff 200

b. Adjacent Twenhafel #2 had similar problems as Wohlwend with vandals/ lack of electrical power, plowing under of lease roads by farmer 201

c. Heulsing #1 farmer interfered with RWS according to Matlock and RWS's witnesses, and prevented 1995 MIT attempt 202

d. Harrell #1 equipment vandalized and lease roads plowed over by Lyle Allen delaying MIT/plugging 203

e. Zander #2 vandalized and farmer plowed lease roads 203

f. Atwood #1 equipment and electrical vandalized beyond repair such that MIT not possible, well had been ordered plugged by IDNR prior to EPA issuance of 9/8/00 NOV 204

4. Officer erred in misconstruing Wohlwend litigation as granting RWS right to operate prior to MIT deadlines where deadlines had passed prior to issuance of appealed 1994 state court order initially determining rights and since by law Fisher's appeal stayed the 1994 order until at least April 1997, and was not resolved until even longer after that, so no penalty should have been assessed for this well 205

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

rights to Klockenkemper 205

b. Wohlwend #6 was in possession of and "operated" by C. Fisher from 1977 until court ordered removal of Fihser's equipment and Respondents' taking possession in December 1998, thus it was "impossible" for RWS to MIT prior to 1999 and IDNR recognized this status on 4/17/97 by deferring RWS submission of annual reports until appeals of 1994 Clinton County order and other orders were exhausted 206

c. 8/8/02 Clinton County Court consent order with IDNR allowed Respondents until 11/15/02 to bring Wohlwend #6 into compliance, thus, MIT having been performed on 4/23/01 (not 2002), no penalty should be assessed for MIT or Annual Reporting Violations on this well 207

5. Officer erred in misconstruing Twenhafel litigation as allowing RWS right to operate Twenhafel wells prior to MIT deadline where deadline had passed prior to resolution of Twenhafel litigation in 2001 and where Fisher was in possession until at least issuance of 4/22/97 Rule 23 Order 207

a. Twenhafel permit involuntarily transferred to RWS by IDMM in 1988, Fisher remained in possession of leasehold 208

b. Fisher ordered to plug Twenhafel in 1990 and admittedly operated Twenhafel well from 1992-1997 208

c. IDNR recognized indeterminate status of operator of lease on 4/17/97 by deferring RWS submission of annual reports until Twenhafel appeal resolved . . . 209

d. On 4/21/97 Ruth Ann Maschhoff filed suit to void whatever lease RWS had to the Twenhafel field, separate from *Fisher v. Klockenkemper* , and Maschhoff acknowledges that RWS was not the operator 209

e. On 4/22/97 the Illinois Appellate Court found Fisher in possession, ordered Fisher to vacate his equipment, and awarded right to lease to Mr. Klockenkemper 209

f. Maschhoff litigation not resolved until 2002, and Respondents were found to have no interests in lease 210

g. Officer erred in rejecting Twenhafel reduction since RWS did not have actual or legal right to possession or a valid lease for this well in 1995 or thereafter prior to 2002 second involuntary transfer (to Ed Huels). 210

6. Officer erred in ignoring other "Other Matters" set forth by Respondents 210

a. EPA Opening Statement: Actual need for deterrence not established at hearing (*FOF at p144*) 211

b. IDNR refusal to consider RWS request for temporary abandonment under 62 IAC 1130(c)(1998 Oil & Gas Rules), as codified at time of RWS's request, was contrary to law, deprived RWS of a statutory right, and forced RWS into longer violation period (*FOF at p141-143*) 211

c. Small size discount was not enough since Perenchio/EPA admitted that "RWS not Shell Oil" and could not afford to pay commensurately (*FOF at p144*) 211

d. No economic benefit and no funds available to RWS due to non-production of inactive leases (*FOF at p144-145*) 211

e. Prejudice: RWS/Contractor Recordkeeping - Length of delay in EPA prosecuting this matter and applicability of 805 ILCS 410 three year record retention requirement in Illinois caused loss of evidence and records by RWS and potential witnesses (*FOF at p145*) 211

7. Officer Toney's 7/23/08 and 11/29/07 Orders should be vacated for foregoing reasons, and findings 5-11, 13-16, 19-16, and 28 reversed, and opposite findings of fact should be made to those vacated, and the penalty should be eliminated 212

IX. 7/12/07, 8/27/07, and 10/2/07 TONEY ORDERS ON MOTIONS TO CONFORM 212

A. Posture Below: Mr. Klockenkemper was hard of hearing and could not clearly hear questions at the hearing in Mt. Vernon appellate courthouse, and only a minimal accommodation was provided by EPA of allowing him to read real-time output on computer despite availability of amplification and/or smaller conference room 212

B. Sullivan Reporting released a certified transcript of the 4/26/07 hearing on 5/17/07, which Respondent Klockenkemper and counsel found to be incomplete, erroneous and not reflective of his actual testimony as reflected in Respondents' initial 6/18/07 Motion to Conform 214

C. On or about July 12, 2007, Sullivan Reporting "withdrew" the certified 4/26/07 transcript as not having been proofread, and to check against audiotape for missing portions due to transcription equipment malfunctions occurring in hearing room 215

D. Sullivan indicated that the reporter's transcription computer was malfunctioning on 4/26/07, contributing to erroneous and possible incomplete 4/26/07 transcript, corroborating Respondents' claims of missing and misstated testimony 215

E. Officer erred in 7/12/07, 8/27/07 and 10/2/07 Orders by denying Respondents' 7/5/07 and 8/24/07 Motions requesting that she order EPA-contract reporter Sullivan to release any additional recordings to EPA, depriving Respondents of the opportunity to ascertain the accuracy of the revised transcript and of their requested conformations, since the audio files provided to both Respondents and to EPA for 4/26/07 hearing thus far were garbled and largely inaudible, as claimed by Sullivan 216

F. Sullivan released a revised 4/26/07 transcript on 7/23/07, which side-by-side differed materially and in over 100 instances from initial 5/17/07 transcript, was 10 pages longer, and included at least 20 of Respondent Klockenkemper's requested 6/18/07 conformations to the initial unedited transcript, further corroborating Respondents' claims of erroneous transcription 217

G. Respondents' requested changes met standard for 40 CFR 22.25 as interpreted by Ms. Toney 218

H. Officer Toney erred in granting only a portion of Respondents' conformations, and also because she did so without explanation or basis, and totality of hearing problems and errors amounted to denial of a fair hearing for Mr. Klockenkemper and RWS, thus the conformations should be ordered and no penalty should be assessed due to lack of a fair and accurate hearing for Mr. Klockenkemper 218

X. 5/17/06 TONEY ORDER STRIKING AFFIRMATIVE DEFENSES - FIRST AND EIGHTH AFFIRMATIVE DEFENSES IMPROPERLY STRICKEN 219

A. First Affirmative Defense, that EPA has no subject matter jurisdiction over Mr. Klockenkemper since is not the "Permittee" under the Illinois UIC program, is raisable anytime, may not be stricken 219

B. Eighth Affirmative Defense - IDNR denial of hearing and statutory process for temporary abandonment/future use status is "Other Matter" that should be considered under SDWA statutory penalty factor 6 220

XI. CONCLUSION 220

XII. PROPOSED FINDINGS OF FACT AND LAW 221

A. EPA's 1/25/02 NOV and 2/20/02 amended complaint fail to plead jurisdictional facts, and thus fail to confer jurisdiction to EPA over Mr. Klockenkemper under 225 ILCS 725/8a, and as a result the and the Officer's Order of 12/27/06 is declared null and void as to Mr. Klockenkemper, and the Orders of 2/6/03 and 5/3/05 are reversed and vacated as to non-Respondent Klockenkemper for lack of facial and subject matter jurisdiction as pleaded in 2/20/03 amended complaint. 221

B. EPA failed to plead or prove a prima facie 40 CFR 22.24 case against Mr. Klockenkemper under 225 ILCS 725/8a, 42 USC 300h-2 for the violations alleged, and did not attempt to

pierce the corporate veil of Rocky Well Service, Inc. , thus the 12/27/06 Order is in error and null and void, and vacated as to Mr. Klockenkemper, and he is found not jointly and severally liable under the SDWA and otherwise not liable for the violations alleged. 221

C. EPA failed to meet its 40 CFR 22.24 burden as to the proposed penalty assessment against either Respondent, no harm was shown, no USDW was shown to be threatened, and there was insufficient evidence to support the Officer's own assessment, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent. 221

D. EPA and the Officer failed to properly apply 42 USC 300h-2 statutory penalty factors to each violation at each well, and failed to recognize numerous good faith efforts and other matters, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent 221

E. The Officer committed reversible error in striking Respondent's affirmative defenses, and in the conduct of the April 24-26, 2007, hearing and post hearing procedures, that denied Respondents due process, proper disability accommodations for Mr. Klockenkemper, a fair trial and an accurate record thereof, and the Officer's orders of 5/17/06, 7/12/07, 8/27/07 and 10/2/07 and 11/29/07 where in error and are vacated and reversed as to both Respondents, and this matter is dismissed with prejudice/remanded for further hearing as directed. 221

APPENDIX A - TABLE OF AUTHORITIES (Part 2) . . . . . .a-c