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

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

# REVISED APPELLATE BRIEF

## OF RESPONDENT

## EDWARD J. KLOCKENKEMPER

**March 1, 2009**

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# APPELLATE BRIEF
# OF RESPONDENT EDWARD J. KLOCKENKEMPER

Now Comes Respondent Edward J. Klockenkemper (hereinafter "EJK"), by and through undersigned counsel, and, by reference, Rocky Well Service, Inc. (hereinafter "RWS"), and pursuant to 40 CFR Part 22 submits this revised Appellate Brief requesting the dismissal of Respondent Klockenkemper, and the significant reduction or elimination of the penalty due to, *inter alia*, EPA having determined that Rocky Well Service was unable to pay same.[1]

## I. STATEMENT OF GENERAL ISSUES FOR REVIEW

A. Whether EPA's February 20, 2003 Amended Complaint issued to Mr. Klockenkemper, was well-pleaded and facially and factually sufficient as required by FRCP 12(b)(1) and 12(b)(6) to confer jurisdiction under the Illinois 42 USC 300h-2 SDWA UIC Program (225 ILCS 725) or under the equitable theory of Piercing the Corporate Veil, as to Mr. Klockenkemper. (Kossek Orders of 2/6/03 and 5/3/05, Toney Order of 12/27/06).

B. Whether EPA's January 25, 2002, Notice of Violation issued to Mr. Klockenkemper, was well-pleaded and facially and factually sufficient as required by the SDWA under 225 ILCS 725, and 62 IAC 240.150(a) to give notice, confer jurisdiction over, and allow the amended complaint to issue to Mr. Klockenkemper. (12/27/06 Order)

C. Whether 28 USC 2462's 5 year statute of limitations barred EPA's pursuit of penalties against Respondents for those Count I and Count II MIT violations occurring over five years prior to the filing of the 7/9/01 and 2/20/03 complaints in this matter. (12/27/06 Order).

D. Whether EPA properly met its 40 CFR Part 22 burden as to Respondent Klockenkemper sufficient to allow Officer Toney to impose joint and several liability under 225 ILCS 725 and 62 IAC 240 as to Mr. Klockenkemper either directly or indirectly. (12/27/06 Order)

E. Whether EPA and the Presiding Officer correctly applied the six SDWA statutory penalty factors to each violation at each well as to each Respondent and met 40 CFR Part 22.14 Burdern, and if so, whether the assessed penalty is reasonable and equitable under the facts relied upon by the Officer

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[1]This revised brief is submitted under protest and without waiving objections as to jurisdiction or as to: 1) the EAB's rejection of Respondent's original 10/30/08 brief; 2) the page limit limitations imposed by the EAB, requiring a 70% reduction in the length of the original brief to 70 pages; and 3) to the EAB's prohibition of RWS's submission of an expanded brief of its own, despite the 70 page limit for Respondent Klockenkemper's brief. As a result of the EAB page limitations and bar on substantive revisions to RWS's brief, the Respondents are unable to fully set forth the basis for their appeal of the nine orders under appeal, especially including the basis for their appeal of EPA's 7/23/08 Initial Decision on penalty. Consequently, subject to prior objections and without waiver thereof, Respondents hereby incorporate herein and adopt as part of their appeal as to the errors in and for reduction or elimination of the assessed penalty, the proposed facts and conclusions contained in *Respondents' 12/21/07 Proposed Findings of Fact/Conclusions of Law*; and the arguments contained in: 2) *Respondents 12/21/07 Brief in Support*; 3) *Respondents' 1/22/08 Response to EPA's Brief/Proposed Findings*; and 4) *Respondents' 2/4/08 Reply to EPA's Response to Respondents' 12/21/07Brief*.

(Toney Order of 7/23/08).

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

## II. NATURE OF THE CASE

### A. SUMMARY OF CASE BELOW

This matter arises from the assessment of joint liability and a joint administrative civil penalty of $105,590 under section 1423(c), of the Safe Drinking Water Act as amended (42 U.S.C. §300h-2(c)("SDWA"), and under 40 Code of Federal Regulations Part 22 (Consolidated Rules of Practice)("40 CFR 22") against Respondents Rocky Well Service, Inc ("RWS"), and E.J. Klockenkemper ("EJK") (collectively "Respondents"). Respondents appeal from nine orders below, including a 12/27/06, Accelerated Decision and a 7/23/08, Initial Decision by Presiding Officer Marcy Toney, Esq., as well as 2/6/03 and 5/3/05 orders entered by the prior Presiding Officer Regina Kossek, Esq. Notices of Appeal were filed by Respondents on July 28, 2008, and an amended Notice was filed by Respondent EJK on 10/30/08.

### B. SUMMARY OF FACTS

Prior to and at the time of the 1995-1996 MIT and other violations asserted herein, Rocky Well Service, Inc. ("RWS"), was a duly licensed closely-held Nevada corporation in good standing and licensed to do business in Illinois, whose primary business was providing contract oilfield services related to the production of oil and gas in the southern Illinois area. *C. Exh. 43 at para. 16 (2/20/03 Complaint) ; R. Exh 99 at paras. 3-4 (RWS's 8/23/06 Declaration Opposing Liability)*. At the time of the 2/20/03 complaint, Edward Klockenkemper was one of the directors, and also the President and chief operating officer of RWS. *C. Exh. 37 at para. 16 (7/1/09 Complaint); R. Exh. 99 at para. 2*. In 1988, RWS became the sole "permittee" responsible for the six injection wells subject to this action under 225 ILCS 725, which is the federally-approved SDWA Underground Injection Control program ("UIC Program") for Illinois. *C. Exh. 37 at paras. 20-23; R. Exh. 99 at paras. 6-7; 225 ILCS 725, et. seq.* Under that program, an oil lease operator, or an assignee of such rights (such as RWS) that wished to dispose of the brine that accompanies extraction of oil in that area by injection (rather than by trucking it off), was required to apply for and obtain a UIC permit to be allowed to utilize the

injection well for such purpose, and thus became the authorized "permittee" for such well. *C. Exh. 37 at paras. 20-23; 62 IAC 240.10 and 240.330.* At no time did Mr. Klockenkemper himself ever operate or inject into the six wells, since he had no permit to do so and since he cannot by law inject into another permittee's well (or an unpermitted well). *R. Exh. 99 at para. 8; 62 IAC 240.330.* Prior to and at the time of the 1995-1996 Mechanical Integrity Testing ("MIT") violations, and during the annual reporting violation period 1996-1998, none of the six injection wells were operational or injecting. *R. Exh. 99 at para. 15*. Further, 2 wells had already been MIT'd in 1991 in compliance with the UIC program (Huelsing #1 and Zander #2), and all 6 were properly capped and shut-in prior to 1995-1996 and thereafter, as required by 62 IAC 240 while not in use and awaiting MIT. *R. Exh. 99 at para. 15*. Due to various legal and other force majeure circumstances, RWS was unable to perform MIT's on the six wells by the 1995-1996 deadlines, and did not submit annual reports for the six inoperative wells for the period 1996-1998, leading to this action seeking and imposing a $105,590 penalty "jointly" upon both Respondents. *R. Exh. 99 at para. 15.*

**C. STANDARD OF REVIEW**

On appeal, both the factual and legal conclusions of the Presiding Officer reviewed *de novo*. *40 CFR § 22.30(f)*. Such review is conducted under the "preponderance of the evidence" standard established by 40 CFR § 22.24(b). *In re The Bullen Companies, Inc., 9 E.A.D. 620, 632 (EAB 2001).*

## III. ORDERS UNDER APPEAL

Respondents appeal as to the following orders and seek that they be reviewed de novo as unsupported in fact and law or as otherwise being arbitrary and capricious[2]:

1. **2/6/03 R. Kossek Order Granting Leave to Amend**
2. **5/3/05 R. Kossek Order Denying Motion to Dismiss Complaint (dated 5/18/03 in EPA Docket)**
3. **12/27/06 M. Toney Partial Accelerated Decision on Liability**
4. **11/29/07 M. Toney Order Altering Briefing Format at 11th Hour**
5. **7/23/08 M. Toney Initial Order on Penalty**
6. **10/2/07 M. Toney Order Denying EJK Motion to Conform Transcripts**
7. **5/17/06 M. Toney Order Striking Affirmative Defenses**

[2] Due to the page limitations on this Brief, Respondents direct the EAB to the Respondents' motions, responsive briefs and objections attendant to each order for the arguments rejected by the Officers and for which review is sought to the extent they are not set forth herein. Exhibit A hereto lists Respondents' relevant materials for each order listed.

Respondents allege that in each order the Presiding Officers improperly granted or denied such relief in whole or part because they made related errors of procedural and substantive fact and law, failed to properly interpret, construe and apply the Federally-authorized Illinois underground injection control program law and rules, entirely failed to consider (or explain the rejection of) several of Respondents' affirmative defenses, and ignored an overwhelming number of contrary laws, facts, evidence and testimony of record. These errors and omissions detrimentally resulted in, *inter alia*, the assertion of SDWA jurisdiction over Mr. Klockenkemper's persona where it did not exist, lack of legal notice, denial of a requested hearing for Mr. Klockenkemper on his personal liability prior to imposition of same, improper assessment of joint and several liability, and improper calculation of the penalty.

## IV. STATUTORY AND REGULATORY LIABILITY FRAMEWORK

### A. EPA Adopted Illinois Oil and Gas Act, 225 ILCS 725, as Illinois' UIC Program

Section 1421 of the SDWA requires that state Underground Injection Control ("UIC") programs require persons to obtain permits for any underground injection. *SDWA Section 1421(b)(1)(A)*. Under Section 1421 and 40 CFR 145.21-145.34 and 146.21-146.24, Illinois promulgated and administered its own Class II UIC permit program, and EPA adopted by rule the Illinois Oil & Gas Act, 225 ILCS 725, et seq. and its implementing regulation 62 Illinois Administrative Code Sec. 240, et. seq, ("62 IAC 240") as the Illinois UIC program. *See 40 CFR 147.701*. As such, 62 IAC 240 et seq., represents the federal Class II UIC program's requirements applicable to injection wells and their permit holders under the SDWA in Illinois. (Respondents refer to 62 IAC 240 as promulgated in 1995-1996).

### B. 225 ILCS 725/62 Illinois Administrative Sec. 240 Are Illinois' Class II UIC Program

#### 1. Only Permittee Expressly Responsible for Illinois SDWA Compliance: No Federal or State "Operator Liability" As Under CERCLA or RCRA,

Consistent with Sec. 1421 of the SDWA, Illinois Class II UIC regulations state that "no person shall drill, deepen, or convert for use as a Class II UIC well without a permit...". *62 IAC 240.310(a)*. 62 IAC 240.330(d) specifically provides that "The entity or person to whom the permit is issued shall be called the Permittee and shall be responsible for all regulatory requirements relative to the well.". Thus, the term "person" is applied by the statute to an individual or company which becomes regulated only when he or the company applies for and obtains a UIC permit to

drill/inject, whereafter the "person" becomes the "permittee" and is then subject to the requirements of the permit and the SDWA *62 IAC 240.10, 240.310 and 240.330.*

Contrary to EPA's use of the term "operator", it is not defined under the Illinois SDWA, and the Oil and Gas Act and implementing regulations do not speak to "operators" in terms of regulatory liability, but rather speak of the operation of injection wells by the permittee/owner, or by an unpermitted person.[3] *62 IAC 240.10*. The "operator" of an oil lease is not the "operator" of an injection well located on the lease unless he applies for and receives a permit to inject as a UIC permittee. *62 IAC 240.10 and 240.330*.

**2. A "Person" Other Than the Permittee Becomes Regulated Only When A Permit Should Have Been Obtained For the Person's Injection**

The only other way a "person" other than the permittee becomes subject to SDWA jurisdiction is if he drilled or injected without a permit after April 14, 1991. *62 IAC 240.310(f)*. The only obligation imposed on a corporate officer is contained at 62 IAC 240.330(b) which states: "...If the owner is a corporation, the application shall be signed by an officer of the corporation.".

**C. "Permittee" Expressly Responsible for 62 IAC 240.760 Testing and 240.780 Reporting**

62 IAC 240.760 governs the performance of a mechanical integrity test ("MIT") on a permittee's wells, and speaks only to the "permittee", not an "operator" or "any person". 62 IAC 240.760(a) stated "For purposes of this Section, establishment of internal mechanical integrity includes proper placement of the packer in accordance with subsection (b) and successful completion of a pressure test in accordance with subsection (g).". 62 IAC 240.760(c) allowed a "permittee" to request alternative packer placement from IDNR, and 62 IAC 240.7760(d) and (g) required the "permittee" to contact IDNR 24 hours before setting the packer and 24 hours before performing the pressure test to allow an IDNR inspector to be presents. Finally, 62 IAC 240.760(f) required that all Class II UIC wells not pressure tested by September 1, 1990, be tested by September 1, 1995, and required the "permittee" to test at least 20% of its wells every year, such that all each is tested every five years. With regard to reporting, 62 IAC 240.780(e)

[3] "Owner" is defined as the "person who has the right to drill into and produce from any pool, and to appropriate the production..."; "Permit" means "the Department's written authorization allowing a well to be drilled, deepened, converted, or operated by an owner"; "Permittee" means "the owner holding or required to hold the permit... who is responsible for compliance with all statutory and regulatory requirements pertaining to the well". *225 ILCS 725/1*; *62 IAC 240.10.*

requires that the "permittee" of each Class II well file an Annual Well Status Report.

**D. Enforcement Jurisdiction Limited to "Permittee" or Unpermitted Operator**

42 USC 300h-2 provides EPA jurisdiction to enforce in a State with primary authority only against a "person who is subject to a requirement of an applicable underground control program in such State [who] is violating such requirement", after issuance of a notice of violation and a lack of State action. (Emphasis Added). Concomitantly, Illinois' Class II UIC enforcement authority is provided by 225 ILCS 725/8a, which states that an action may be taken only against a"permittee, or any person engaged in conduct or activities required to be permitted under this Act.". Consistent with its authorizing statute, 62 IAC 240.150(a) authorizes issuance of a notice of violation to "any permittee" or when "any person engaged in conduct or activities required to be permitted..[is]...in violation of any requirement. (Emphasis added). It is against this statutory framework, limiting SDWA liability to a permit holder or an unpermitted injector, that Respondent appeals the orders finding EPA jurisdiction over and imposing liability against Mr. Klockenkemper, as discussed below.

**V. ARGUMENT**

**A. First Affirmative Defense - Amended Complaint was Facially and Factually Insufficient under FRCP12(b)(1) and 12(b)(6): As Pleaded EPA had no Jurisdiction over Non-Permittee Mr. Klockenkemper Under the SDWA or in Equity**

Respondent EJK asserts as an initial matter that it was error for the Presiding Officers to ignore their gatekeeping duties under FRCP 12(b)(1) and FRCP 12(b)(6) by failing to address, and proceeding against Respondent EJK's FRCP 12(b)(1) and 12(b)(6) jurisdictional objections to EPA's direct liability pleading structure set forth in the proposed amended complaint *(2/6/03 Kossek Order*) and in the amended complaint (*5/3/05 Kossek Order denying FRCP 12 dismissal; 12/27/07 Toney liability Order*).[4] Respondent EJK challenges the jurisdiction of EPA de novo

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

under the SDWA and under the theory of piercing the corporate shield, based upon the lack of sufficient jurisdictional allegations and facts in the amended complaint and in the record. *FRCP(12)(b)(1), FRCP 12(b)(6)*; *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577, (1999))*("Jurisdiction is the 'power to declare law,' and without it the federal courts cannot proceed...Accordingly, not only may the federal courts police subject matter jurisdiction sua sponte, they must"). Respondents assert that EPA and both Ms. Kossek and Ms. Toney erred in misinterpreting the SDWA liability scheme and thus asserted and found jurisdiction where it was not properly pleaded and did not exist over Respondent EJK.[5]

**1. Initial Complaint Properly Pleaded Illinois SDWA Liability and Jurisdiction as to RWS**

EPA's initial 7/09/01 complaint correctly pleaded the current state of Illinois SDWA liability at that time, properly alleging that RWS was the permittee and that it was thus regulated under the SDWA.. *C. Exh. 37 at paras. 20, 22; 62 IAC 240.10, 240.150 and 240.330(d).* The initial complaint also correctly pleaded the legal fact that only RWS was allowed and authorized to inject by way of RWS permit. *Id. at paras. 22 and 23.* It also expressly and correctly pleaded that the "permittee" of a Class II UIC well was responsible for performing MIT's and annual reporting as described at 62 IAC 240.760 and 240.780. *C. Exh. 37 at paras. 31, 34, 41-42, 46, 48-49.* EPA's complaint made no mention of Mr. Klockenkemper, despite EPA's awareness of his existence and role in RWS. *See C. Exh. 33 - 5/19/99 IDNR Referral of RWS to EPA, at p2, top, and at 13th page of Attachments*; *C. Exh. 34-RWS NOV* (addressed c/o "President" Klockenkemper);

**2. Amended Complaint Attempts to Infer Direct SDWA Liability Against Mr. Klockenkemper as if he were a "Permittee", but Only Alleges he Was An "Owner/Operator" of the Wells**

EPA's initial substantive addition to the initial complaint found in the Amended Complaint claims, in it's "General Allegations" section, that jurisdiction against Mr. Klockenkemper is based

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an equitable theory of relief for piercing RWS's corporate veil. *2/6/03 Kossek Order at 10.* (Stating that the issue of piercing "will become a question of fact to be developed in the administrative record.").

[5] *See Also Karazanos v. Madison Two Assoc.*, 147 F.3d 624, 625-26 (7th Cir. 1998)(Jurisdiction is raisable at any time and is subject to de novo review since federal courts have limited subject matter jurisdiction and may only hear cases when empowered to do so by Constitution and act of Congress); *Radil v. Sanborn Western Camps, Inc., 384 F.3d 1220 (10th Cir 2004)*(A court must be satisfied that jurisdiction exists before proceeding to the merits of a case).

on 42 U.S.C. 300h-2(a)(1). *C. Exh. 43 at paras. 6 and 13*. As discussed above in the statutory framework section, under the federally-approved state UIC law, EPA was then required to plead that either Mr. Klockenkemper was a "permittee" that violated a Illinois SDWA UIC requirement which applied to him, or that he operated an injection well without a permit, either of which allegations, if true, would then render him a "Person" regulated by the SDWA. *42 USC 300h-2, 225 ILCS 725/8a, 62 IAC 240.150(a).* However, the amended complaint alleges only that RWS was the "owner and/or operator" of the six wells (rather than the prior allegation of RWS as "permittee"in para. 20 of the initial complaint), and only that Mr. Klockenkemper is the "operator and/or person who conducted [RWS's] day-to-day maintenance and production operations with regard to the [six] Wells.". *Compare C. Exh. 37 at para. 20 to C. Exh. 43 at paras. 22 and 23.*

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

. Based on the allegation that EJK was an "operator" of RWS in relation to the wells (or the operator of the wells), the amended complaint concludes that Mr. Klockenkemper was regulated under the SDWA because he allegedly was "allowed" or "authorized to inject by way of RWS's permit under 40 C.F.R. 144.3. *C. Exh. 43 at paras. 25-26, 29 - Compare to C. Exh. 37 at paras. 22-23.* Concomitantly, EPA's complaint provides no specifics as to any alleged unauthorized injections by EJK.[6]

**4. Amended Complaint Contained Other Significant Altered "General Allegations" as to RWS Not Reflected in Initial Complaint and Implying Lack of Jurisdiction over EJK**

In addition to failing to designate RWS or EJK as the permittee, the amended complaint made other significant allegations with regard to the initial complaint's pleading of RWS's status. As noted above, rather than stating that RWS was the "permitted operator" as pleaded in the initial complaint, EPA's amended complaint now states only that Rocky Well "is or was the owner and/or operator" of the six wells at issue. *C. Exh. 43 at para. 22 Compare to C. Exh. 37 at para. 20*. Similarly, EPA alleged that "The State of Illinois issued permits to...Rocky Well" for the six wells

[6]EPA also asserted that the determination that Mr. Klockenkemper was subject to 62 IAC 240.760 and 240.780(e) was made by EPA sometime after August 23, 2001. *Complaint at para. 35*. However, EPA does not set forth any fact supporting its "determination" how EJK became liable for the $107,000+ civil penalty, when he was not so liable on July 9, 2001.

at issue (*C. Exh. 43 at para. 25 - Compare to C. Exh. 37 at para. 22)*, and that at all times relevant to the complaint, Rocky Well was authorized to perform injections into the six wells. *C. Exh. 43 at para. 26 - Compare to C. Exh. 37 at para. 23.*

**5. Specific Allegations of Violation In Counts I and II Also Omitted Term "Permittee"**

Consistent with the above-noted alterations to the general prefatory general allegations (especially the absence of the term "permitted" from the initial complaint in new para. 22), the amended complaint also omitted the term "permittee" from the operative paragraphs of Counts I and II of the initial complaint, stating the requirement to MIT in the passive. *Compare C. Exh. 37 at paras. 20, 31 and 39* (stating the "permittee" RWS was required to MIT the wells) *to C. Exh. 43 at paras. 22, 23, 43 and 51* (stating only that the wells were required to be MIT'd).

**6. Face of Complaint And Illinois SDWA Establish Jurisdictional Inadequacy of Amended Complaint Under SDWA and FRCP 12, SDWA Direct Liability Jurisdiction Absent Under Either SDWA Prong as to Mr. Klockenkemper**

As noted above, the Illinois SDWA UIC Class II program imposes responsibility and bestows authority to inject only on the "permittee", and imposes liability only on the permittee or "another person" engaging in unpermitted conduct . *62 IAC 240.10, 240.150(a) and 240.330(d).* EPA admits that only RWS is the "permittee", as acknowledged by Officer Kossek, "...both parties agree that the permittee is Rocky Well Service, Inc.". *5/3/05 Kossek Order at 4.* Consequently, the only remaining avenue for direct liability for EPA's complaint was to allege that Mr. Klockenkemper engaged in unpermitted injection, yet the amended complaint (erroneously) states that he was "authorized to inject" by RWS permit, thus any injection would have been "permitted" by RWS's permit, eliminating the remaining liability category of unauthorized injector. *C. Exh. 43 at paras. 25 and 26.*

EPA's amended complaint's restructuring of the initial complaint is a simply incorrect, since under the Illinois SDWA, RWS's permit does not allow Mr. Klockenkemper or any other officer to inject as if he were the permittee, and does not subject him to regulation and liability under the SDWA MIT permit requirements in the same manner as the permittee RWS. .[7] *C. Exh. 43 at*

[7]The only specific mention of officers, directors, or owners with regard to failure to comply with the Illinois SDWA is in regard to an officer who fails to prevent a permittee from continuing to inject after his company was ordered to cease injecting, but the regulation does not impose any independent liability on such officer for such failure. *225 ILCS 725/8a(3); 62 IAC 240.250(b)(3) and 240.1460(a)(5) and (6).*

*paras. 25, 26, 29 and 35. 62 IAC 240.10, 240.150(a) and 240.330(d)*. In essence, the combined assertions of EPA's complaint amount to alleging that, because he was a managing officer of RWS's operations, he was a defacto "Permittee". However, there is no such provision in the SDWA. *225 ILCS 725 et seq.* Such assertion is also antithetical to the SDWA's primary purpose of preventing drilling or injection by anyone not named in a permit, since it would allow a non-permitted officer or "person" to do so without submitting and obtaining approval of an application (and without paying the fees that sustain the program). *Id.*

Since EPA's jurisdictional allegations in paragraphs 25, 26 and 35 are legally and factually incorrect as to Mr. Klockenkemper, who was not "authorized" to inject at any time after transfer of his permits to RWS in 1987 (*See e.g. C. Exh 145 and R. Exh. 1*), the allegations must be ignored as ineffective to confer jurisdiction. Without those allegations, the amended complaint is facially deficient since, even taking all the other foregoing listed allegations as to Mr. Klockenkemper as true, it does not contain the requisite jurisdictional allegations or facts allowing it to exercise jurisdiction against Mr. Klockenkemper as a "permittee" under the SDWA as promulgated at 62 IAC 240 et seq. *See In Re Strong Steel Docket Nos. RCRA-5-2001-0016 (10/27/2003), See Also Legal Environmental Assist. Foundation v. U.S. EPA, 276 F. 2d 1253 (11th Cir. 2001)*("Agency deference aside, EPA cannot rewrite legislation through interpretation, it must abide by enabling statutes and regulations until they are amended).

Further, the amended complaint is entirely bereft of any facts or allegations that Mr. Klockenkemper himself engaged in any unpermitted conduct which violated the SDWA as to the six wells, or otherwise. Given that the amended complaint alleges he is authorized to inject, the complaint cannot and does not allege Mr. Klockenkemper to be "any other person" engaged in unpermitted activity under 62 IAC 240.150 or 225 ILCS 725/8.

Thus, the amended complaint was and is jurisdictionally deficient since neither prong of SDWA liability is alleged, and it should have been and must now be dismissed under FRCP 12(b)(1) and 12(b)(6) as to the SDWA direct liability claims against Mr. Klockenkemper.

**7. Absent Direct SDWA Jurisdiction, EPA was Required to Plead and Pierce of Corporate Veil to Find Officer Liable for Permittee's Violations**

Dismissal on jurisdictional grounds was also indicated by case law holding that no independent U.S. EPA enforcement authority exists under Sec 1423 of the SDWA as to an officer, director, or

sole shareholder of a Class II well permittee by way of the statute itself. *See In Re J. Magness, Inc., Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996).* In such a case, EPA's only avenue for imposing liability against a non-permitted officer of a corporate UIC permittee was to attempt to specifically plead, and then prove, facts allowing it to "Pierce the Corporate Veil" ("PCV"). *Id.*

**a. EPA Region 8 Made Identical "Officer Liability" Arguments Which Were Rejected in *In Re J. Magness, Inc., Docket No. UIC-VIII-94-03, 1996 EPA RJO Lexis 9. (October 29 1996)***

In *In Re J. Magness*, EPA Region 8 attempted to impose liability and a civil penalty of $125,000 for alleged SDWA reporting and MIT violations on J. Magness, Inc., and also on Jay D. Magness, the corporation's sole managing owner, director and shareholder. *Id.* As in the instant matter, Region 8 EPA based his individual liability solely on his being a "person" as defined at SDWA Sec. 1401, 42 U.S.C. 300f(12) who was the "operator" of the injection wells, without designating him as the permittee or as an unauthorized injector in the complaint. *Id., See C. Exh 43 at para 17.*

**b. Mere Allegation that Officer is a "Person" who runs Closely Held Corporation not Enough to Impose Liability as "Permittee"**

Contrary to Ms. Kossek's findings, the *Magness* ALJ stated that alleging that a Respondent is a SDWA regulated "Person" solely by way of being an officer of a permittee (and thus a "person" under the SDWA's generic definitions), is inadequate to impose liability since, contrary to the Presidng Officer's assertion here, the SDWA and its legislative history do not state that the corporate shield should be ignored:

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

The *Magness* ALJ found that to hold a corporate officer liable under the SDWA for an MIT permit violation such as RWS's, he would have to find the officer to also be the permittee. See *Magness, at footnotes 14 and 15 and associated text*. However, since Region 8 (like EPA Region 5), admitted the "permittee" was the corporate entity Magness, Inc., only the corporation could be held to be the permittee, and there was no direct liability under the SDWA as to Mr. Magness. *Id*.

EPA Region 5 has the same jurisdictional problem here: as previously noted, it admits on the record that Rocky Well Service, Inc. is the sole permittee and thus EPA cannot attach jurisdiction

to Mr. Klockenkemper as the "Permittee". *5/3/05 Kossek Order at 4 ( "...both parties agree that the permittee is Rocky Well Service, Inc."); 62 IAC 240.150(a).* Given the statutory scheme, like Region 8, EPA Region 5 is also unable to rely on its bald repetition of the definition of "person" in the SDWA to confer jurisdiction over Mr. Klockenkemper as a "Person" and "Permittee" under 62 IAC 240 or the SDWA. *In Re Magness, Supra.* Since EPA Region 5 also does not allege EJK engaged in unpermitted injection, and thus has no direct SDWA jurisdiction as to him, individually, for the SDWA violations or civil penalties alleged in the amended complaint, EPA was constrained to plead and pursue (as stated by Ms. Kossek) "standard hornbook principles" of corporate law relating to derivative liability by piercing the corporate veil. *2/6/03 Kossek Order at 10*; *In Re J. Magness, Inc., Supra*.

**8. Amended Complaint Does Not Allege PCV Elements or Seek Equitable Relief**

**a. Ms. Kossek's Grant of Leave to Amend Contemplated that EPA Would Plead Elements for "Piercing the Corporate Veil" in Forthcoming Amended Complaint, but EPA did Not**

In her 2/6/03 order Ms. Kossek explicitly stated that amendment would not be futile since derivative liability was being pursued and "EPA is attempting to pierce the corporate veil".[8] *2/6/03 Order at 10*. Such finding is error since an inspection of the amended complaint as proposed on 5/1/02 and as filed reveals that EPA did not plead the specific elements required to pierce the corporate veil (or even state that such relief was being sought).[9] *C. Exh 43*.

**b. EPA Complaint Must Allege All Three Elements Of PCV Theory With Specificity Under FRCP 9 and 12**

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[8]Rather than confining her FRCP 12(b) analysis to the face of the complaint, Ms. Kossek went outside the complaint to EPA's briefs, finding that the EPA's analysis of EPA's main case, *In Re Sunbeam Water Company, Inc.*, Dkt. No. 10-97-0066-SDWA (10/28/99) indicated that EPA would attempt to hold Mr. Klockenkemper "liable under the ordinary application of corporate law principles..." by piercing the corporate veil. *2/6/03 Order at 10*.

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

Due to the reluctance of a court to disregard the corporate form, the burden is high on a plaintiff to plead and prove facts showing that there was 1) control by an "alter ego", 2) an indistinguishable unity of interest between the individual and the corporation, and 3) that fraud would continue causing an inequitable result to occur. *S.A.M. Electronic, Inc. v. Osaaraprasop, et al., 1998 U.S. Dist. Lexis 3214 at 3235-3237 (N.D. ILL 1998)*(Complaint alleging only that individual is president/sole shareholder inadequate to allow pursuit of PCV theory since unity of interest and sham/fraud/injustice must also be pleaded in complaint to withstand FRCP 12(b)(6) motion). Due to the fraud/sham component and tenor of the theory, FRCP 9(b) also requires pleading with specificity when attempting to pierce the corporate veil. *Bd. of Trustees of Teamsters Local v. Foodtown, Inc., 296 F.3d 164, 173 n.10 (3d Cir. 2002)*(When a plaintiff seeks to pierce the corporate veil, its pleading is subject to specific pleading requirements of FRCP 9(b)); *U.S.A. v. Peter E. Jolly, et al., 2000 U.S. App. LEXIS 29907; 51 ERC (BNA 2083)(2000)*(Individual officer held liable under SDWA 42 U.S.C. 300h-2 by piercing of the corporate veil only where PCV theory was specifically pleaded and proved).

**c. EPA Complaint Does Not Plead All Three Elements: No Alter Ego, Violative Conduct, or Fraud Alleged, Despite FRCP 9(b) Requirement for Specific Pleading**

On inspection it is clear that the amended complaint does not plead the 3 required elements for piercing the corporate veil of either an Illinois or Nevada corporation. In fact, Officer Toney confirmed this when she expressly found that EPA did not base its claims in this matter on a PCV theory: "Complainant argues that Respondent..is directly liable..<u>it does not argue derivative liability based on a "piercing the corporate veil theory</u>.". *12/27/06 Initial Decision at 12*. (Emphasis added). Aside from the ineffective statement that Mr. Klockenkemper had several duties for Rocky Well at the time of issuance of the complaint, the pleading does not contain a scintilla of fact, or even conclusory language, indicating EPA was attempting to seek to hold Mr. Klockenkemper liable as an alter ego or for fraudulent conduct by piercing the corporate veil.[10]

[10]The amended complaint added the following undated allegations as to Mr. Klockenkemper: 1) He "is an individual who serves" various management positions in and "conducts the day to day operations of Rocky Well.". (*C. Exh. 43 at para. 17* )(stated in the present tense without alleging him to have so served in 1995-1996); 2) He is or was the "operator and/or the person who conducted the majority of Rocky Well's day-to-day well maintenance and production operations" with regard to the wells at issue *(Id. at para. 23*)(again without a temporal attribution to the 1995-1996 MIT violations)

*C. Exh. 43*. Given that the Complaint does not plead PCV or even request as relief that the court use its equitable powers to PCV, it does not provide even minimal notice that EPA would pursue any other claim than the direct SDWA liability theory discussed above.[11]

**d. EPA Amended Complaint Fails to Allege That Mr. Klockenkemper Had Control or Did Anything Related to RWS or the Wells at the Time of Violations**

EPA's complaint fails to connect the alleged roles of EJK to the time of the alleged violations, and thus does not establish even a prima facie case on the control element of PCV for the 1995-1996 violations as a result. *Campbell v. U. Of Akron, 2006 U.S. App. LEXIS 25876 (6th Cir. 2006)*(To establish a causal connection between claimed conduct and violation, Complainant must allege and prove a temporal proximity between the alleged conduct and alleged violation).

**9. Amended Complaint Defective on its Face and Does Not Confer Any Jurisdiction Over Mr. Klockenkemper Under 225 ILCS 725/8a or PCV Theory**

As set forth above and as evident from the face of the complaint, EPA did not plead that Respondent Klockenkemper was the permittee, that he engaged in activities required to be permitted, or that he violated a SDWA permit requirement that applied to him, despite 42 USC 300h-2 and 225 ILCS 725/8a requiring a Respondent to be pleaded as such for jurisdiction to attach. The amended complaint also fails to plead the 3 specific elements and supporting facts required unde FRCP 9 and 12 for piercing the corporate veil, despite Officer Kossek's grant of leave conditioned on EPA's pursuit of such equitable remedy. *2/6/03 Kossek Order at 10; Bd. of Trustees of Teamsters Local v. Foodtown, Inc., Supra; Kelsey Axle & Brake Division v. Presco Plastics, Supra.* Thus, the complaint's lack of jurisdictional pleading of SDWA direct or adequate indirect PCV liability elements requires that the EAB dismiss Mr. Klockenkemper from this matter, since EPA's improper pleading was inadequate to confer SDWA jurisdiction over

[11]*See e.g. United States v. Peter E. Jolly, JAF Oil Company, Inc. and Strategic Investments, Inc., 2000 U.S. App. LEXIS 29907 (6th Cir. 2000)*(Sole director/shareholder derivatively liable under PCV due to his failure to cease corporation's continued injection into 89 injection wells in violation of SDWA administrative order, his fraudulent transfer of assets to sham corporation, his history of "bad-faith" non-compliance with the AO, and his abject and fraudulent disregard of corporate formalities. *Id.*

him, directly or indirectly.[12] *In Re J. Magness, Supra*, *Kelsey Axle, Supra*.

**B. Second Affirmative Defense: 1/25/02 Notice of Violation ("NOV") to Respondent Defective and Insufficient to Confer Jurisdiction and Enforcement Authority Because Like Amended Complaint it Misinterprets, Misapplies and Mis-cites Existing Statutory Requirements under *225 ILCS 725/8a, 62 IAC 240.150(a) and 42 U.S.C. 300h-2(a)(1),* and Thus Action Cannot be Maintained Based Thereon**

**1. Second Affirmative Defense Challenging Jurisdiction Erroneously Not Addressed and Entirely Ignored By 12/27/06 Toney Order**

Despite previously refusing to strike this defense (*5/18/06 Toney Order at 4-5*) Officer Toney's 12/27/06 Order entirely ignores Respondent's jurisdictional second affirmative defense that the underlying 1/25/02 EPA NOV to Mr. Klockenkemper (*C. Exh. 39*) fails to comport with the Illinois SDWA requirements for NOV's establishing jurisdiction as set forth at 62 IAC 240.150 and 225 ILCS 725/8a. *12/27/06 Toney Order*. Respondent previously and again argues

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[12] In regard to her 5/3/05 Order, Ms. Kossek's errors appealed here also include: 1) Failing to discuss and make findings as to Respondent's jurisdictional arguments supporting its 4/15/03 Motion to Dismiss and as to the sufficiency of the challenged paragraphs; 2) Ignoring the *J. Magness* case and misinterpreting and misapplying 42 USC 300g Public Water System "operator liability" cases to reach her erroneous finding that the Illinois SDWA/42 USC 300h provides for direct statutory liability of a corporate officer who is not a permittee or unpermitted injector *(5/3/05 Order at 5*) See *In Re Sunbeam Water Company, Inc, Dkt. No. 10-97-0066-SDWA (10/28/99)*(Individual managing corporation running a Public Water System held liable under 42 USC 300g for operating PWS in violation of agreed order that he signed in his personal capacity) and *U.S. v. Alisal Water Corporation , 114 F.Supp 2d 927 (N.D. Cal. 2000)*(PWS operators held liable for active, fraudulent, egregious illegal conduct which violated SDWA 42 USC 300g); 3) Misciting *Sunbeam* and *Alisal* for her finding that the SDWA allows EPA to disregard the corporate form to reach a corporate officer without piercing the corporate veil (*Order at 5*); 4) Improperly relying on bald legal conclusions (*C. Exh. 43 at paras. 17, 35, 48, 58, 65*) as "facts" to find that the complaint stated a prima facie case under FRCP 12(b)(1) and that it was sufficient under FRCP 12(b)(6) (*Order at 6-9, See Lewis v. Stevenson, 2005 U.S. App. LEXIS 1993, 1999 (10th Cir. 2005), Dixon v. Coburg Dairy, 2004 U.S. App. LEXIS 10233 (4th Cir 2004)*(Conclusory assertion that defendant was subject to and violated federal statute not sufficient to demonstrate subject matter jurisdiction), *Roche v. Lincoln Property Co, 373 F.3d 610; 2004 U.S. App. LEXIS 13488 (4th Cir 2004*)(federal courts with limited jurisdiction must presume the absence of jurisdiction and must ignore mere conclusory allegations of jurisdiction), *NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005)(*FRCP 12(b)(6) requires more than bare assertion of legal conclusions, complaint must contain either direct or inferential allegations respecting all the material elements and state a viable legal theory); 5) Asserting that the complaint alleged that Respondent "is the person who would have performed/arranged for" the MIT, even though this is <u>not</u> alleged anywhere in the complaint. (*Order at 6, 8*); 6) Misrelying on a FRCP 15, CAA case to support her erroneous FRCP 12(b)(6) findings *In the Matter of Wayne Vaughn, Sr., et al, Dkt. No. 9-2001-0002 (7/25/02)*(EPA FRCP 15 Motion for Leave to Amend granted to add CAA statutory claims, no mention of PCV or FRCP 12(b) made in decision)(*Order at 9*).

that since EPA failed to perfect the SDWA jurisdictional prerequisite to this action as to him, EPA could not issue the amended complaint and cannot maintain this action now. *See Respondent's 7/11/05 Answer at 12-13; Respondent's 3/14/06 Response to 2/13/06 EPA Motion to Strike at 9-10; Respondent's 6/6/06 Amended Answer at 10-11; and Respondent's 8/28/06 Response to EPA Motion for Accelerated Decision at 42-44.* Respondent's second defense asserts that the January 25, 2002, NOV is jurisdictionally, legally and factually invalid as to Mr. Klockenkemper since, like the complaint, the EJK NOV fails to allege that he is the "permittee" of said wells or that he otherwise personally "engaged in conduct or activities required to be permitted under the [SDWA]" (e.g. unpermitted injection). *62 IAC 240.150(a)*. As with the complaint, the NOV's allegation that Mr. Klockenkemper was the "operator" (undefined in 42 USC 300h-2) is ineffective to confer notice or jurisdiction under the Illinois SDWA statute since, unlike CERCLA or RCRA, there is no "operator liability" for injection wells under 42 USC 300h.

Respondent asserts that Officer Toney's ignorance of the second affirmative defense was error since she failed to exercise her gatekeeping duties under FRCP 12(b)(1) and 12(b)(6) by way of her failure to comport with her duty to closely scrutinize and assure jurisdiction was present after the issue was raised to her. *See Ruhrgas AG v. Marathon Oil Co., Supra, and other jurisdiction cases cited above.*

**2. 42 USC 300h-2(a)(1) Requires NOV Prior to Action, and 62 IAC 240.150(a) Expressely Prohibits EPA Action in Absence of Issuance of a Proper NOV**

42 USC 300h-2(a)(1) and 62 IAC 240.150(a) provide that after an EPA "determination" of a violation by a "permittee" or a "person" conducting unpermitted activities, an NOV must be issued to the permittee or "any person engaged in conduct or activities required to be permitted under the Act", and that "a person cannot be held liable...in the absence" of the issuance of an NOV. Thus, in order to issue the initial complaint in this matter, EPA had to issue an NOV to RWS (*9/8/00-R. Exh. 31*), and, prior to the 2/20/03 amended complaint, one to EJK (1/25/02).[13]

**a. 1/25/02 NOV Does Not Contain Determination That Mr. Klockenkemper Was the Permittee or an Unpermitted Violator but Only Alleges Klockenkemper Is "Operator"**

[13] Respondents object that EPA somehow failed to include a copy of the 9/8/00 NOV as part of *C. Exh. 34*, or anywhere else in its PEX submissions, and assert that EPA has failed to establish on the record under 40 CFR 22.24 that it issued a proper NOV to RWS.

Contrary to 62 IAC 240.150(a), the 1/25/02 NOV only alleges that Mr. Klockenkemper was the "operator" of the wells, despite the fact that the Illinois UIC program does not even define "operator" for purposes of responsibility and liability for regulatory compliance. *See C. Exh 39 at para. 14; 62 IAC 240.10 (Definitions).* Upon comparison, this allegation is inconsistent with the 9/8/00 NOV to RWS, which correctly states that RWS was the "permittee" rather than the "operator", and that the permittee was responsible for compliance. *R. Exh. 31 at paras. 11, 12, 13, 16, **17,** 18.* Thus, para. 14 of the EJK NOV fails to comport with the requirement that EPA name as the respondent either the permittee, or a person operating without a permit. *62 IAC 240.150(a); 42 USC 300h-2(a)(1).*

**b. EPA NOV Miscites the Applicable Requirements at 62 IAC 240.760 and 780, Which Address Permittees and do not Use the Term "Operator"**

Contrary to EPA's recitation at para. 11 of the NOV of 62 IAC 240.760(e)(6), and as previously discussed, that provision does not require the "operator" to conduct the test, but rather just requires that a MIT be performed, and thus para. 11 of the NOV is legally incorrect and ineffective. *C. Exh. 39 at 11; 62 IAC 240.760(e)(6).* Next, paragraph 12 of the NOV ignores the fact that companion regulation 62 IAC 240.760(f) specifically provides that the *"permittee* shall conduct an internal mechanical integrity test" on each well at issue in this complaint, and again does not use the term "operator" as stated at para. 12 of the NOV, thus para..12 is inadequately pleaded. *C. Exh. 39 at para. 12; 12/27/06 Decision at 13; Compare to R. Exh. 31 at paras. 11 and 12.* Similarly, as acknowledged by Officer Toney and mis-stated by EPA's NOV, 62 IAC 240.780 also requires the annual reports to be submitted by the "permittee" and does not use the term "operator", and thus para. 13 of the NOV is legally incorrect and a nullity. *C. Exh. 39 at para. 13; 12/27/06 Decision at 13.* Finally, as with the amended complaint, EPA's assertions at paras. 14 and 16 of the NOV, that Mr. Klockenkemper was the "operator" of the wells, does not bring him within the ambit of 62 IAC 240.760 or 240.780, since these requirements only apply to the "permittee" and not to an "operator" or a non-violating "person". *C. Exh. 39 at paras. 14, 16.*

**3. NOV Invalid Because it Impermissibly Omits Term "Permittee" and Substitutes "Operator" In Attempt to Non-Legislatively Expand Ambit of SDWA**

Since the 1/25/02 EPA NOV fails to determine or allege that Mr. Klockenkemper was a

"permittee", and fails to determine or allege that he "engaged in an activity" for which he should have obtained a permit under the SDWA, it fails to comply with 62 IAC 240.150(a) and is invalid. The differences between the EPA's assertions in its initial complaint and 9/8/00 NOV, when compared to the 1/25/02 NOV, are further evidence of EPA's impermissible attempt to reinterpret the Illinois SDWA to apply to other entities beyond those two categories provided by the statute. *Legal Environmental Assist. Foundation v. U.S. EPA, 276 F. 2d 1253 (11th Cir. 2001)*("Agency deference aside, EPA cannot rewrite legislation through interpretation, it must abide by enabling statutes and regulations until they are amended").[14] Since there was no valid NOV issued to Mr. Klockenkemper 62 IAC 240.150(a) and 225 ILCS 725/8a prohibited this action from being initiated and maintained and the EAB must dismiss Mr. Klockenkemper from this matter.[15] *Id.*

**C. Eleventh Affirmative Defense: 28 USC 2462 5-year Limitations Period Barred EPA's Pursuit of Penalties Against Respondents for Those Count I and Count II MIT Violations Occurring over Five Years Prior to the Filing of the 7/9/01 and 2/20/03 Complaints in this Matter, since MIT Requirement Is Not "Continuing" but Rather "Intermittent" and "One-time" for 28 Usc 2462 Purposes (12/27/06 Order)**

In her findings, the Officer rejected most of Respondents' argments that 28 USC 2462 operated to bar EPA's July 9, 2001, initiation of a penalty action as to the Count II (September 1, 1995) testing violations against Rocky Well Service, Inc. (*See Respondent's 6/6/06 Answer and Amended Affirmative Defenses*; *Respondents' 7/21/06 Memorandum in Support of Motion*

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

[15]Officer Toney erred in her 12/27/06 order by, *inter alia*, ignoring and thereby denying Respondent's second defense, and in failing to dismiss this matter with prejudice due to the EPA's failure to establish proper pre-complaint notice to confer SDWA subject matter jurisdiction to EPA over Mr. Klockenkemper. Officer Kossek erred in 1) allowing leave for the amended complaint to be filed despite the jurisdictional defects in the NOV and proposed Amended Complaint (*2/6/03 Kossek Order*) and 2) failing to dismiss the Amended Complaint despite lack of adequate jurisdictional pleading in the NOV and Amended Complaint (*5/3/05 Kossek Order*).

*for Accel. Dec. at 5-12*; *Respondents 9/18/06 Joint Reply to EPA Response to Respondents' Motion for Accelerated Decision; Respondent Klockenkemper's 3/29/06 Motion for Leave to Amend Answer to Add Affirmative Defenses; and Respondent's 4/28/06 Reply To EPA's 4/13/06 Response to Respondent's Motion for Decision at 6-8.* Officer Toney also rejected Respondent Klockenkemper's related affirmative defense that the EPA's February 20, 2003, amended complaint adding him as a Respondent was time-barred as to himself as outside the 28 USC 2462 five year period against penalty actions as to both Count I (December 19, 1996) and Count II (September 1, 1995). *Id.*

**1. Officer Agreed That 28 USC 2462 Applies to This SDWA Penalty Action To Bar Some Annual Reporting Claims, and Agreed That 5 Year Bar Applies to Void Counts I and II Unless MIT is "Continuing" Violation, Tolling Statute**

The Officer initially found that 28 USC 2462 applied to this particular action, thus agreeing with a portion of Respondent's eleventh affirmative fefense as it relates to Count III. (*Decision at 4, 6.* She then dismissed those Count III reporting violations occurring more than five years from the issuance of the respective complaints. *Id.*

As to counts I and II, Officer Toney cited *In Re: Lazarus* and *Toussie v. United States*, for the rule that a limitations period begins to run when the violation first "accrues":

> "The doctrine of continuing violations provides a special rule for determining when a violation first accrues. *Toussie v. United States, 397 U.S, 112, 115 (1970)*...Under this special accrual rule, the limitations period for continuing violations does not begin to run until "an illegal course of conduct is complete," not when an action to enforce the violation can first be maintained. Thus, if the doctrine of continuing violations applies to any of the violations at issue in this case, an action for civil penalties may be initiated during the period of continuing violations and up to five years after the violations have ceased. *In re Lazarus, 7 E.A.D. at 364-65;* citing *In re Harmon Electronics, Inc., 7 E.A.D, 1, 45* (*EAB 1997*)." *12/27/06 Decision at 5.*

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

> "Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame (footnotes omitted). *In re Lazarus*, 7 E.A.D. at *366-67." 12/27/06 Decision at 5.*

**2. Text of Illinois SDWA Statute and Regulations Contradict Toney Findings: Applicable Regulations 62 IAC 240.760(e) and (f) Plainly State and Require One Time Action (MIT) "No Later Than" a Date Certain**

Looking to the language of the statute, Counts I alleges violation of 62 IAC 760(e)(6) for two wells, and Count II alleges violation of 62 IAC 760(f) for four wells, respectively, which

regulations provide in relevant part:

> "Section 240.760: Establishment of Internal Mechanical Integrity for Class II UIC Wells:
>
> > 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... (Emphasis Added)
> >
> > 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*..." (Emphasis Added).

Respondents argue that consistent with the Officer's reading of *Lazarus*, but contrary to Officer's rejection of this defense as to Counts I and II, the plain language of the SDWA MIT regulations clearly indicate that the MIT is not a daily "ongoing" testing activity (such as CWA permit daily effluent monitoring or SDWA daily PWS testing) , but rather an intermittent testing requirement that "must be fulfilled within a particular time frame" (e.g. by 9/1/05 and once every five years thereafter). *In re Lazarus, 7 E.A.D. at 364-65.* Consequently, Respondents assert that a failure to MIT is a violation of a "one-time" requirement, and that 28 USC 2462 barred this penalty action as to Mr. Klockenkemper for all of Counts I and II, and as to RWS for Count II. Once the bar is applied, EPA would be left only with the penalties for the 1997 and 1998 reporting violations as to Respondent Klockenkemper, and with Count I and the 1996, 1997, and 1998 Count III annual reporting violations as to RWS.

To begin with, Respondents cite Ms. Toney's interpretation as error since it mis-classifies a discrete omission of a one-time statutory compliance requirement, failure to MIT by a date certain, as a continuing pattern of affirmative violative conduct or acts that "cease" when action is taken and the test is done. *See Garcia v Brockway, 526 F.3d 456; 2008 U.S. App. LEXIS 10258 (9th Cir. 2008)*[16]. Simply put and as discussed in *Respondents' 7/21/06 Memorandum in Support of Motion for Accelerated Decision* and *Respondents' 9/18/06 Reply to EPA's Response* thereto, the failure to conduct a one-time test every five years by the applicable deadlines for each well is not a continuing series of acts or violations, but is a single omission that triggers the limitations

[16](Failing to properly design/construct accessible building is a discrete violation of FHA, fact that violations and effects of and harm from failure remain do not cause failure to comply to be a continuing violation or toll the limitations period; tolling requires a continuing pattern of repeated statutory violations, one of which occurs within the limitations period).

period the following day.[17] Respondents agree that Officer Toney correctly began the first stage of analysis of whether a violation is continuing or one-time by looking at the plain language of the statute at issue. *Center for Biological Diversity v. United States Fish and Wildlife Service, 2006 U.S. App. LEXIS 16198 (11th Cir. 2006)*(Plain language of statute requiring act "not later than" a date certain indicates that requirement was fixed, rather than continuing, and no tolling occurred). However, Ms. Toney simply misreads what is plainly required by the regulations, since in our case, the Illinois SDWA UIC MIT requirements clearly required a single test to be performed by a date certain in one of two ways; 1) either MIT a least once within five years of the date of the last successful MIT (*62 IAC 240.760(e)(6)* - Count I); or, 2) if no prior MIT occurred, MIT by September 1, 1995 (*62 IAC 240.760(f)* - Count II)(emphasis added).

The plain text of the regulations combined with the facts of our case indicate the date certain for the MITs at issue in Count I was December 19, 1996, and for Count II September 1, 1995. Similarly, a date certain (May 1 of the following year) is set for submission of the annual report for each well for the preceding calendar reporting year, a fact cited by Ms. Toney in applying the bar to the reporting violations. *62 IAC 240.780(e).* The Illinois MIT regulations are worded to require compliance "no later than" the dates certain set forth above, and thus the statutory language here is quite similar to that found to indicate a non-continuing requirement in *Biological Diversity*, *Supra*.[18] In fact, Officer Toney effectively acknowledged that the requirement was

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[17]62 IAC 240.760(e)(6)'s imposition of a five year term during which each MIT must be repeated in is also consistent with the five year limit imposed on government penalty actions by 28 USC 2462, inferring that EPA must bring its penalty action within the five-year deadline, even if EPA chooses to wait more than five years to bring its action for injunctive relief, as it did here. Similarly, EPA's Proposed UIC Penalty Policy prohibits EPA from considering violations which occurred more than 5 years prior to the EPA's discovery of the violation at issue as part of a history of non-compliance. *C. Exh. 47 at 5 - UIC Penalty Policy.*

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

worded in a singular manner: "Both counts involve failure to conduct [MIT] *by a specified date*" under 62 IAC 240.760(e)(6) and 240.760(f). *Decision at 5.* (Emphasis Added).

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

As argued in the briefs to Officer Toney, Respondents believe *Frontier Stone* should be followed here, due to: 1) the similarity of the CAA equipment testing requirements "by a date certain" discussed in *Frontier* to the instant statutory scheme requiring MIT of SDWA injection well equipment by a date certain; 2) the fact that EPA unsuccessfully put forth very similar arguments in *Frontier Stone* as it did in its briefs and pleadings here; and 3) the fact that the *Frontier Stone* ALJ set forth an expanded discussion of *Harmon* and *Lazarous* clarifying the distinctions in statutory language between continuing and one-time violations. *In Re Frontier Stone CAA Docket No. II-95-0105 (Order Dismissing Complaint And Initial Decision - 3/10/97) at p4.* Respondents note as error that the Presiding Officer failed to even mention, let alone distinguish, *Frontier Stone*, despite having been cited prominently in Respondent's briefing of the accelerated decision.

**a. *Frontier Stone* Held that EPA's Right to Sue for Penalty, and Running of Statute of Limitations, Accrues on Day After Testing Deadline Missed**

In *Frontier Stone*, EPA filed a May 18, 1995, CAA administrative penalty action alleging failure to test production equipment within 180 days of the start up of several rock crushers, the last of which went into operation on October 18, 1989, and which should thus have been tested by April 18, 1990.[19] *Frontier at 1 and 4 (Citing 40 CFR 60.8(a))*. After examining the text of the regulation at issue, the nature of the requirement and violation, and related case law, ALJ Pearlstein held that while a violation of a testing requirement deadline may continue to exist, the testing requirement itself is one-time, accruing the day after the deadline is missed for purposes of statute of limitations. *Id. at 5.* In his holding, the ALJ rejected many of the same arguments used by EPA and the Officer Toney to support their findings that the MIT violations in our case were ongoing patterns of conduct:

> "The plain language of the regulation...and the language of 28 U.S.C. §§2462, indicate that the failure to conduct timely...tests is not a continuing violation...for the purpose of applying the statute of

[19]Like Rocky Well, at the time of the alleged violations Frontier had a valid operating permit issued by the federally-authorized New York state CAA program. *Id. at 2.*

> limitations...The regulation requires a test to be done by a certain deadline...[but]...such a violation is not continuing after the deadline has passed...the violation "first accrues" on the 181st day after initial startup. During the ensuing five years, if a facility does not conduct the performance tests, it remains in violation and subject to a civil penalty. But it would be a fallacy to construe each day the test is not done as a new violation....Complainant misunderstands the nature of this violation in its statement that a party that does not conduct the testing within 180 days "remains in violation until such time as the performance testing is done." Even after the tests are done late, the party is still a violator...Once the tests are not done within 180 days after startup, there is then a continuing failure to conduct the tests, until they are done. That does not mean the violation is continuing, however. The violation was complete and first accrued on the expiration of 180 days after startup. It is but an exercise in semantics to debate whether that also means the violation itself is "continuing." *Id. at 5*.

Intrinsic to the ALJ's reasoning was that the violation alleged, a single failure to test by a date certain, was inherently different than the singular failure of an operating facility to obtain a permit, which is deemed continuing as long as the facility is operating without one.[20] *Id. at 6.* Unlike the Respondent in *Harmon Electronics, Inc., Docket No. RCRA-VIII-91-H-0037 (12/12/94)*, Frontier Stone did not operate its facility without a permit, a fact which ALJ Pearlstein found to be quite distinguishable from operating equipment without the required tests:

> "Complainant cites the Initial Decision in *In re Harmon Electronics Inc.*, Docket No. RCRA-VII-91-H-0037 (December 12, 1994). In that decision the ALJ stated that the violations at issue were inherently distinguishable from those in the cases of *Toussie v. U.S.*, 397 U.S. 112 (1970), and *United States v. McGoff*, 831 F.2d 1071 (D.C. Cir. 1987). The violations in *Harmon* all stemmed from the ongoing operation of the respondent's landfill without a permit. The ALJ described them as follows: 'The offense here was not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA by treating, storing and disposing of hazardous waste without a permit'. Respondent's violation here is more akin to that in *Toussie*-- the failure to register for the military draft within the prescribed time period, five days from the person's eighteenth birthday. Frontier failed to conduct performance tests and file the report of the tests within the prescribed time period...After conducting the tests and filing the report, nothing further is required of the facility. This is a far cry from the ongoing operation of a facility without a permit." [21] *Frontier at 4-5*.

Thus, as in *Frontier*, the language of the MIT requirement renders the violations alleged in

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[20] ALJ Pearlstein stated further: "The same violation may be considered continuing for the purposes of applying multi-day penalties, while it is not continuing for the purposes of applying the statute of limitations." *Id. at fn 11.* Such finding cuts against Officer Toney's holding that terms similar to the the SDWA language providing for a recurring penalty "for each day of violation" had been found by the EAB in *Lazarus* to be indicative of a "continuing violation.", since such is not the case. *12/27/06 Decision at 8.*

[21] ALJ Pearlstein also noted the similarity of the failure to test to the one-time TSCA Pre-manufacture Notice violations at issue in *3M v. Browner,* and to the one-time TSCA quarterly inspection and reporting violations at issue in *In re Lazarus I. Frontier at 6.*

Counts I and II as one-time, rather than continuing, and the accrual was not tolled by any exception. They accrued for Count I on December 20, 1996, and for Count II on September 2, 1995, respectively, and with their bar dates running on December 19, 2001, and September 1, 2000, respectively. On closer inspection, neither *Lazarus I or II* or *Harmon* support the Officer's finding either.[22]

**b. *In Re Lazarus, TSCA Docket V-W-32-93 (1995)("Lazarus I") and In Re Lazarus, 7 E.A.D, 1 (EAB 1997)("Lazarus II")* Support Finding of One-Time Violation Despite RWS's Ongoing Duty to MIT Once Every 5 Years**

In *Lazarus II*, the EAB upheld the *Lazarus I* presiding officer's finding that tolling of the statute of limitations was allowable as to the registration and marking penalty counts because the TSCA PCB registration and marking requirements were a defacto statutory permit (permit by rule) that attached and issued only when Lazarus registered its operational PCB transformers with the local fire department and marked the door behind which the PCB Transformers were located. *Lazarus II at 370, 373-374.* The EAB also relied on the fact that congressional and regulatory records indicated that failure to abide by the requirements was akin to failure to obtain a permit. *Id. at 371-376.*

Thus, in our case, the Officer's reliance on *Lazarus II* to find that the post-permit, MIT requirement was continuing is at odds with the underpinnings of *Lazarus I and II*, given that RWS had obtained and held valid permits (e.g. had "registered" the wells by applying for permits) at the time of the alleged MIT. *C. Exh 43 at para. 25*. EPA's and the Officer's position is further undercut by the fact that in *Lazarus II* EPA did not appeal the portion of *Lazarus I* applying 28 USC 2462 to bar the penalty action for the operator's failure to conduct quarterly inspections of the transformers and submit annual reports. *In re Lazarus, Inc*., Docket No. TSCA-V-C--32-93 (5/25/95)(*Lazarus I)*. Finally, the subject regulatory language in *Lazarus I* is nearly identical in nature to that quoted by Officer Toney from 62 IAC 240.760(e)(6), which requires an MIT "at lease once every 5 years" *(Compare 40 C.F.R. 761.30(a) (1) (ix) to 62 IAC*

[22]Unlike ALJ Pearlstein's citations, in its briefing on the accelerated decision EPA cited only to a case involving a leaking UST, whereas here there is no allegation that any RWS injection well was leaking to a USDW, or that there was anything in the wells to leak. *See In Re: Norman Mayes, Docket No. RCRA-UST-04-2002-0001; RCRA (9006) Appeal No. 04-01; 2005 EPA App. Lexis 5 (3/5/05)(*ongoing leaking of fluids from underground storage tanks continuing violation under 28 USC 2462).

*240.760(e)(6))*.[23] *Id.* Consequently, the TSCA registration underpinnings of *Lazarus* allowing tolling (failure to obtain a permit by rule and failure to demarcate the location of PCBs to allow notice to responders of the existence of a contaminant of special concern at a facility) are not present in the instant case, and *Lazarus I and II* cut against a finding of continuing violation where RWS did so register and obtain permits for its wells, and thus was not an "unpermitted operator" as Lazarus was.

Finally, given that the *Lazarus* cases stand for the affixing of the date of accrual of a one-time recurring inspection violation at the end of each required reinspection period, Presiding Officer is remiss in citing the *Lazarus* findings relating to the registration/marking violations in support of her incorrect finding that the date of accrual for EPA's right to sue for penalty for the MIT violations was the date the MIT was finally performed.

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

Consistent with *Frontier Stone* and *Lazarus*, EPA concedes in its briefing on the 12/27/06 Decision that EPA could have sued as early as the next day after the deadline, thus there is no dispute between the parties below as to the dates of first accrual being September 2, 1995 and December 20, 1996, for penalty actions for the Count I and II MIT violations. *See EPA 8/28/06 Response to 7/21/06 Motion for Accel. Dec. at 2* ("the September 1, 1995, date...represents the first (but not the last) date of Respondent's violation of this provision...").[24] Thus, contrary to the Officer's findings, EPA has admitted that the date of first accrual is fixed by the end of each 5 year SDWA MIT period, and thus effectively concedes that the 28 USC 2462 5 year limitations period began to run the day after the MIT was due. *Id.*

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[23] In *Lazarus I*, the ALJ found that "The...provision...involved here...[is]... section [40 CFR 761.] 30(a) (1) (ix) , which requires that transformers in use or stored for reuse <u>be inspected at least once every three months for leaks</u>...". (Emphasis Added). *Lazarus I at 17-18.* Emphasizing the fact that a discrete act was called for within a set time period, the ALJ found "While the obligation to make quarterly inspections is made by rule a continuing one, the failure to inspect in any quarterly time period is not the kind of violation that is by nature continuing but is complete upon termination of the quarterly period...". *Lazarus I at 20.*

[24] Respondents note that EPA's September 1, 1995, accrual date is technically incorrect by one day, since day 1 of the violation and the 5 year 28 U.S.C. 2462 period would begin on the next day, Sept. 2.

**d. Officer Toney Misapplied *Harmon* Cases Since Violation Was Failure to Obtain Permit/Illegal Operation, and Relevant Holding of *Harmon I* not Overruled by *Harmon II***

As with *Lazarus*, Respondents and the ALJ in *Frontier Stone* cited to portions of the 1994 Initial Decision in *Harmon I* which were not overturned by the 1997 EAB *Harmon II* decision cited by the Presiding Officer in her Initial Decision, and which, by reverse inference, cut against finding the MIT violations as "continuing".[25] *See In re Harmon Electronics Inc., Docket No. RCRA-VII-91-H-0037 (12/12/94)*("*Harmon I*") and *In re Harmon Electronics Inc,* 7 E.A.D. 1 (EAB 1997)("*Harmon II*"). Given that the *Harmon I and II* findings are applicable to the ongoing failure to register and obtain RCRA permits, as well as the ongoing operation in absence thereof, Officer Toney mis-applies *Harmon II* here to what clearly is a one-time violation by a properly-permitted regulated party not accused of injecting without a permit.[26]

Consequently, the attempt to construe *Harmon* as rendering the alleged MIT violations as "continuing" in the same vein that illegal hazardous waste disposal or failure to report the presence of PCB's represents a continuing threat to the environment, must fail. Unlike ongoing unpermitted waste handling or disposal, RWS's failure to run a single test at least once prior to the fixed due dates gave rise to EPA's right of action on eadline was missed. Consequenlty, Even using (without agreeing with) the 5/1/02 date of filing asserted by Ms. Toney, EPA's amended complaint was filed after the 12/19/01 and 9/1/00 bar dates for the MIT violations set forth in Count I and Count II, respectively, as to Mr. Klockenkemper (and too late for Count II as to RWS).[27] *Frontier Stone, Supra; Newell Recycling Company v United States*

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[25]The Lazarus EAB stated: "The RCRA requirements in *Harmon* that were found to be continuing in nature were distinguished from obligations in other cases that were complete upon certain dates. Citing *Harmon,* slip op. at 42, 46, 48.

[26]In *Harmon I*, EPA filed its complaint on September 30, 1991, alleging violations including dumping of solvents out the back door that EPA admitted began in 1980-1982, but which continued to at least 1987. *Harmon I at 20-21.* The ALJ held the violations to be continuing since there was ongoing active unpermitted disposal of hazardous waste up until at least the August 8, 1988, filing of Harmon's permit application, triggering the limitations period. *Id. at 31.*

[27] In her decision at footnote 2, Ms. Toney stated: "For purposes of statute of limitations analysis, the Amended Complaint is deemed to have been filed on May 1, 2002, the date for Motion for Leave to Amend and Proposed Amended Complaint were filed by the Complainant." (Citing *Greenfield v. Shuck*, 856 F. Supp. 705, 711 (D. Mass 1994)." *Toney Decision at fn 2.* Contrary to that finding, the *Lazarus*

*Environmental Protection Agency, 231 F.3d 204 (5th Cir. 2000)*(Pre-1990 PCB disposal violations continued until 1995 clean-up of the released PCB's, saving EPA's 1995 complaint from 28 USC 2462).

**f. 42 USC Sec. 300h(b) (State Program Minimum Requirements) Irrelevant and do Not Impose Continuing Obligation on a SDWA Regulated Party**

Officer Toney also relied in part on 42 USC Sec. 300h(b)s' statutory state program enabling provisions and minimum program requirements to assert that the MIT violations were continuing.[28] *Toney Decision at 6*. However, the minimum requirements that a state program must meet and place in its permits to gain federal approval and to be protective of the environment simply are irrelevant to the MIT violations at issue and do not render them per se "continuing" harm to the environment.[29] The continuing obligation of the state to ensure the minimum requirements are being imposed, and a permittee's ongoing obligation to comply with them, does not make RWS's MIT violations continuing. *Cf. In Re Frontier Stone, Supra*.

**g. 40 CFR 144.51 Requirement that Mechanical Integrity be Continuously Maintained at an Operating Well Does Not Render MIT Requirement Continuing**

Next, as did EPA, Officer Toney cites as support 40 CFR 144.51(a) and (q), which require, inter alia, that MI be maintained and that the state issue a cessation order requiring suspension of injections if MI was found to be lacking. Officer Toney inferred that the requirement of a permittee to continually maintain MI while injecting under a permit rendered, the MIT requirement to also be continuing:

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*I* court found the filing date of a complaint to be the date the complaint was actually filed with the Regional Hearing Clerk, thus the actual filing date of February 20, 2003, should be used for limitations purposes in our case, not May 1, 2002. *Lazarus I Initial Decision at 18.*

[28] In order to be approved, a state program must, *inter alia*, 1) set minimum requirements for effective programs to prevent underground injection which endangers a USDW (*300h(b)(1)*); 2) prohibit any underground injection which is not authorized by a permit (*300h(b)(1)(A)*); and 3) require a permit applicant to prove that the injection will not endanger a USDW (*300h(b)(1)(B)*).

[29] In fact, in her 7/23/08 Initial Decision, Officer Toney specifically found that the record in this matter contained no evidence that there was even a USDW present near or under the wells to harm or potentially harm, and there is no well-specific evidence that there was any injection or threat from any of the six Rocky Well wells to any USDW. As stated in her opinion, the only thing the "evidence" showed there was a generic potential for any permittee's failure to MIT to harm the UIC program. *7/23/08 Initial Decision at 9.*

> "The regulations further require that when a state program director determines that a Class II well lacks mechanical integrity, he shall give written notice to the owner or operator and, unless the director requires immediate cessation, the owner or operator "shall cease injection into the well with 48 hours." 40 C.F.R. § 144.51 (q)(2). Again, these federal regulations impose a duty that is ongoing, not one that ends at a date certain." Decision at 6-7.

Respondents allege error occurred since the two regulations on their face require distinctly different acts, one continuing (maintain MI and cease injection when ordered to do so) and one not (test for MI every 5 years). *40 C.F.R. § 144.51 (q)(2)*; *62 IAC 240.760.* Also, EPA and the Officer ignore that fact that there were no allegations, or evidence in the record, that MI was ever lost at any RWS well, that injections occurred, that a cessation order was issued, that injection continued after a cessation order, or that a USDW was threatened by any of the six inoperative wells. *See e.g C. Exh. 43 at paras. 48 and 58.* The Presiding Officer erred by confusing failure to MIT (62 IAC 240.760), with failure to maintain MI (40 CFR 144.51), where failure to maintain MI while injecting, or lack of MI (versus lack of an MIT) is not part of this case. *Decision at p6-7.* Like the enabling statute discussed above, 40 CFR 144 is irrelevant to this case and to the 28 USC 2462 issue. *See In Re Frontier, Supra: Garcia, Supra.*

**h. 62 IAC 240.760(e) and (f) Provision Requiring a Permittee to Either MIT or Obtain Temporary Abandonment Status and Requirement to Comply With Permit Does Render Failure to Timely MIT a Continuing Course of Conduct**

Based on her prior erroneous analogy of the SDWA regulations at issue to the permit by rule "use authorization" TSCA requirements in *Lazarus*, Ms. Toney found that 240.760 required a "continuing course of conduct rather than a discrete act.". 12/27/06 *Decision at 7.* Under her reasoning, since RWS did not either MIT or obtain temporary abandonment ("TA") status, its failure to do one of the two became a continuing violation of RWS permit.[30] *Id.* However, failure to TA is not alleged by EPA in this case, RWS had proper permits, and the ongoing obligation to comply with a SDWA UIC permit does not render failure to MIT an ongoing violation of the SDWA, in and of itself. *In Re Frontier Stone, Supra*.

[30] Toney stated: "To do neither [MIT or TA] is, in both instances, a continuing violation which tolls the statute of limitations until the violating behavior has ceased.... Given that mechanical integrity testing is an integral part of an effective UIC program to maintain the integrity of underground sources of drinking water, timely compliance with such UIC permit requirements is an obligation that must continue... as a means of protecting that resource. *Id.*

**i. 62 IAC 240.760(h) Requirement to Shut In Wells If No MI Performed Does Not Render Failure to MIT Continuing Violation, and Wells Were Shut In**

Ms. Toney also relied on another regulation not at issue or alleged to have been violated in this matter, the SDWA requirement to "shut in" (cap) wells that have not been MIT'd, to support her finding that the requirement to MIT is "continuous" for limitations purposes, since in her view an MIT is allegedly a prerequisite to "continued operation".[31] *Decision at 7-8. See 62 IAC 240.760(h).*

However, EPA's complaint does not allege violations of 240.760(h) for failure to shut in, or any failure to pass MIT, and the unrebutted record indicates that RWS did in fact shut in and capped its inoperable wells as required.[32] Thus, there is no alleged or actual violation of 240.760(h) that might somehow render the MIT requirement to be continuous, and this regulation does not support Ms. Toney's conclusion either.[33]

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[31] 62 IAC 240.760(h) provides in part: Any Class 11 UIC well which fails an internal mechanical integrity test, or on which an internal mechanical integrity test has not been performed when required by subsections (e) and (f), shall be shut in until the well is plugged or until remedial work is completed and an internal mechanical integrity test is successfully completed.

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

[33]Given her conclusion that MIT violations are continuing, Ms. Toney did not address EPA's FRCP 15 based relation back arguments. *12/27/06 Decision at 8, fn5; See EPA 8/28/06 Response to Respondents 7/21/06 Motion for Accel. Dec. at 14-18.* In the event the EAB finds 28 USC 2462 to bar Counts I and II absent relation back, Respondents renew their arguments that the FRCP 15 criteria for relation back are not met and thus cannot save the complaint. *See Respondents' 9/18/06 Reply To EPA 8/28/06 Response to 7/21/06 Motion for Accelerated Dec. at 10-13.* As previously noted in relation to the absence of mention of EJK in the initial complaint, foremost among these is the fact that EPA was told of and knew of Mr. Klockekemper's existence and roles in RWS as early as 1999 by way of the state referral of these violations specifically mentioning him by name and including a description of his various roles as RWS's sole corporate officer, principal, president, treasurer and secretary. *See C. Exh. 33 - 5/19/99 IDNR Referral of RWS to EPA at p2, top, and at 13th page of Attachments.* EPA also addressed the first NOV to RWS c/o Mr. Klockenkemper as "President" of RWS. *C. Exh. 34.* Thus there was no "mistake" as to who he was as required for FRCP 15 relation back.. *Schiavone v. Fortune, 477 U.S. 21*

The literal language of the statute requiring a discrete event by a date certain, and the total absence of support for Ms. Toney's interpretation of the MIT requirement as a repeating, continuous act, requires that Ms. Toney's interpretation be rejected and the MIT violations be found to be subject to 28 USC 2462. *In Re Frontier Stone, Supra*.

**D. EPA Failed to Meet its 40 CFR Part 22.24 Burden Sufficient to Allow Officer Toney to Impose Liability Under 225 ILCS 725 and 62 IAC 240 as to Mr. Klockenkemper, and SDWA Not Joint and Several Liability Statute (Toney Order of 12/27/06)**

Ms. Toney based her imposition of joint and several liability on the following findings of fact:

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

2. Respondent Klockenkemper directly participated in the operational activities of Rocky Well's business.
   (a) He personally performed work at the wells. *C Ex. 60.14a*.
   (b) He also hired others to perform maintenance and operational activities at the wells. *C Ex 60.14d, 60.14e, 60.14f*
   (c) He sought access to the wells from property owners. *C Ex. 60.14b*.
   (d) He supervised and personally directed work being performed on the wells by others. *C Ex, 60.14f.*
   (e) He was the person in charge of Rocky Well Service and the operational and maintenance activities at the wells. *C Exs. 60,14c, 60.14e, 60.14f, 60.14g*.

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

In reaching her findings, Officer Toney found that liability could be determined summarily based on alleged affidavits without hearing from and cross-examining the declarants, and without taking of and weighing of further evidence as to liability:

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*(1986)*(Actual or constructive knowledge of identity of proper defendant prior to filing negates argument that ascertainment of the defendant's identity was difficult); *Eison v. McCoy, et al. 146 F.3d 468 (7th Cir. 1998)*(FRCP 15(c) relation back inapplicable where lack of information as to identity or role of new defendant at time of original filing was basis for failure to name, Plaintiff must have intended to sue at time of original filing). Further, EPA claims that it did not know of his role, thus, if true, it could not have intended to sue him as of 7/1/01, and, despite the pre-suit notices, the first time Mr. Klockenkemper actually "knew" was being sued was shortly after February 20, 2003, when the amended complaint was filed and he later received it. *Schiavone at 15-16.* Accordingly, FRCP 15(c) relation back is unavailable for a non-misnomer mistake such as that claimed by EPA, since not knowing the identity of a defendant at the time of initial filing is not a "mistake" concerning the defendant's identity for purposes of FRCP 15(c). *See Wilson v. United States, 23 F.3d 559, 563 (1st Cir. 1994); Barrow v. Wethersfield Police Dept., 66 F.3d 466, 469 (2d Cir. 1995), amended by 74 F.3d 1366 (2d Cir. 1996); W. Contracting Corp. v. Bechtel Corp., 885 F.2d 1196, 1201 (4th Cir. 1989); Jacobsen v Osborne, 133 F.3d 315, 320 (5th Cir. 1998); Cox v. Treadway, 75 F.3d 230, 240 (6th Cir. 1996); Worthington v. Wilson, 8 F.3d 1253, 1256 (7th Cir. 1993); Powers v. Graff, 148 F.3d 1223, 1226-27 (11th Cir. 1998).*

"Respondent raises several arguments to rebut Complainant's evidence, but fails to raise a genuine issue of material fact that would preclude the grant of a motion for accelerated decision. First, Klockenkemper raises the fact that the U.S. EPA investigator's report is dated roughly two years before the declarations were signed as well as the fact that U.S. EPA has not produced the original investigator notes. Neither fact detracts significantly from the cumulative evidentiary weight of the seven signed declarations on which Complainant relies. [C. Exh. 60.14a-60.14g]. Respondent also attacks several declarations on the grounds that they include some hearsay and that they contain certain discrepancies when compared to the investigator's report. Hearsay and minimal discrepancies, however, do not rob the declarations of their probative value on the issue of Respondent Klockenkemper's involvement with the day-to-day operations of the business of Rocky Well Service, Inc. *12/27/06 Decision at 14.* (Emphasis Added).

**1. Finding One: Irrelevant and Incorrect Application of Illinois SDWA: Corporate Role Of Mr. Klockenkemper is Not SDWA Liability Criteria**

With regard to the first finding, it is a matter of public record that, at the time of issuance of the complaint Mr. Klockenkemper held the offices listed, however Ms. Toney errs by failing to state that he held these offices or "controlled" RWS at the time of the 1995-1996 violations. *See C. Exh. 60.1.a - Nevada Secretary of State Summary*. Notwithstanding, Respondents assert that such fact is irrelevant as to whether non-permittee Mr. Klockenkemper himself engaged in unpermitted injections apart from RWS's violations as the Permittee, and such role is not sufficient to establish the control or unity elements required for PCV. *225 ILCS 725/8a; 62 IAC 240.150; Kelsey Axle, Supra.*

**2. Finding Two: Error at Law to Rely On Irrelevant and Flawed Written Witness Statements Without Cross-Exam and Error in fact since "Facts" Do Not Prove EJK Was Unpermitted Violator or was Controlling, Fraudulent Alter Ego as Required for PCV**

As a matter of law, Officer Toney erred by affording "cumulative evidentiary weight" and "probative value" to various written witness declarations in making her findings of material fact as to Mr. Klockenkemper's liability. *Decision at 14; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*(On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder). She did so despite her acknowledgment of Respondent's identification of significant discrepancies between the declarants' June 2003 statements to a government investigator (Mr. Arkell) and the 2005 declarations she relied upon, and she ignored numerous indicia of temporal and factual irrelevance, lack of credibility, presence of bias, and

unreliability of the declarations, which are discernable from the face of the statements relied on by the Officer for finding 2. *Decision at 14; See Respondents' 8/28/06 Response to EPA 7/21/06 Motion at 22-32; See R. Exh. 98 - Affidavit of E.J. Klockenkemper In Rebuttal To EPA Motion For Accelerated Decision.* Ms. Toney also failed to note that Mr. Klockenkemper directly opposed the seven statements in his affidavit on summary judgement, as did RWS, thus raising material issues of fact. *See R. Exh. 98 - 8/23/06 - Affidavit of E.J. Klockenkemper; See R. Exh. 99 - Affidavit of RWS* .

**a. Officer Toney Violated Rule That Court May Not Weigh Disputed, Inconsistent Testimonial Evidence, Make Credibility Determinations, or Draw Inferences From Disputed Facts Contrary to Non-Movant on Summary Judgement: Officer Thereby Denied Respondent Klockenkemper's Constitutional Right to Hear From And Cross Examine Witnesses Under Oath at Trial**

It is well settled that on summary judgement a court may not weigh evidence, make credibility determinations, or draw adverse inferences from disputed facts against to the non-moving party. *Anderson, Supra*.[34] Where inconsistencies are shown on the record, and where the truth of a witnesses statements is challenged or is based upon hearsay, a party is entitled to have a jury find whether the statements were lies and to hear from the alleged originators of the hearsay statements. *Allen v Chicago Transit Authority, 317 F.3d 696; 2003 U.S. App. LEXIS 262 (7th Cir. 2003)*(Summary judgement reversed where inconsistencies and contradictions between witnesses' prior statements required presentation of witnesses to jury for evaluation and findings of credibility and truth - c*iting Perfetti v. First National Bank, 950 F.2d 449, 456 (7th Cir. 1991)).* When a witness contradicts himself on material matters, and contradicts documentary evidence likely to be accurate (such as time sheets, inspection reports, or police reports) the witness's credibility becomes an issue for the jury; it cannot be resolved in a summary judgment

[34]Also See: *Betaco, Inc. v. Cessna Aircraft Co., 32 F.3d 1126, 1138 (7th Cir. 1994); Sarsha v. Sears, Roebuck & Co., 3 F.3d 1035, 1041 (7th Cir. 1993)*(court must decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial); *Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994)*(Summary judgment not appropriate if evidence allows a reasonable jury to return a verdict for the nonmoving party); *Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999)*(Court must construe the record in light most favorable to the nonmovant and must avoid the temptation to decide which party's version of the facts is more likely true); *Weeks v. Samsung Heavy Indus., 126 F.3d 926, 933 (7th Cir.1997)*(Summary judgment cannot be used to resolve swearing contests between litigants).

proceeding. *Allen v. CTA, Supra (citing Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570, 575 (7th Cir. 1987)).*

Consequently, the Presiding Officer committed clear error by relying on written statements of alleged witnesses where the party against whom the statements were proffered (EJK) could not cross-examine or impeach same under oath, and where such reliance is had without a chance to evaluate the credibility, motives and memory of each testator under oath. *Allen v CTA, Supra.* Concomitantly, finding 2 is legally invalid since it is based entirely on the written statements of declarants whose credibility and admissibility was put at issue by their inconsistent 2003 statements to Arkell, Respondents' affidavits and the statements' own content, and which admittedly contain evidence of potential bias, hearsay, speculative assertions based on belief or opinion, inflammatory statements and various material discrepancies. Any "facts" based on the written declarations should have only been determined after a hearing where the declarants testified under oath, and where EJK had the opportunity to rebut or discredit such statements.[35] *Anderson, Supra.; Allen, Supra*. Further, by denying Mr. Klockenkemper a hearing by summarily basing her "facts" on dubious declarations of witnesses not subject to cross examination, Presiding Officer Toney violated Mr. Klockenkemper's Seventh Amendment right to trial and cross examination on the SDWA liability issue. *Tull v. United States, 481 U.S. 412; 107 S. Ct. 1831 (1987).*

**b. Declarations do not Contain Relevant Material Facts - No Illegal Conduct Shown Therein or by Non-well Specific Finding 2, Thus Finding 2 does not Support SDWA Liability Over Mr. Klockenkemper and 40 CFR 22.14 Burden of Proof Not Met by EPA or Officer**

Factually, with regard to findings 2(a)-(e) specifically, and without waiving objections thereto, Respondent Klockenkemper asserts that, collectively, the findings fail to show or prove that any illegal, unauthorized drilling or injection was going on, despite the Illinois SDWA requirement that the "person" be "engaged in conduct or activities required to be permitted under the Act."

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

*225 ILCS 725/8a; 62 LAC § 240. 150(a).* Additionally, the findings are not specific to any of the injection wells by name, so one is unable to determine from their face that the "wells" allegedly addressed by the declarations are actually one of the six injection wells at issue, or even that the declarations specifically deal with any of them.

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

In fact, unlike each of the cases cited by the Presiding Officer, where the officer or "person" himself was actively violating the statute without a permit and failed to have his company cease and desist until it obtained one, Mr. Klockenkemper did cause proper permits to be in place and is not alleged to have himself injected without a permit, so the findings in number 2 establish nothing, and the assessment of SDWA liability cannot stand without such finding.[36] Thus, given that Mr. Klockenkemper is not the permittee, and given that EPA has failed to show he was personally engaged in activities that would have required a UIC permit under the SDWA, finding number 2 does not support personal liability as to Mr. Klockenkemper as either the "permittee" or as "any person" engaged in activities that require a permit. *225 ILCS 725/8a.; 62 IAC 240.150(a).* Mere "involvement" in a company's day to day activities does not, itself, impute

[36]Officer Toney cited four unsupportive cases to support her finding that Mr. Klockenkemper was liable under the "Officer Liability" theory as a "Person" under the SDWA. *In Re Roger Antkiewicz & Pest Elimination Products of America, Inc., 8 E.A.D. 218, 230 (EAB 1999)* is unhelpful to EPA because individual liability was based upon the controlling officer's malfeasance, including failure to obtain FIFRA distribution permits and conducting ongoing operations, including sales of an illegal mislabeled pesticide in violation of an EPA cessation order. Similarly, *In re Safe & Sure Products, Inc. and Lester J. Workman, 8 E.A,D. 517 (EAB 1999)* is an inapplicable FIFRA illegal distribution case where PCV was properly pleaded and proven, and even there a hearing was afforded on the individual PCV liability issue. *United States v. Pollution Abatement Services of Oswego, Inc., 763 F. 2d 133, 135 (2d Cir. 1985)* is an inapplicable CERCLA illegal unpermitted landfill cleanup case under a statute that, unlike the SDWA, expressly provides for joint and several liability and for "operator" liability. Finally, *In Re Sunbeam, Supra,* is an unsupportive PCV case as discussed previously herein in relation to Officer Kossek's orders.

liability on an officer for a permittee's inability to test all of its wells by the deadline. *In Re Magness, Supra.*

As discussed below, EPA presented nothing in the declarations to prove its prima facie case under 225 ILCS 725, or to rebut Respondent Klockenkemper's sworn statements that he did not inject without a permit, did not commit illegal operations, and attempted in good faith to cause RWS to comply with the UIC requirements. *See R. Exh. 98 - 8/23/06 - Affidavit of E.J. Klockenkemper at paras. 8, 10, and 11.* Consequently, EPA failed to meet its 40 CFR 22.14 burdens, and the Presiding Officer erred in granting EPA's Motion for Accelerated Decision and in denying Respondent's request for dismissal of Mr. Klockenkemper. *See Respondent E.J. Klockenkemper's 8/28/06 Response in Opposition to July 21, 2006 EPA Motion for Partial Accelerated Decision as to Liability at 42.*

**3. Finding 2(a): "He personally performed work at the wells"- C. Exh. 60.14.a (Paul G. Flood-Zander #2)**

Mr. Flood's statement is directed only at the Zander wellfield, and is replete with lack of contemporaneity, second-hand knowledge, hearsay, and irrelevant statements which render it inadmissible on summary judgement to support EPA's contentions as to Zander #2 or any other injection well. *FRCP 56, FRE 602.*

**a. Events Flood Observed Occurred in 2004-2005, Not 1995-1996, And Not Tied to Zander #2**

The lack of contemporaneity to the time of the violations (1995-1996), and lack of first hand knowledge of what RWS or Mr. Klockenkemper was doing at that time at any of the Zander wells, is exemplified by Mr. Flood's admission that he did not own the land on which the Zander oil production wellheads are located until "about 3 years ago" (e.g. 2002). *C. Exh. 60.14.a at para. 2.* Thus the events Mr. Flood alleges to have observed are not probative of what Mr. Klockenkemper was doing in relation to the Zander #2 injection well in 1995-1996.[37] *Id. at paras. 9, 10, 11, 12, and 13; See 7/21/06 EPA Memorandum at 47.* Flood only states that he saw Mr. Klockenkemper working "near the wells" digging a pit, and that EJK drove over a field to get to the wells, and does not state that he saw Respondent actually performing maintenance or

[37]Flood specifically states he saw Mr. Klockenkemper on July 29, 2005. *Flood at para. 9.* The alleged acts, that Mr. Klockenkemper was working near the Zander wells and was digging pits in the past three years, have nothing to do with the December 19, 1996, alleged MIT or reporting violations.

operational activities at the injection well in 1995-1996. *Id. at paras. 9, 12*.

**b. Flood Recollections Based Largely on Inadmissible Hearsay From Others**

Furthermore, Mr. Flood's recollections were also admittedly based in large part on Dale Heitman's and Art Joergen's hearsay statements to him. *C. Exh. 60.14.a at para. 6* ("Heitman...told me that the Zander wells were not in operation"), *para. 8* ("Joergens...told me that it had not been plugged "), and *para. 12* ("Joergens told me there was some underground piping..."). Thus they are inadmissible under the FRE. *FRE 602*.

**c. Officer Toney's Sole Reliance on Flood Statement Error: Finding 2(a) must be Vacated as Improper Under FRCP 56(e) and FRE 602, Unsupported And Inapplicable to Zander #2 or other 5 Wells**

Mr. Flood's attestations as to any pre-2002 events are irrelevant, purely inadmissible hearsay and speculation not based on first hand knowledge, in contravention of FRCP 56(e) and FRE 602. Given the above, and the fact that Officer Toney admittedly improperly assigned significant weight to this "evidence", Ms. Toney's treatment of and reliance on the Flood statement to find EJK worked on any of the injection wells was clear error since it does not even prove Mr. Klockenkemper worked on the Zander #2 well, and finding 2(a) must be vacated as improper, unsupported, and not a basis for assessing liability. *FRCP 56(e) and FRE 602; Payne v. Pauley, 337 F.3d 767; 2003 U.S. App. LEXIS 13807 (7th Cir 2003)*(Defendant has right to jury trial to decide contested issues of alleged fact).

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

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

**i. Pierce Admits No First Hand Knowledge And No Contact With Mr. Klockenkemper From 1985 to 2005, and Declaration Directed Only at Atwood #1**

Like Mr. Flood, Pierce's statement suffers from a lack of an express or even inferred temporal connection of the events alleged therein to the alleged September 1, 1995, MIT violations or annual reporting violations for Atwood #1. *C. Exh 60.14.d*. Pierce admits that he "did not have any contact with Edward Klockenkemper for more than 20 years until the summer of 2005", and thus he has no first hand knowledge of what RWS or Mr. Klockenkemper did between 1985-200 as to the alleged 1995 MIT or reporting violations, or operations and maintenance, at Atwood #1

injection well. *C. Exh. 60.14.d at para 10.* Pierce's use of the phrase, "It is my understanding", and recitation of events from the 1970's and 2000's also indicate a lack of first hand knowledge as to any activities at Atwood #1 circa 1995-1996. *C. Exh. 60.14.d. at paras. 5, 6, 7, 8, 9, 10.*

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

Pierce states he had several confrontations and arguments with Mr. Klockenkemper in the 1970's, early 1980's, and 2005. *Id. at paras. 6, 8, and 10.* This includes one in the 1970's where Respondent allegedly accused Pierce of stealing his well pipe, resulting in a visit to Pierce's farm by the police. *C. Exh. 14.d at paras. 6, 8 and 10.* Consequently, there is motive for Pierce to be biased against Respondents and thus potentially sway his testimony, which are issues for cross exam.

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

What the Pierce statement does do is tend to establish in non-movant's favor that the Atwood #1 well was inactive after 1971. *Id. at paras. 5, 8.* Given the inoperable status of Atwood #1, EPA's requested inference that the lack of MIT somehow rendered operation of Atwood #1 illegal is not supported, since, according to Pierce, the well was not in operation at the time of violation.[38] *Id*. Rather, the inference must be drawn in non-movant's favor that there were not any "maintenance and operational activities" or injections at Atwood #1 well either before, at or after the time of the violations. *FRCP 56, Payne, Supra; Allen v. CTA, Supra.* The Pierce statement simply cannot lend a basis for the court to find that Klockenkemper "hired others to perform maintenance and operational activities" at Atwood #1 or any other of the five injections wells at issue. Pierce's statement should have been given no probative value or weight in favor of EPA in this matter, and he should have been subjected to cross examination if his testimony was to be used. *Id.*

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

**i. V. Huelsing Declaration Defective: Not Dated as Required by 28 USC 1746 And Contains Unfilled Blanks Which Would Have Tied Statement to Huelsing #1**

Respondent again objects that, contrary to the requirements of 28 USC 1746, Mr. Huelsing

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

failed to date the allegedly sworn document presented at *C. Exh. 60.14.e*, and neither his initials nor a date appear on any of the 4 pages of his alleged sworn statement. *Id.* Thus, EPA's proffer of the document as "sworn" is not true, since the date it was sworn is not provided, and thus it does not comport with the rule. *28 USC 1746.* Second, Respondent again objects that the document is materially incomplete, containing blanks with missing text at paragraphs 2 and 12 which would have related the statement to Huelsing #1.[39] The omissions are material since Mr. Huelsing's statement otherwise entirely fails mention Huelsing #1 by name, and does not connect the injection well to any activity of RWS or EJK, or to any of Mr. Huelsing's alleged observations. *Id.*

**ii. Huelsing Had No First Hand Knowledge of and did not Observe 'Men Hired By Mr. Klockenkemper' At Huelsing #1 In 1995-1996 Since He States All Huelsing Lease Wells Were Inactive From 1992-2005**

Mr. Huelsing states that none of the Huelsing wells were active in the thirteen years prior to 2005, which would cover the time of the alleged MIT violation and most if not all of the reporting violations for Huelsing #1.[40] *Compl. Exh. 60.14.e at para. 9.* Like Flood and Pierce, the only mention of contact with Respondents and hiring of men where a time frame is specified is related to alleged 2005 work at the Huelsing lease oil wells (without specifying which well), and there is no specific mention of Mr. Huelsing having observed RWS, Mr. Klockenkemper or any hired hands working in 1995-1996 at Huelsing # 1 or at any other Huelsing well. *C. Exh. 14.e. at paras. 5, 7.* The rest of Mr. Huelsing's alleged observations regarding the Huelsing well field are not fixed in time, but, like his failure to specify well numbers, are generic, broad-brushed and rambling.[41] *Id.* Thus, any alleged "maintenance and operational" activity by Rocky Well or Respondent attributed in Mr. Huelsing's statement to Mr. Klockenkemper was either before

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[39] Mr. Arkell testified that his initial 2003 write ups were based on interviews with the declarants, and that he later prepared the 2005 declarations for signature himself. *4/25/07 Tr. H. at 120-122 (Arkell).*

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

[41] e.g. paragraphs 1 ("many years ago"); 4 ("At least one of the Huelsing wells was productive for many years"); and 6 ("a saltwater leak from one of the Huelsing wells a number of years ago...").

1992, or in 2005, and statements cannot be temporally, or in any other manner, attributed by EPA or this court to proving liability or penalty for the December 19, 1996, alleged MIT violation at Huelsing #1. *Compl. Exh. 60.14.e at para. 9. Id.* As such, Mr. Huelsing's statement does not established that he has first hand knowledge at to what Mr. Klockenkemper did at the wells circa 1995-1996. *Id., FRCP 56 and FRE 602.*

**iii. Statement Directed At Oil Production Wells, Not Huelsing #1 Injection Well**

Third, it appears that the totality of Mr. Huelsing's statement (other than para. 13's purely speculative "belief" that Respondent was (in 2005, supposedly) injecting brine from another field to "one injection well") is directed at production wells (.e.g Subpart C oil wells), and not to a separately regulated injection well such as Huelsing #1. *Compl. Exh. 60.14.e.* The lack of specificity, especially the failure to specifically attribute any action or even hearsay statement to Mr. Klockenkemper in connection with Huelsing #1 injections or operations around 1995-1996, renders the testimony immaterial, irrelevant and not probative as to Mr. Klockenkemper's role proximate to the time of the MIT violation. The testimony does not tend to make it more likely than not that Mr. Klockenkemper was engaged in conduct which required a permit at the time of the 1995-1996 violations, or that he committed any other UIC violation at the Huelsing #1 injection well which might somehow make him personally liable under the SDWA, or that he rendered himself and thus it is not admissible under FRCP 56(e) and FRE 602 either at trial or upon motion for summary judgement.

**iv. Inconsistencies Between Alleged 2003 Statements to Arkell and 2005 Declaration, Including Omission of Adverse, 2003 Statements from the 2005 Declaration, Required Explanation by Huelsing/Arkell**

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

| | **Mr. Arkell - 2003** | **Mr. V.J. Huelsing-2005 Declaration (C. 60.14.e)** |
|---|---|---|

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

Mr. Huelsing's refusal to attribute his statements to an injection well when he was attesting his statements to a production well is understandable, since there are no oil production rights or lease rights to be granted for an injection well such as Huelsing #1, since it does not produce oil.[42] *Compare C. Exh. 60.13. at p11, para.1 to C. Exh. H at para. 2.* The foregoing subtle yet material differences between the 2003 Arkell attribution and actual 2005 statement, as well as Mr. Huelsing's apparent refusal to fill in the blanks specifying the EPA's desired well name, highlight the unreliability of the statement, and by implication Mr. Arkell's report, as to proving anything EPA has alleged related to Huelsing #1, and Respondent should have been allowed to examine them as to the circumstances of the omissions.

**v. Indicia of Potential Bias of Declarant Present - Declarant Accused Respondent of Committing Fraud On Huelsing Family**

Mr. Huelsing also accuses Mr. Klockenkemper of various offenses allegedly committed against the Huelsing family and of other improprieties, for the most part based on pure hearsay.[43]

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[42] *C. Exh. 86 at 1; 4/26/07 H. Tr. at 237 (Morgan)(*"...brine...is produced with the oil...is separated from the loose oil and ...many times it's put back in the injection wells...It's just a salt water disposal well. It's just for disposal, it's not going to reproduce [Oil]".); *See Also C. Exh. 84 at 2-3, and figure 2*.

[43] e.g. "I believe that Edward Klockenkemper may have been selling it to several oil companies in a scheme to cheat my family out of proper royalties...I have been upset with Klockenkemper's practice of...driving vehicles over corn...Klockenkemper tried to run me down with a vehicle...I filed a lawsuit against Edward Klockenkemper in an attempt to get him removed from the Huelsing's wells lease...I believe that Edward Klockenkemper was able to copy the signatures of my parents, aunt and uncle onto a separate lease for the one injection well." *Id.*

The nature of such inflammatory, irrelevant, superfluous, speculative hearsay material indicates the high potential for bias and the increased possibility that the declarant is not testifying truthfully or accurately, rendering the declaration highly prejudicial, unreliable, and immaterial. *C. Exh. 60.14.e at paras 4, 5, 8, 11, 13; FRCP 56, FRE 403, FRE 603.* Further, Mr. Huelsing's accusations do not specify Huelsing #1 or the 1995-1996 time period at issue, consist of opinion, and are irrelevant to whether Mr. Klockenkemper was involved with the Huelsing #1 injection well circa 1995-1996. *Id. at paras. 4, 5, 7, 8, 10, 11, 12, and 13*.

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

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

Like the Huelsing statement, the Heitman statement does not specifically mention any observations as to "maintenance and operational activities" at either the Huelsing #1 or Zander #2 injection wells around the 1995-1996 time of the violations. Temporally, Heitman's statement relates only to events which allegedly occurred "during the early 1970s to the late 1980s", or after 2005, or for which he did not specify a date or year. *See C. Exh. 60.d at paras. 1, 2, 5*.

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

Like prior statements, the Heitman statement is directed at production wells, and does not attribute any action of Respondent, or statement made therein, to the alleged December 19, 1996, MIT or reporting violations at the two injection wells.[44] *C. Exh. 60.d.* This circumstance, by itself, renders Heitman's testimony irrelevant to the finding that maintenance and operational activities occurred at either injection well (since he was not hired to work on injection wells), and no weight should have been given to the statement as to Respondent's liability for the alleged SDWA violations for these or any other wells.

**iii. Declaration Based on Inflammatory Hearsay, Opinion, and Belief and Indicia of Bias Present from Admitted Firing of Declarant by RWS/Declarant's Lawsuit Against Respondents**

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

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[44] Such fact is not surprising since Heitman was an oil "pumper' who worked on the oil wells, and not a contractor hired to work on the saltwater injection wells which do not produce oil. *C. Exh. 60.14.f. at paras. 5, 6.*

*e.g. Compl. Exh. 60.f. at paras. 2, 5, 7.*[45] Additionally, an obvious source of potential bias is provided by Heitman's statement he was fired by Respondents, that the declarant had unsuccessfully sued Respondent Klockenkemper, and that Respondents allegedly owed him money. *Compl. Exh. 60.14.f at para. 3.*

**iv. Material Inconsistencies Between 2003 and 2005 Heitman Statements And Inconsistencies in Arkell Report Also Precluded Use of Declaration**

Mr. Arkell again appears to attribute specific statements, naming the Huelsing #1 well, to Mr. Heitman in 2003, that Mr. Heitman did not make in his November 2005 sworn statement. *C. Exh. 60.13* at p10. Interestingly, Mr. Arkell's June 2003 summary attributes specific mention of the "Zander #1" well to Mr. Heitman, although the well at issue is the Zander #2 well. The following table again illustrates that subtle yet material differences between Arkell's 2003 attributions and Heitman's 2005 sworn statement existed:

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

Again, contrary to Arkell's 2003 rendition, there is no "oil lease" for an injection well such as Huelsing #1, and injection wells do not produce either oil or saltwater, items which Heitman apparently had to correct. These discrepancies highlight the issue of Mr. Arkell's accuracy and the need for cross-examination of Arkell and Mr. Heitman at hearing prior to accepting the

[45] e.g. "I have heard that [Respondent] often will not bill [investors] for years and then send a bill demanding not only reimbursement for the costs but interest also...there may have been small areas of ground that were contaminated with saltwater."

declarant's testimony.[46]

**d. Finding 2(b) Fails to Mention or Cite Evidence for Other Three Wells, and is Unsupported as to Atwood #1, Huelsing #1, Zander #2 Wells, Thus It Must Be Vacated As To All 6 Wells**

Officer Toney cites no evidence or declarations in her Finding 2(b) as to any of the other three wells at issue, Twenhafel #2, Wohlwend #6 or Harrell, thus 2(b) does apply at all to these three. *See 12/27/07 Decision*. Further, the declarations cited in support do not in fact support the Officer's hypothesis as to the Atwood #1, Huelsing #1, or Zander #2 wells, as depicted above. Thus, finding 2(b) must be vacated as to all wells.

**6. Finding 2 (c): "He sought access to the wells from property owners": Unsupported by Single Atwood Lease Witness - *C Ex. 60.14.b - 10/17/05 David Jones (Atwood #1)*[47]**

**a. No Temporal Relevance/First Hand Knowledge: Jones Admits Selling Atwood Property In 1968, And To Not Speaking With Respondent Since 1985**

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

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

Like the previous declarants, Jones also admits to not having contact with Respondents at the time of the MIT violations: "I have not spoken to Edward Klockenkemper in more than 20 years." (Since 1985) *Id. at para. 6.*

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

Jones admits that the Atwood #1 well "has not been operative for about the past 30 years...", thus indicating that any alleged access would not have been requested for the inoperative Atwood #1 injection well, but rather for one or more of the Atwood production wells. *Id. at para. 4.* This also indicates that neither Mr. Klockenkemper or RWS were operating the Atwood #1 in

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[46]Mr. Arkell admitted that he did nothing to verify the content or veracity of statements that were being made to him by the declarants, and that he did not bother to interview other witnesses that had information beyond those on the list provided by EPA counsel, despite acknowledging that there were contradictions. *4/25/07 Tr. H. at 126-127.*

[47]Respondent objects that the act of seeking access from property owners to a well field has no relation to proving that Mr. Klockenkemper was conducting illegal or other violative operations in regard to the six wells in 1995-1996, and thus finding 2(c) itself is irrelevant to liability under the SDWA even if it were supported by the single declaration.

1995-1996 on a "day to day" or any other basis. *Id.* Jones also admits that he has no actual knowledge that the Atwood #1 well ever operated prior to 1975: "I do not know if it has been used for underground injection disposal...", thus he cannot testify as to what Mr. Klockenkemper was doing in regard to the operation of, or access to, the Atwood #1 well even when it may have been operative more than 30 years ago. *Id. at para. 6.*

**c. Jones Sole Alleged "Access" Incident Does Not Specify That Atwood #1 Involved, Appears to Refer to Production Wells, and Does Not State Date/year of Alleged Occurrence**

The only reference in the Jones Declaration to a "request" for access is an undated incident where Jones states Mr. Klockenkemper allegedly "demanded that an access way between the two wells in the middle of the field be allowed". *Id. at para. 3.* Notably, Jones does not state that one of the 2 wells at issue regarding the access road was the Atwood #1 injection well. *Id.* In fact, it appears that the alleged access incident Jones was referring to involved Atwood production wells: "Saltwater extracted from one of the wells ruined a large part of my wheat crop one season many years ago". *Id. at para. 3.* Given that saltwater is extracted from production wells and then reinjected by way of a separate injection well (such as Atwood #1), it appears that Mr. Jones statements in para. 3 refer to oil production operations and alleged releases of the brine extracted with the oil from the Atwood lease production wells, and not Atwood #1 injection well. *Id. See C. Exh. 86 at 1, C. Exh. 87 at 1, C. Exh. 89; See Also 4/26/07 H. Tr. at 237 (Morgan); See Also C. Exh. 84 at 2-3, and figure 2.* Thus, the Jones statement is irrelevant to this matter and finding 2(c), and should not have been considered by the Officer, leaving finding 2(c) entirely unsupported as to the Atwood #1 well, and also as to the other 5 unmentioned wells.

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

Further, the Jones statement refers only to the Atwood lease, and thus the Officer's use of the word "wells" or "owners" is not supported by the Jones statement to the extent her finding is meant to infer the finding applies to all six injection wells at issue. *Id. at para. 2.* Finding 2(c) simply has nothing to do with operations at, or SDWA liability for, the Atwood #1 or any of the other injection wells at issue here, and 2(c) is thus irrelevant, in addition to unsupported, as to Mr. Klockenkemper's liability for the Atwood #1 violations, let alone the other 5 MIT violations at other wells. Given the foregoing, the Officer Toney's finding 2(c) has no support and must be vacated in its entirety.

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

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

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

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

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

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

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

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

Like Heitman's declaration, Maschhoff's testimony is also directed at production wells, not injection, wells, and indicates the entire Twenhafel well field was inactive in 1995.[48] *C. Exh. 60.14.c. at paras. 4 and 5.* Her declaration also incorrectly states that the Twenhafel #2 well was one of the Twenhafel lease's "oil wells", rather than an injection well, indicating a lack of reliability as to her statements (or as to Arkell's drafting). *Id. at para 3.*

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

[48] To wit: "In about 1977, my father and I signed an oil and gas lease transferring the productions rights for the Reinhold Twenhafel lease to Mr. Klockenkemper...There was not any production from the wells from about 1987 to 1998". Concomitantly, there would be nothing to inject into #2.

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

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

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

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

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

**iv. Indicia of Bias: Admits to Being at Odds With and Suing Respondent Klockenkemper**

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

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

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

Respondent incorporates herein his discussion of and objections to the Officer's reliance

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

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

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

Respondent incorporates herein his discussion of Heitman's statement in the objections to finding 2(b) above, and for that same reasons asserts that the Heitman declaration is irrelevant to and does not relate what Mr. Klockenkemper was doing in regard to operational or maintenance activities at the Huelsing #1 and Zander #2 wells, let alone the other 4 wells, at the time of the 1996 MIT violations. *C. Exh 60.14.f.* The only thing it establishes is Mr. Heitman worked for RWS up until approximately 1989, when Heitman alleges he was fired. *Id. at paras. 2, 3, 5, 6.* Consequently, Heitman has no first hand knowledge to testify as to what Mr. Klockenkemper did or if he was in charge as far as RWS or the 2 wells at the time of the 1995-1996 MIT violations. His statement should not have been relied upon for any assertions as to these two or any other of the six wells. *FRCP 56(e); FRE 602.*

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

**i. Allen Admits That He Does Not Know if any Harrell Lease Well Was Used for Injection**

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

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

Allen states that the Harrell wells have "been inoperable for more than 10 years", further

indicating he did not observe any maintenance or operational activities there since at least 1993. *Id.* Allen appears to be of the impression that the 2 wells he observed were oil wells, since he states that he beleived that saltwater was pumped from the 2 wells through piping to a tank located between the 2 wells. *C. Exh. 60.14.g at para. 5*.

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

Allen's statement that "Klockenkemper and others working for him" accessed the two wells, does not, according to Allen, relate to the injection well, and Allen fails to state the basis for his knowledge, or to provide a date or even year for his alleged observations or inferences. *C. Exh. 60.14.g*. The only time that Allen specifically states he saw Respondent at the site was in 2004 when the stored materials were removed from the site, but he did not talk to him. *Id. at para. 8*. Allen also stated that his conversations with Mr. Klockenkemper "focused on his storage of junk and scrap materials on my property", rather than on operation of the wells. *Id at para. 7*.

**iv. Potential Bias Present Due to Admitted Past Run-Ins With Respondent, Including Threatening To "Kick" Klockenkemper's "Ass", and Reliance on Hearsay To Impugn**

Allen also has personal issues with Mr. Klockenkemper over alleged run-ins, claims of vandalism, and Allen's dislike of RWS's storage of wellfield materials on the oil lease, lending to a possibility of biased testimony. *Id. at para. 6.* In fact, Allen reportedly made a 2003 statement to Mr. Arkell that Allen had in the past threatened to "kick" Mr. Klockenkemper's "ass" over a dispute as to oil well access and equipment storage/theft (which fact did not get included in the 2005 declaration). *C. Exh. 60.13 at p*6. Further lending to suspicion is Allen's reliance on hearsay regarding several of Allen's irrelevant inflammatory accusations.[49] *C. Exh. 60.14.g. at paras. 6, 8.*

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

As with the other declarations, Allen does not testify to any facts that establish or even allow an inference in favor of EPA's claim that RWS/Klockenkemper was observed by Allen to be "in charge" of any operational activities and maintenance at Harrell #1 or any of the six injection

[49] e.g "I have spoken to other persons who have told me [he ] made the same accusations about me to them...My understanding is that the wells had not been properly plugged...". *Id. at paras. 6, 8*.

wells, at or around the time of the violations or any time near that.

**9. Finding 2 Failed to Cite Any Alleged Fact In Support of Liability for Wohlwend #6 Well, and Must be Vacated Entirely Since No Admissible Facts Cited For Other 5 Wells**

Finding 2 has to be vacated with regard to Wohlwend #6 well, since testimony or alleged facts whatsoever were cited as to Finding 2 for that well, yet liability was still assessed therefore. When taken cumulatively, the declarations do not contain facts supporting finding 2 as to the other 5 wells due to their temporal irrelevance, lack of specificity, hearsay basis, inflammatory content, lack of confirmatory investigations, and potential bias of the witnesses. Taken individually or cumulatively, the declarations simply do not contain facts that support EPA's contention or the Officer's stated findings, and attempted inference of Finding #2, that Klockenkemper actually conducted or directed any operational activities at the injection wells at any time relevant to the 1995-1996 MIT violations.

Rather, the flaws and nature of the declarations require that they be disregarded as proof of EPA's case as to operating in violation of the SDWA permitting requirement, and instead be seen as support for Respondents' contention that there was no illegal operational activity at the injection wells that required another permit, or that could be considered continuing illegal conduct. It was error for the Presiding Officer to assign any weight to and to base her findings upon them *FRCP 56(e); FRE 602, Payne, Supra, Allen, Supra.* Consequently, finding 2 must be vacated in its entirety.

Respondents also object that the Presiding Officer, like EPA, improperly lumped all six wells together in her findings for liability purposes despite the six distinct violations alleged, and asert that the Presiding Officer's blanket assessment of liability, without underlying support for each violation at each well, violates Respondents due process rights and makes it impossible to accurately determine how much penalty should be subtracted in the event less than all violations are dismissed (for instance in the event Count II was dismissed as to RWS under 28 USC 2462).

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

Finding 3 is essentially a subset of Finding 1, and the fact that an officer was the contact between a company and environmental agencies and handled a company's environmental affairs is insufficient basis to impose SDWA direct liability, or indirect liability by way of PCV. *225 ILCS 725/8a; 62 IAC 245.150(a)*; *See In Re J. Magness, Supra; See Respondents' 8/28/06 Response*

*at 7-20.* The documents cited by Ms. Toney all indicate that Mr. Klockenkemper handled RWS's business affairs in the capacity of an officer, always signed corporate documents and correspondence as "President", maintained RWS's corporate identity separate from his, and that Mr. Klockenkemper was acting for, and not as, RWS. As evidenced by their content, the documents cited by Toney do not prove that Mr. Klockenkemper himself illegally operated or injected into any of the wells at any time, let alone 1995-1996, and do not demonstrate or even imply that he was RWS's alter ego who nefariously directed RWS to act illegally in regard thereto for his own benefit to the harm of the environment. *Kelsey Axle & Brake Division, Supra, Aetna Casualty & Surety Co., Supra***.**

**11. Lack of Support for and Irrelevance of Findings Requires They Be Vacated Entirely and Liability Finding Reversed, and that Mr. Klockenkemper be Dismissed**

Given the lack of factual support and errors described above, the three findings on which liability was based must be vacated as irrelevant to and not establishing SDWA liability as to Mr. Klockenkemper, and thus the assessment of liability must be reversed and Mr. Klockenkemper dismissed from this matter as a result thereof.

**12. Mr. Klockenkemper's Other Affirmative Defenses Erroneously Rejected**

**a. 4th Affirmative Defense Rejected: No Laches Found Despite 11 Year Delay**

The entirety of Officer Toney's consideration and rejection of the laches defense as to penalty comprises one-paragraph:

> "The undisputed facts are as follows. By letter dated May 19, 1999, the IDNR referred this matter to EPA Region 5 for enforcement. U.S. EPA issued Notices of Violation to Rocky Well Service on September 8, 2000...to Mr. Klockenkemper on January 25, 2002...filed this administrative action against Rocky Well on July 9, 2001, and moved to amend its Complaint to add Mr. Klockenkemper as respondent on May 1, 2002. This timeline does not constitute the "unreasonable delay" that is required to invoke the doctrine of laches and Respondents' claim that the doctrine bars U.S. EPA's claims in this case is rejected. *See In re Crown Central Petroleum Corp. No.* CWA-08-2000-06 Jan. 9, 2002) slip op. at 55. *Id."*

Respondents assert that the Officer failed to consider and mention several delays, and their resulting prejudice to RWS and Mr. Klockenkemper, especially in that they, *inter alia*, delayed Respondents' requests for, and ability to prepare for hearing on the 1995-1996 violations, until 2001 and 2003, respectively. Respondents propose the following timeline as more representative:

| Date | Action | Delay (yrs from initial violation /from referral) | Comment |
|---|---|---|---|

| | | | |
|---|---|---|---|
| 9/1/95 | Count II MIT violations | | |
| 12/19/96 | Count I MIT violations | | |
| 5/19/99 | C. Exh. 33 - IDNR Referral | 3.5/0 | Referral States/Shows EJK Sole Officer of RWS |
| 9/8/00 | C. Exh. 34 - RWS NOV | 5.08/1.5 | Untimely as to Count II |
| 7/9/01 | Initial Complaint - RWS | 5.80/2.2 | Untimely as to Count II |
| 1/11/02 | EPA Motion to Stay Proceeding 90 Days | 6.5/2.7 | Stayed To Proceedings to March 13, 2003 |
| 1/25/02 | C. Exh. 40 - EJK NOV | 6.5/2.7 | Untimely as to Counts I and II<br>Defective Under 62 IAC 240.150(a) |
| 3/13/02 | C. Exh. 41 - EPA Notice of Intent to Sue EJK | 6.6/2.8 | |
| 5/1/02 | Motion to Amend to Add EJK | 6.7/3 | |
| 5/21/02 | C. Exh. 60.1.a - Nevada Secretary of State Corporate Information for RWS | 6.7/3 | First Indicia Of Any EPA Investigation Into RWS<br>Shows EJK Sole Officer of RWS |
| 6/2002<br>[4/14/06] | C. Exh 60 - Arkell Report | 6.8/3 | States at p1, paragraph 1, of "Introduction" that initial investigative information was first provided to EPA June 2002, updated 2003 and 2006.<br>Most attachments generated 2005-2006 |
| 2/20/03 | Amended Complaint | 7.5/3.5 | |
| 4/15/03 | EJK Motion to Dismiss Amended Complaint | 7.6/3.6 | |
| 6/16/03 | Completion of Briefing on M/Dismiss | 7.7/3.8 | |
| 6/17/03 | *C. Exh. 60.13 - Mr. Arkell's initial investigative report* to EPA | 7.7/3.8 | First EPA investigative interviews conducted in May 2003 |
| 5/3/05 | RJO Kossek's Order Denying EJK Motion to Dismiss | 9.6/6 | Per Docket, **no activity on case by EPA RJO for 2 years** - from 6/16/03 (close of briefing) to 5/3/05 Order |
| 4/24-26/07 | Hearing | 11.5/8.0 | Over a Decade Later, 8 years from referral |

Respondents assert that the delays depicted above, totaling nearly 12 years from violation to hearing, are not reasonable on their face. [50] Considering the equities of this matter, given the fact that the 28 USC 2462 deadlines were missed by EPA and the extreme prejudice (prosecution after running of statute of limitations, lack of timely hearing, loss of evidence and memory) that has resulted to Respondents from EPA's dilatory and inappropriate prosecution of this matter, laches should have attached to bar prosecution of all Counts as to Mr. Klockenkemper as well as RWS,

[50]Neither has EPA validly and credibly explained the delays or lack of diligence in the first five years after the violation, especially considering the fact that the record contains no indicia of any EPA investigation whatsoever until May of 2002, three years after the IDNR referral and well after the MIT violation statute of limitations had run as to Mr. Klockenkemper.

or, if not, the defense should at least have been allowed to go to hearing.[51]

**b. 3rd Affirmative Defense - Equitable Estoppel/Estoppel en Pais**

Officer Toney rejected the third affirmative defense (estoppel), finding that Respondent did not establish "affirmative misconduct by the government or reasonable reliance thereon.". *12/27/06 Decision at 13*. Error is alleged in the fact that no further discussion is provided by the Officer, rendering it impossible to review her rationale. *Id.* Officer Toney's finding that Respondent did not "established affirmative misconduct" or "reasonable reliance" begs the Respondent's instant arguments that the issue should have been allowed to be fully developed and explored at hearing, as was allowed by the cases cited in support of this defense.[52] *In the Consolidated Matters of County of Bergen and Betal Environmental Corporation, Inc., Supra* .

**c. 12th Affirmative Defense - Rejection of Selective Enforcement Defense Without Hearing Error**

Respondent asserts that, based on the foregoing facts and issues, a material issue for hearing was raised below, including as to whether EPA had any valid reason to pursue Respondent individually, and whether there was improper motive in EPA's attempts to ignore the SDWA and Illinois UIC program jurisdictional definitions as well as Rocky Well's corporate form in pursuing him personally when he was not regulated by the SDWA. EPA's prosecution could reasonably construed as punitive and selective where RWS had a valid corporate existence, where no advance statutory or factual notice of the revised liability scheme was given to Mr.

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[51] *Order of R.R. Tel. v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49, 64 S. Ct. 582, 88 L. Ed. 788 (1944)*(Statutes of limitations and laches prevent pursuance of claims that have been allowed to loiter until evidence has been lost, memories have faded, and witnesses have disappeared). *In the Consolidated Matters of County of Bergen and Betal Environmental Corporation, Inc.* Docket Nos. RCRA-02-2001-7110 and RCRA-02-2001-7108 (3/7/03 Order)(Laches and equitable estoppel defenses should be preserved since Respondent might successfully prove its case after full development of record).

[52] Respondent argues EPA was estopped by: 1) EPA's failure to timely investigate and include Respondent in initial complaint; and 2) EPA's pleading of Rocky Well Service as the sole "permittee" in the original complaint. *6/6/06 Answer; See Respondent's 3/14/06 Response to EPA Motion to Strike 12-15, See 7/9/01 Complaint at paras. 20, 22, 23, 27, and 28.* Forcing Respondent to proceed was highly prejudicial when compared to the prior status quo between EPA, IDNR and original sole respondent, Rocky Well and the amount of time that passed since the violations. Respondent asserts that all 4 elements of estoppel were shown to be present, sufficient to at least allow hearing on the defense.

Klockenkemper, and where no valid basis existed in record for pursuing him personally without regard to the form.

**d. 14th Affirmative Defense - Impossibility of Compliance Due to Lack of Access or Control of Wohlwend #6 and Twenhafel #2 - Record Reflects That Charles Fisher Operated and Had Legal Possession to Wells at Time of Violations and Until 1998**

The Officer summarily found that there were insufficient facts indicating that impossibility was an issue, with regard to two wells which were under separate litigation in 1995-1996 and not in RWS's legal possession or control on the dates of violation and which rendered it impossible for RWS to MIT them in the 1995-1996 time span. *12/27/06 Decision at 15*. However, the record before the Officer evidenced that neither Mr. Klockenkemper nor RWS were in legal possession of Twenhafel and Wohlwend wells at time of violations because Charles Fisher was adjudicated to have acquired interests in, held possession of Twenhafel and Wohlwend leases, and operated a well or wells on the Wohlwend lease, from 1980 to 1997. *R. Exh. 19 - 4/22/97 Court Order*. As evidenced by the 4/22/97 Order, any court grant of production rights, including the right to access the lease, if it was valid, did not occur until 1997, after the alleged violations.[53]

Respondents presented sufficient indicia of disputed material facts which would tend to defeat EPA's claims as to Rocky Well or Respondent in regard to the Twenhafel and Wohlwend wells, if in fact someone else besides Rocky Well or Respondent had been adjudicated the operator of the leases at the time of the violations. *See Maschoff v. Klockenkemper*, No. 5-99-0276, (Ill. App. Ct. 5th Cir. - Order of December 2, 2000), *(R. Exh 33)*. Consequently, it was error for Ms. Toney not to allow this defense to go to hearing prior to rejecting it.

**13. Conclusion - Partial Accelerated Decision**

EPA's amended complaint did not establish SDWA jurisdiction over Mr. Klockenkemper, did not pierce the corporate veil to reach him, issued an invalid SDWA NOV to him, failed to file its

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[53] The text of the April 22, 1997, order *(R. Exh. 19*) expressly supports Respondents' assertions that Mr. Fisher held the leases' access rights and operated the leases, including the wells at issue, at the time of violation:

-"Fisher...started working the [Twenhafel and Wohlwend] leases in 1976...while the [Klockenkemper] case was in some sort of litigation hiatus, Fisher had set out to... acquire...the majority of all remaining interests in the original leases" (R. Exh. 19 at 1-2)

-"...Fisher remained in possession of the Wohlwend lease after 1980 and used the equipment and produced oil for his own benefit until the present [1997]" (*Id. at 4*)

-"[During the] seven-year litigation hiatus...Fisher remained in possession of the Wohlwend lease...and attempted to make a few oil runs only after acquiring a new lease in 1982 on the property...we also believe that Fisher hardly has abandoned any interest in the equipment on the leases when he has been constantly litigating to defend such title...(*Id. at 7-8*).

amended complaint within 5 years of the MIT violations, and failed to establish a prima facie case under 40 CFR 22.14 and 225 ILCS 725, thus the 12/27/06 Order granting EPA's 7/21/06 Motion on liability must be reversed, and Respondent's 7/21/06 Motion should be granted dismissing EJK.

**E. EPA and the Presiding Officer Incorrectly Assessed a "Joint" Penalty, and Failed to Apply the Six SDWA Statutory Penalty Factors By, *Inter Alia*, Failing to Properly and Separately Apply Each Factor to Each Violation, at Each Well, and Assessing a Penalty That Is Incorrectly Calculated, Without Support Under the Evidence Relied upon by the Officer (Toney Order of 7/23/08).**[54]

A hearing on penalty was held from April 24-26, 2007, in the Illinois Appellate courthouse in Mt. Vernon, Illinois.[55] Prior to the hearing, EPA's sole penalty calculation witness, Lisa Perenchio, provided her direct testimony by way of a 40 CFR 22.22(c) declaration, but such declaration did not include any or reference any supporting exhibits, including EPA's proposed hearing exhibits. *C. Exh. 141*. RWS and Mr. Klockenkemper did likewise, but unlike EPA, provided foundation for and introduced Respondents' hearing exhibits as a part thereof. *C. Exhs. 181 and 182*, respectively. Direct testimony and evidence rebutting EPA's findings of harm and the EPA's penalty assessment as set forth in EPA's initial penalty calculations by Jeff McDonald was also provided under 40 CFR 22.22(c) by RWS's expert witness Mr. John Morgan. *C. Exh. 180*. EPA did not present an expert rebuttal witness to Mr. Morgan. Respondents appeal the Initial Decision as being in error at law and fact and inconsistent with the record below, and for ignoring or improperly rejecting Respondents' numerous relevant objections and arguments set forth in their post-hearing briefing, and for entirely rejecting without discussion all of

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[54] See footnote 1 above. Due to the 70 page limitation imposed by the EAB on this Revised Brief, and given the Initial Decision's nearly verbatim adoption of EPA's penalty calculations and supporting arguments as set forth in EPA's post hearing briefs (Ms. Toney calculated assessment differed from EPA's by only *$10-See Order at 12, fn24*), Respondents incorporate herein by reference their facts and conclusions set forth in their 12/21/07 Proposed Findings of Fact/Conclusions of Law and their argumetns set forth in the 12/21/07 Brief in Support, as well as those in Respondents 1/22/08 Response to EPA Brief in Support, and in Respondent's 2/4/08 reply to EPA's Response to Respondents' Brief, and present same as their arguments on appeal in support of elimination or reduction of the penalty, asserting that the Presiding Officer erred in failing to adopt the proposed facts and conclusions based upon Respondents' arguments and the facts before her.

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

Respondents' proposed findings of fact/conclusions of law. *Initial Decision at 21-24*. Respondents also challenge findings Nos. 5-8, 10-14, 16, 19, 20-28 as unsupported and erroneous, and make other points of error, as discussed herein.

**1. Error 1: Irrespective of Failure to Apply SDWA Factors, Officer Toney's Assessment of the Penalty "Jointly" Against Respondents Violates the SDWA and Due Process**

Ms. Toney stated that she assessed the penalty "jointly" against Respondents. *7/23/08 Order at 5*. Respondents assert such assessment is in error and violates Respondents' due process rights, since, *inter alia*, the Illinois SDWA, unlike CERCLA, is not a joint and several liability statute, and does not provide for imposition of joint liability or "joint" penalty assessment event given that only a single entity, the permittee, may be held liable for each well. *225 ILCS 725/8a*. Such holding is an improper executive expansion of the legislatively established SDWA liability scheme discussed in the statutory framework section above. Thus, without even addressing the issue of the Officer's failure to properly apply the 6 factors, calculate the penalty or meet the 40 CFR 22.24 burdens, the penalty assessment is legally invalid and must be reversed and the Initial Decision vacated.

**2. Error 2: Officer Erred by Lumping the Wells Together, Thus Failing Apply Any of Six Factors to Each "Particular Violation" at Each Particular Well, Based upon Site Specific Information**

Respondents assert that the Officer and EPA fatally erred by grouping all six MIT violations as if they had occurred at one well, or were in fact one violation, for purposes of analysis under the seriousness factor (Factor 1) and the other 5 factors, rather than analyzing the circumstances of each "particular" violation at each well against the 6 factors based on site specific facts.[56] *See Respondent's 12/21/07 Post- hearing Brief at 2-4, 8-10; See e.g. Respondents' 12/21/07 Proposed Findings of Fact at pp1-96, Secs. I-VI (Well By Well Analysis).* Such combined approach makes it impossible for EPA or the Officer to have considered and applied the first or any of the statutory factors to each well individually. *Id.* The failure to individually calculate,

[56] Perenchio admitted that the Policy expressly requires that EPA take into account the "potential" for a "particular violation to endanger...(USDW)" in using Table I. *C. Exh. 47 at 1, Section I.A,; 4/25/07 Tr. at p147, L19 to p148, L6.* Ms. Perenchio also admitted that she did not take any case-specific or RWS well-specific facts into account for Counts I and II in relation to Table I, other than the fact that MIT violations were alleged, when she selected the highest level from Table I for all six well's violations as a group. *4/25/07 Tr. at p156, L6-23; C. Exh. 141, at para 22.*

explain and document how it arrived at the gravity penalty for each violation for each well has been held to be improper calculation, especially where the calculator applied a rote or mechanical selection of seriousness, without an individualized evaluation. *In the Matter of: Gypsum North Corporation, Inc.*, Docket No. CAA 02-2001-1253 at pp10-11 (11/1/02)[57]. Concomitantly, the failure to properly calculate the gravity portion of the penalty and a failure to consider site specific information has been found to constitute a failure prove the proposed penalty under 40 CFR 22.24, and is a violation of the governing statutory provision at 42 USC 300h. *In the Matter of: Bil-Dry Corp., Docket No. RCRA-III-264*. Due to the grouping of the wells, EPA and the Officer failed to address the 6 factors to the facts attendant to each of the "particular violations" at each well, and the assessment is thus in violation of 42 USC 300h and must be reversed.

**3. Error 3: Presiding Officer Erred by Misconstruing SDWA by Incorrectly Equating the Endangerment Assumed by the SDWA from "Any Injection", to a Mandate Allowing EPA to Assume the Highest Level of Endangerment from "Any [MIT] Violation", Resulting in Impermissible Mechanical Selection of Seriousness Level in Table I (SF 1)**

In her preamble to her analysis of statutory factor 1, Ms. Toney stated:

> "The UIC Penalty Policy provides that several elements are to be considered in evaluating the seriousness of a violation, including (1) the *potential* of a particular violation to *endanger* underground sources of drinking water...As to element (1), it is significant that the statute defines the term "endanger"to include any injection which *may* result in the presence of contaminants in underground sources of drinking water ("USDWs"). ...The Policy itself speaks to the "potential" for such endangerment. Thus, a violation need not rise to the level of actually causing harm to the environment for it to be of a serious nature. *Decision at 5-6*. (Italics by Ms. Toney; underlining added)

As does EPA, Officer Toney errs in misreading the SDWA term "any injection" from 42 USC 300h(d)(2) as being the same for seriousness purposes as the penalty policy term "any violation". C. Exh. at 1. By its own terms, the UIC SDWA program and UIC Penalty Policy contemplate that high seriousness will be indicated by the potential threat presented by "injections", and not just merely from the existence of

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[57] In *Gypsum*, EPA's enforcement officer made the initial gravity seriousness penalty amount selection based solely on the classification of the violation (failure to notify EPA of asbestos-related demolition and obtain permit by rule), and admitted that he assigned the highest level penalty of $16,500 by rote, and that a "subhuman" could perform the initial gravity "calculation". The *Gypsum* ALJ held that EPA's penalty calculator cannot initially blindly select the gravity of a penalty based solely on the "category" of violation, where the resultant penalty component is always same for every violation of that type, but must consider individual facts from the outset. The *Gypsum* Court stated: "Because the Policy operated as an edict, affording no individualized assessment of the particular facts surrounding the violation, it failed to comport with the statutory command that the penalty criteria be considered.

a particular type of non-injection "violation".[58] *42 U.S.C. § 300h(d)(2)*; *C. Exh. 47 at fn1*. Caselaw and the SDWA itself do not support EPA's and the Officer's interpretation of the penalty policy to automatically and categorically require that any MIT violation must be designated to be of the most serious nature, irrespective of whether EPA showed any injections or other circumstances that presented a real or credible potential threat of environmental harm to any SDWA.[59] As such, the Officer's reading of the SDWA, the UIC penalty policy and caselaw as set forth in her preamble and analysis, especially her reliance on and reading of *In Re Carroll Oil, 10 E.A.D. 635*, must be rejected in this case. *Decision at 5-11.*

EPA and the Officer cited to the EAB decision *In Re Carroll Oil* in support of their assertion that EPA may automatically select the highest level based on the type of violation, alone, and does not need to show "actual harm" when assessing "high" penalties or labeling a violation most serious. *EPA Response to Respondents' Post-hearing brief at 5-6; Decision at 6, 9.* However, the Officer's citation to *Carroll* contradicts her own rigid approach, since the EAB in *Carroll* rejected EPA's rigid mechanical application of the "harm" criteria [60] *In Re Carroll Oil at 670, fn 34.* Thus, contrary to the Officer's assertions here, that case does not stand for the proposition that EPA

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

[59]At hearing, EPA's penalty recalculator, Lisa Perenchio, acknowledged that EPA's selection of the seriousness level in Table I of the UIC Policy in this case was driven solely by the category of violation, and acknowledged that any MIT violation was automatically assigned the highest level of seriousness in Table I by EPA, irrespective of the particular facts of the case or well. *4/25/07 Tr. at p145, L18-22, and p146, L23 to p147, L18, and p148, L20 to p149, L18.* However, Perenchio admitted that the Policy does not state that the Table I seriousness level should be mechanically assigned by EPA based on the "potential" for a "category of" violation to endanger USDW. *4/25/07 Tr. at p148, L7-12*; *C. Exh. 47 at 1, Section I.A.*

[60] To wit, the *Carroll* panel stated: "We acknowledge that the Penalty Policy, Appendix A, automatically ranks violations of 40 C.F.R. § 280.70(c) as major with respect to potential for harm and extent of deviation from requirements. However, the Board is not bound by the Agency's penalty policies, see *In re Rybond, Inc., 6 E.A.D. 614, 639 (EAB 1996)*, and in this case, as explained above, we regard a "moderate" ranking for the "potential for harm" criterion as more appropriate. *Carroll at 670, fn 34.* The *Carroll* EAB found that since EPA failed to establish that there was anything left in the UST's to have leaked, EAB had to reduce the potential for harm from serious to moderate in the applicable penalty matrix there. In Re Carroll Oil, 10 E.A.D. at 657. As a result, EAB ended up reducing EPA's proposed original total gravity component of the penalty nearly 75% from $19,500 to $5,800. The final penalty of $13,750 was reached only after EAB added in a $7,950 economic benefit component that EPA had not included in its original calculations.

may assess a gravity penalty based solely on programmatic harm. *Decision at 6, 9.* Rather, it and related caselaw support Respondents' assertions that some case-specific findings of harm, or at least a realistic potential of harm to a USDW through which the wells pass (versus harm to the program) must be shown to support the highest severity level.[61]

**4. Error 4: Officer Erred by Relying on Generic, Immaterial, Non-well Specific Testimony as to "Programmatic Harm" as Substitute for Well-Specific Analysis, Calculations and Well Specific Testimony for MIT Violations' Table I Seriousness Determination (SF 1)**

**a. Perenchio Testimony Admittedly Generic, Program-wide, and Not Specific to RWS's Wells or RWS's MIT Violations, No Evidence Presented That There Was Any Fluid in RWS's Wells to Leak, and EPA Failed to Show USDW Existed in Area of Wells to Be Threatened**

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

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

An inspection of Ms. Perenchio's testimony reveals that she did not testify as to what "environmental harm" could result from RWS's "particular" failure to MIT at each well, what the likelihood was that any RWS well would leak, or that any brine or fluid was even present in any RWS well to leak. *C. Exh. 141; see fn 3, infra*. Thus, like EPA in *Gypsum*, EPA here admittedly failed to consider the particular circumstances of the violation prior to assigning the highest gravity penalty level, and EPA's overly rigid, non-fact based approach should not have

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[61] *Also See e.g In the Matter of: Leisure Valley West, Docket Nos. SDWA-III-023 and SDWA-III-024, SDWA-III-025)(6/25/99 - Initial Decision)*(High SDWA seriousness for failure to monitor shown by actual data indicating coliform bacterial in water during the time of violation, and by fact 7 boil orders were issued as a result); *In the Matter of Sunbeam Water Company, Inc., Docket No. 10-97-0066-SDWA (10/28/99 - Initial Decision)* (High Seriousness for SDWA failure to monitor indicated by repeated detects of total coliform bacterial contamination, evidence of complaints of gastrointestinal problems from people drinking Sunbeam water, and findings of physical deficiencies in Sunbeam's water system).

been adopted by the Officer. Notwithstanding, Officer Toney asserted that EPA had met its 40 CFR 22.24 burden regarding statutory factor 1, by way of Ms. Perenchio's fact-starved testimony:

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

**b. Perenchio Testimony Is Insufficient as to this Element since "Programmatic Harm" must Be Presented from and Be Tied to Actual or Potential Harm to Environment Flowing from Specific Violations at Issue, Not Generic Theoretical Harm from Regulated Universe of Wells**

Ms. Toney cites to two cases, *Phoenix Construction Services, Inc. 11 E.A.D. 379, 396-400 (EAB 2004)*(CWA), and *Predex Corp., 7 E.A.D. 591, 601-602 (EAB 1998)(FIFRA)* in an attempt to support her findings that a showing of programmatic harm, alone, supports a substantial penalty under these facts. *Decision at 9, fn 15.* However, neither case supports EPA or the Officer. Contrary to Officer Toney's parenthetical, the EAB in *Predex* did not impose a substantial penalty for programmatic harm, but rather, the EAB upheld the ALJ's decision to issue a warning to in lieu of a substantial penalty due to the lack of harm to the environment or the FIFRA program.[62] *Predex Corp., 7 E.A.D. 591, 601-602 (EAB 1998).* As in *Predex*, and as recited by Officer Toney, the UIC penalty policy already takes programmatic harm into account, and also requires some demonstration of potential harm to support a substantial penalty. *C. Exh.*

[62]The *Predex* EAB stated: "The Presiding Officer found that "[h]ere, no harm to human health or the environment resulted from the violations at issue...only Respondent's want of due care...The Presiding Officer rejected the Region's contention that harm to the FIFRA regulatory scheme warranted imposition of a significant penalty in this case...[since] harm to the regulatory scheme caused by a failure to register is taken into account under the framework of the ERP...thus Complainant's argument that damage to the FIFRA program warrants a substantial penalty is rejected.". *Predex at 599-600.* (Emphasis added).

*47 at 2.* Consequently, *Predex* does not support the high penalty assessment here given the lack of demonstrated harm or credible threat thereof to a USDW, and the resultant lack of showing of harm to the program. *Predex, Supra.*

Similarly, In *In Re Phoenix Construction Services, Inx. Supra*. Respondent Phoenix was found liable for a $23,000 penalty from an assessed amount of $27.000 where it knowingly filled in a wetlands without a permit, causing destruction of the wetlands. *In Re Phoenix Construction Services, Inc. 11 E.A.D. 379, 396-400 (EAB 2004).*[63] Consequently, *Phoenix* also fails to support EPA's and the Officer's assertion that a substantial penalty can be imposed where EPA has failed to show any harm or threat of harm whatsoever, and where the violations at issue, lack of MIT's at shut-in, inoperative wells, do not involve operation without a permit. *Id.* Rather, the fact that Phoenix was only assessed a $23,000 penalty, in the face of both actual irreversible environmental impacts and related programmatic harm from blatantly and knowingly filling a sensitive wetlands, in full view of others who might be inclined to do the same, begs the issue of how a $115,000 proposed penalty can be upheld by the Officer or the EAB for RWS's inactive, shut-in injection wells where there was no threat of harm shown.[64] *Phoenix, Supra.*

Given that the foregoing cases found a non-theoretical programmatic harm related directly to the harm presented by the subject violations, they are not helpful to supporting the type of disembodied alleged programmatic harm contemplated by EPA and Officer Toney under the

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

[64]In another case, *In Re Safe and Sure Products, et al, 8 E.A.D. 517 (EAB 1999)* the EAB found harm to the FIFRA registration program from failure to register only where EPA also proved that there were nearly one hundred violations of FIFRA, that distribution of Respondents' unregistered and misbranded products was widespread, that the violations reoccurred over more than a decade, that and Mr. Workman had been lying to inspectors. *Id. at 518-519.* Even given the egregious illegal unpermitted operations by Safe and Sure the EPA's proposed penalty of $229,000 (revised down from EPA from over $400,000), was reduced by the ALJ over 80% to $30,000. *Id.*

SDWA UIC program as to RWS's non-injection violations.[65]

In our case, programmatic harm is not a basis for any penalty, let alone a substantial one, considering EPA's failure to establish that a USDW was at least present and in a position to be threatened by each well's violation. This is compounded by EPA's failure to establish that the condition or operation of the wells was such to allow even an inference that there was a credible chance of impacts from the wells to a USDW, even assuming *arguendo* that a USDW was present. Given the wells were properly permitted, any programmatic harm to the program from RWS violations was hardly substantial. *In Re Carroll Oil, Supra; In Re Safe and Sure Products, Supra, Predex, Supra.* Thus, Ms. Perenchio's testimony lends little or nothing support EPA's seriousness burden as to the RWS MIT violationse, or to show what potential harm was presented from a potential leak from any RWS well, and it was error to rely on it since the SDWA calls for specificity as to each "particular violation", not generic assertions.[66] *42 USC 300h, In Re Gypsum, Supra.*

**c. Inspectors Brown and Matlock's Testimony Only Dealt with the Atwood #1 and Huelsing #1/Zander #2, and Neither Testified That They Saw Any Evidence That Any of these Three Wells Leaked or Had an Actual Potential to Leak or Were a Threat to any USDW**

Officer Toney also relied on Inspectors Matlock's and Brown's generic "programmatic" testimony to attempt to shore up her conclusion that RWS's MIT violations were of a high level of programmatic seriousness for Table I purposes:

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

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[65] As argued at Sec. XI.A of Respondent's proposed findings of fact (p141- Statutory Factor 6- "Other Matters"), Ms. Perenchio's testimony did not even establish the programmatic "deterrence" basis which EPA allegedly was proceeding on. *Respondents FOF at p141, Sec. XI.A.*

[66] Respondents also assert Ms. Perenchio's testimony was flawed and insufficient basis for Ms. Toney to base the gravity portion of the penalty for those reasons set forth in their *Proposed Findings of Fact, Section IX (p116-132).* Ms. Perenchio claimed to have made many findings which were not reflected in her declaration testimony, and a comparison of Perenchio's and Morgan's testimony indicates that Mr. Morgan rebutted those findings that were in fact made.. *Decision at 10; Compare C. Exh. 141 at p6, para. 25 and 4/25/07 Tr. at p162, L9 to p163, L13 (Perenchio) to C. Exh. 180 (Morgan); And See FOF at p141, Sec. XI.A.*

All of these facts contribute to a conclusion that the violations at issue here warrant a penalty calculated on the basis of a high level of seriousness." *Decision at 7*.

However, an inspection of inspector Brown's testimony at the cited pages 50-51 of the hearing transcript reveals that she did not testify as to the seriousness of any of RWS's MIT violations, but rather only that Illinois had outlawed dual production/injection wells, such as the Atwood #1. *4/25/07 Tr. at 50-51*. Ms. Brown also admitted that her involvement with the inactive Atwood No.1 well was not related to the current MIT violations, but rather to surface issues such as the presence of alleged "debris" and storage of well-related materials, and marking issues occurring since 1998.. *See Respondents' 12/21/07 Brief at 17; Respondents' Proposed Findings of Fact at p57, Sec. III.B.24.* Similarly, Matlock's testimony also did not touch on the alleged "high" seriousness of any of RWS's MIT violations, but to the contrary he stated that he found the evidence (passing of MIT's in 1991, 2001 and 2005) to indicate that the risk of loss of Mechanical Integrity ("MI") was low, that the wells were not leaking, and that MI had in fact been maintained at the two wells for the entire period 2001-2005. *4/24/07 Tr. at 205, L8-19; See 12/21/07 Findings of Fact at Sec. V.C.25-28, p82.* Finally, contrary to the Officer's implication that the risk from an operating injection well was the same as an inoperative well, Matlock testified that an inoperative injection well is less prone to leak than an operative one. *Decision at 7; 4/24/07 Tr. at 206-207.* After equivocating, Perenchio also admitted that the risk of fluid migration was less at an inoperative well than an injecting well since "obviously, if you're not injecting anything, it's not going to go anywhere because it's not -- there's nothing to go anywhere." *4/25/07 Tr. at 172*.

Based on the history of the subject wells (inactivity, proper permitting, adequate construction, properly shut-in and successful MIT's both before and after the 1995-1996 missed MIT) the state inspectors testified that the wells were not likely to be leaking or communicating from the injection zone to a USDW or otherwise having potential to impact a USDW. *See e.g. (Inspector Matlock - 4/24/07 Tr. at pp204-206(Huelsing well)); Matlock - 4/24/07 Tr. at 205, L13-19 (Zander well)); Inspector Cunningham - 4/24/07 Tr. at 265-266 (Harrell well)); Inspector Brown - 4/25/07 Tr. at 43, L15, to p46, L13, and at p48 (Atwood well).* Consequently, the testimony relied on by the Officer in essence rejected EPA's generic assertion that a high potential for harm existed at each well, and agreed with Respondents that EPA had not shown any circumstances establishing that there was a high or even moderate threat of any well impacting a

USDW.[67] Notwithstanding, the Officer arbitrarily proceeded to select the highest matrix based on speculative, non-well specific concerns that themselves were not supported on the record.

**5. Error 5: Officer Toney's Summary Rejection of Respondents' Arguments That the "Gravity" Was Improperly Analyzed and Calculated is Without Support and is in Error (SF 1)**

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

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

Clearly, Respondents' 25 page Brief and lengthy Proposed Findings and Conclusions contained more arguments and points of error than the few arrayed in a single paragraph by the Officer, especially with regard to the specific circumstances surrounding each MIT violation at each well, and Respondents assert it was error to ignore same, without some mention of the Officer's disposition of same. *See 12/21/07 Findings of Fact at Secs. I-Wohlwend (p2), II-Twenhafel (p42), III-Atwood (p51), IV-Harrell (p60), V-Huelsing (p76) and VI-Zander (p84).*

**6. Error 6: Officer Improperly Includes and Substitutes "Programmatic Harm" for a Showing of Actual or Potential Harm to a USDW in Table I and Table II Analysis, Where Policy Requires That Such Theoretical Harm to the UIC Program Be Taken into Account in Regard to Both Table I and II Analysis, <u>after</u> Evaluation of Actual or Potential Risk of Harm to Environment**

Ms. Toney's seriousness analysis is also in error since it effectively substitutes the "programmatic harm" element of the Table I and II analysis for the fact specific "harm to a USDW" findings EPA is required to make for Table I analysis, as indicated by Toney's own

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

recitation of the Table II elements as including "the importance of the violation to the regulatory scheme". *Decision at 7, 9.* Further, such approach ignores the Table I and II criteria that requires analysis of the "potential [of the MIT violations]...to endanger USDW". *Id.* Thus Officer Toney errs by incompletely performing the required Table I and Table II analysis of facts specific to the violations and the wells to evaluate environmental harm or endangerment to a USDW, prior to addressing the programmatic harm issue. *Id.* Implicit within the "endangerment" showing is proof that there is actually a USDW present to be threatened by the well's violation, which showing Toney admits was not not made. *Decision at 9.*

**7. Error 7: By Basing Statutory Factor 1 Solely on Theoretical Presence of Programmatic Harm with No Nexus to Violations Themselves, Officer Toney Effectively Reads First Statutory Factor out of SDWA and Results in Penalty Becoming Punitive and Being Imposed Without Due Process (SF 1).**

While Ms. Toney is correct that EPA need always not show actual harm in a penalty case, she ignores the fact that EPA must at least show a credible potential for harm from the violation, and the physical circumstances attendant to it, to the regulated media (here a USDW).[68] *Decision at 6,9, 10.* This burden is the same here as under RCRA or CERCLA, where EPA must show at least a potential for a release to the general environment for jurisdiction/penalty (which is assumed under RCRA and CERCLA from the release or threatened uncontrolled release or presence of a contaminant in the environment). By ignoring the requirement for showing some potential or actual harm from the violations themselves to the regulated or protected media, EPA Region 5's approach basically reads out of the statute the SDWA requirement that each "particular" violation (e.g. rather than each type of violation) must be evaluated for impacts to both the environment, and to the UIC program, thus rendering the penalty punitive and depriving a permittee's of its due process rights.

**8. Error 8: Perenchio Was Not Expert or First Hand Witness and Did Not Testify to or Rebut Morgan Testimony; Perenchio Declaration Does Not Meet 40 CFR 22.24 Burden as to**

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

**Statutory Penalty Factor 1 (SF 1)**

Perenchio was not presented or qualified as an expert witness with Vitae in this matter, but rather was presented only as a fact witness as to EPA's penalty calculation, and EPA counsel did not lay the foundation for any expert opinion as to the site-specific conditions and their import from Perenchio. *12/21/07 EJK Brief at 9. FRE 701, 702 and 703; C. Exh 141.* Nowhere in its prehearing exchange or in her affidavit did EPA qualify her as an expert geologist or other technical expert, or present an expert's curriculum vitae. *See Gilbert Martin Woodworking Co. d/b/a Martin Furniture, Docket No. EPCRA 09-99-0016(6/13/01)*[69] Perenchio was thus not presented to, nor did she specifically attempt to, rebut any of Respondents' expert's (John Morgan) testimony and opinions as to particular well specific issues related to the conditions at and of the wells, especially as to rebutting his opinions, like those of the IDNR inspectors, that the wells had not lost MI between 1991-2005 and that the likelihood of endangerment from the lack of the 1995-1996 MIT was low or not present. *R. Exh. 180.* Furthermore, nowhere does Perenchio or any other EPA witness, expert or otherwise, establish that there was a USDW present under any well, or what the name and location of the supposed USDW's were. Thus, Perenchio's declaration failed to carry EPA's 40 CFR 22.24 burden, and it was error for Ms. Toney to rely on same for the seriousness findings.

**9. Error 9: Officer Erred in Rejecting John Morgan's Expert Testimony as to EPA Penalty Calculations and the Lack of Haem/Seriousness Found by IDNR in Assessing Much Lower Penalty Amounts For Same Violations (SF 1)**

Respondents presented expert witness John Morgan to testify by declaration (*C. Exh. 180*) and for live cross examination at hearing (*4/26/07 Tr.*), as to seriousness and unreasonableness of the EPA's calculated gravity component of the penalty under SDWA statutory factor 1. Respondents' arguments based upon his testimony are presented in their post-hearing brief and findings of fact, and are adopted here in rebuttal of EPA's and Officer Toney's findings. *See Brief at 9, 10, 15, 18, 19, 20, 21, 23; See Also Proposed Findings of Fact at p98-115, Section VIII.A-K.*

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

While the Officer seems to tacitly agree with Respondents' penalty and harm expert witness, former IDNR SDWA UIC Enforcement Director, John Morgan, that there was no actual or potential threat of harm to any USDW from the violations, she errs in failing to readjust the gravity component downward from "most severe" accordingly. *C. Exh. 180 - Morgan Report; Decision at 10-11.* Officer Toney also erred in refusing to allow Mr. Morgan's testimony as to his opinion that EPA's penalty calculations were too high for the low seriousness of the violations, and that, if any, the IDNR's total penalty of $1,900 for the very same six violations was more appropriate, since IDNR found the violations to be of low seriousness. *Decision at 10, fn 16; 4/26/07 Tr. at 211-212 (Toney); See well by well discussion at C. Exh. 180 at 6-8.*

Such was error, where Morgan made his findings of the degree of potential and actual harm as required by the UIC policy, based on his first hand experience in assessing such penalties for failure to MIT when he was the Chief of the Oil and Gas division which directly oversaw and oversees the UIC program. *Decision at 10, and fn 16; C. Exh. 180 at 1, and Att. A morgan (Vitae).* This included his experience supervising the very persons who later initiated this very action (although he retired well prior to this action), and where he routinely had approved their calculations and assessed UIC penalties for injection wells in Illinois.[70] *C. Exh. 180 at 1, fn 1. 12/21/07 Brief at 10-12.*

**10. Error 10: Officer Toney Erred by Failing to Consider the IDNR's Findings of Lack or Harm, Low Seriousness and Penalty Assessment of Only $1,900for All Six Wells, as Discussed by Mr. Morgan (SF 1)**

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

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

the proposition that in instances where there is doubt as to the basis, efficacy or correctness of EPA's penalty calculations, a fact finder may consider and/or adopt the calculations and gravity assigned by the state EPA personnel involved in responding to the violation. *Respondents' 12/21/07 Brief at 4, 11; See In the Matter of Pepperell Associates, Docket No. CWA-2-I-97-1088 )(2/26/99)*[71]

**11. Error 11: Annual Reporting Violations: Gravity Component of $990 Should Be Eliminated Due to Failure Properly Consider and Show Harm and Since There Was Nothing to Report for the Six Inactive Wells for 3 Years at Issue (1996-1998)**

It is established on the unrebutted record that none of the six wells were active from 1996-1998.[72] *C. Exh. 180 at Att. B, Sec. II.A. (Morgan).* Ms. Perenchio admitted that there would be nothing to report in an annual report for a well that was not operating, and that the submission of an annual report showing no pressure or injection was not the only way to tell if a well was operating or not. *4/25/07 Tr. at p181, L16 to p182, L8.* Ms. Perenchio also admitted that her testimony contains none of the specific facts she claims to have considered in determining the potential endangerment to a USDW from the annual reporting violations. *4/25/07 Tr. at p182, L9 to p183, L1; C. Exh. 141 at p10, para. 38.; Decision at 11-12, fn 19, 20,* 22. Consequently, for the foregoing reasons, no penalty should be assessed for the three annual

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

[72]In discussing her Table II selection in relation to MIT, Ms. Toney erroneously stated that RWS operated all six wells "in violation of the [MIT] requirement" for 4 to10 years after 1995-1996 violations. *Decision at 7*. This finding is patently incorrect based on the government's own documents and witnesses Inspector Brown stated **Atwood # 1** had not been operable from at least 1991 until it was plugged. *4/25/07 Tr. at 46-49.* IDNR Inspection reports evidence that the **Harrell #1** was inactive from at least 1990-2001 *(C. Exhs. 63, 77.b, 77.c, 71.a, 72.a, 72.e*), as confirmed by Inspector Cunningham during his testimony. *4/24/07 Tr. at 225-227.* IDNR reports also document that the **Twenhafel #2** well was inoperative from at least 1988-2002, when it was transferred to Mr. Huels, who operated it after it again passed MIT. *C. Exh. 64.a; R. Exhs. 80.a and 80.b.* **Wohlwend #6** was also documented by IDNR to be inactive and capped from 1990-2003. *R. Exhs. 83.b, 85.a-85.e, and C. Exh. 74.* Inspector Matlock also testified that the **Zander #2** well was inactive from 1991 to 2005. *4/24/07 Tr. at 205*. Finally, IDNR records show that the **Huelsing #1** was not operated until 2001, after it was MIT'd on 3/14/01. *R. Exh. 76.b; R. Exh. 118.* Consequently, Officer Toney's interpretation of the parties' joint stipulation and her finding that RWS operated all six wells in violation of MIT requirements for "4 to 10 years", is not supported by the record and must be disregarded.

reporting years at the inactive wells due to EPA's failure to meet its 40 CFR 22.24 burden.

**12. Error 12:Officer Toney Improperly Failed to Objectively Consider Evidence by Formulating Findings First and Then Accepting Only Evidence That Supported Her Preconceived Determinations, Rather than Impartially Arraying and Weighing All Evidence in Order to Reach Her Findings**

Officer Toney stated that formulation of her findings occurred prior to an impartial consideration of evidence, rather than by consideration of evidence prior to making findings.[73] *Id. at 4.* Respondents object to Ms. Toney's statements at p4, para. 2 of the decision that she appears to have improperly reviewed the evidence against her own preconceived findings, rather than reviewing the evidence first, weighing the competing evidence, and then comparing it to the parties' proposed findings to see which findings and conclusions had the most evidentiary support.[74] Respondents assert that Officer Toney erred by her failure to indicate which specific findings, conclusions and arguments of each party she "accepted", which she omitted as "irrelevant" or "not necessary", or what testimony she discredited as not in "accord", and failure to explain the rationale or basis for doing so. *Id. at 4.*

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

[74]On 11/1/07 Officer Toney entered an order regarding the post-hearing briefing format, stating that citation would be allowed to the "administrative record". *11/1/07 Order.* On 11/28/07, Officer Toney orally informed Respondents that the 11/1/07 Order would be amended to limit briefing citations to the "hearing record", and that she would not consider references to the entire "administrative record" (to which Respondents objected), and on 11/29/07 Officer Toney issued an order limiting citation to the "record". *11/29/07 Order*. However, in her Initial Decision Ms. Toney stated she nevertheless considered the "entire administrative record", despite of her 11/29/07 Order. Respondents assert as error that Respondents were capriciously limited to the "hearing record" briefing the Initial Decision and not given a full opportunity to present their defenses and arguments. *Decision at 4*

**13. Error 13: Statutory Factor 4 - Good Faith Efforts: Officer and EPA Erred by Failing to Properly Consider and Discount for Numerous Documented Good Faith Efforts by RWS and Respondent to Comply with SDWA, as Set Forth in Post-hearing Brief and Findings of Fact**

Ms. Toney improperly enumerated and discussed only three of Respondents' several asserted indicia of good faith efforts: 1) RWS's numerous interactions and communications with IDNR and EPA regarding the MIT and reporting violations; 2) RWS's on-site activities such as well repair, work-overs and grading/rebuilding of access roads; 3) Financial ability of RWS to come into compliance with MIT violations. *Decision at 13-16.* However, as with statutory factor 1, Officer Toney did not address the numerous good faith efforts claims made by Respondents on a well-by-well basis, but rather again improperly lumped them together in her analysis. *Id.* Unlike Ms. Toney, Respondents provided a breakdown of such various and differing good faith efforts on a well by well basis in their Brief. *See Brief at 13 (Sec. II.B.1.b* - Wohlwend*), at 15 (Sec. II.B.2.b.* - Twenhafel*), at 18 (Sec. II.B.3.b.* - Atwood*), at 20 (Sec. II.B.4.b* - Harrell*), at 21 (Sec. II.b.5.b* - Huelsing*)*[75]*, and at 23 (Sec. II.b.6.b* - Zander*)*. Respondents adopt and incorporate here the arguments and caselaw set forth in the foregoing cited sections of their Brief (and related findings of fact) as ther appeal in regard to the good faith efforts that the Officer failed to credit, which good faith efforts Respondents respectfully request that the EAB acknowledge and credit against any penalty. *Id.* Respondents also incorporate here and refer the EAB to Attachment C to the 40 CFR 22.22 declaration of RWS, which attachment lists for each well a chronology of the various documents and events related to RWS's compliance efforts, beginning with RWS updates to IDMM beginning in 1988 through 2005. *C. Exh. 181 at Att. C (see e.g. C.8 - R. Exh. 160 - 1998 RWS response letter to IDMM).*

**14. Statutory Factor 5 - Economic Impact: EPA/Officer Erred by Not Reducing Penalty Due to RWS Inability to Pay**

Officer Toney acknowledged that RWS had been determined unable to pay the penalty per EPA financial expert Gail Coad's analysis, yet the penalty was not eliminated or reduced. *Decision at 16-17; C. Exh. 141 at para. 50 (Perenchio); C. Exhs. 126 and 127 (G. Coad declarations).* Given that RWS meets the criteria, and given that EPA asserts "joint and several

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

liability", both Respondents should also have jointly and severally been afforded the elimination or reduction.

**15. 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**

Respondents incorporate by reference here their arguments from their brief and findings of fact related to the "other matters" arrayed for each well. *See Brief at Secs. II.B.1.c (Wohlwend), II.B.2.c (Twenhafel), II.B.3.c (Atwood), II.B.4.b-c, (Harrell), II.B.5.c., (Huelsing),*[76] *II.B.6.c. (Zander)* (and corresponding citations to the caselaw, findings of fact and record contained therein). Respondents also incorporate the "other matters" cited in Section III of the *12/21/07 Brief*, and at *Sec. XI, pp141-145 of Respondents' Proposed Findings of Fact.*

**F. 7/12/07, 8/27/07, and 10/2/07 Toney Orders on Motions to Conform Erroneous/Due Process**

Respondents assert error denying them a fair hearing based on a combination of lack of accommodation at hearing for Mr. Klockenkemper's auditory deficiency, the highly irregular transcription and then withdrawal of a certified transcript and reediting of same by the EPA-contract court reporting service, and Ms. Toney's subsequent failure to grant conformations requested by Respondents, such objections being set out in the related documents listed in Exh. A.

## VI. Proposed Findings of Fact and Conclusions of Law

Respondents incorporate by reference herein their *12/21/07 Proposed Findings of Fact and Conclusions of Law* as their proposed findings and conclusions on appeal.

## VII. Conclusion

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

**Respectfully Submitted By:** ***s/: Felipe N. Gomez*** **Date: March 1, 2009**

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

## Exhibit A

## Briefs and Filings Relating to Orders Under Appeal

**Respondent's Revised Appellate Brief**
**March 2, 2009**
**Appeal Nos. 08-03 & 08-04**

### 1. 2/06/03 R. Kossek Order Granting Leave to Amend

5/01/02 EPA Motion Leave Amend
6/07/02 Motion to Reconsider Grant of Leave
6/27/02 Memorandum in Opposition to EPA Motion to Amend Complaint
7/11/02 EPA Reply

### 2. 5/03/05 R. Kossek Order Denying Motion to Dismiss Complaint

4/15/03 Motion to Dismiss Amended Complaint
4/29/03 EPA Response
5/14/03 Reply to 4/29/03 EPA Response

### 3. 12/27/06 M. Toney Partial Accelerated Decision on Liability

7/11/05 Answer and Affirmative Defenses
2/13/06 EPA Motion Strike
3/14/06 Response to EPA Motion Strike
3/29/06 Motion Leave to Amend Affirm Def.
3/30/06 EPA Reply to 3/14/06 Response
4/13/06 EPA Response to 3/29/06 Motion for Leave Amend
5/17/06 Order Striking and Allowing Defenses, Granting Leave (Also Under Appeal)
6/06/06 Answer and Amended Affirmative Defenses
7/21/06 Motion for Accel. Decision on Liability
7/21/06 EPA Motion Accel. Dec.
8/28/06 EPA Response
8/28/06 esponse to EPA Motion Accel. Dec.
9/18/06 EPA Reply
9/18/06 Reply to EPA Motion

### 4. 11/29/07 M. Toney Order Altering Briefing Format at 11th Hour

**11/30/07 Objections to 11/29/07 Order**

### 5. 7/23/08 M. Toney Initial Order on Penalty

12/03/07 EPA Brief and Proposed Facts/Conclusions
12/21/07 Brief and Proposed Findings of Fact/Conclusions of Law
01/22/08 Response to EPA's Brief/Proposed Findings; and 4) Respondents'
02/04/08 Reply to EPA's Response

## 6. 10/2/07 M. Toney Order Denying EJK Motion to Conform Transcripts

5/08/08 4/24/07 Hearing Transcript
5/09/07 4/25/07 Hearing Transcript
5/17/07 4/26/07 Hearing Transcript
6/04/07 Order for Briefing Motions to Conform
6/14/07 Hearing Exhibits (5 folders)
6/18/07 EPA and Respondents Motions to Conform
6/21/07 Audio Tapes of Hearing
7/03/07 EPA Response Motion Conform
7/09/07 Response to EPA Motion Conform'
7/12/07 Order RegardingWithdrawel of 4/26/07 Transcript
7/17/07 Letter From Court Reporter Re Errors in Transcription of 4/26/07 Hearing
8/22/07 Status Report
8/22/07 EPA Status Report
8/24/07 Respondents' Revised Motion to Conform
9/07/07 Response/Objections to EPA 8/22/07 Status Report
9/07/07 EPA Revised Response to 8/24/07 Revised Motion Conform
9/17/07 Parties' Replies
10/30/07 Respondents' Objections to ORder/Process

## 7. 5/17/06 R. Kossek Order Striking Defenses (See 3. Above)

## TABLE OF AUTHORITIES

### Federally-Approved State Statues - Illinois UIC Program



### Federally-Approved State Regulations



### Federal Cases

**Federal Regulations**



**Federal Rules**

**Environmental Appeals Board**



**Office of ALJ**



**State Cases**



*Ecklund v. Nevada Wholesale Lumber Co., 92 Nev. 196, 198-199; 562 P.2d 479, 480 (1977)(PCV - Must plead and prove control, unity, fraud/sham)* . . . . . 13

**BEFORE THE ENVIRONMENTAL APPEALS BOARD**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**WASHINGTON, D.C.**

| | | |
|---|---|---|
| In re: | ) | **E.A.B. Docket No. 08-03** |
| | ) | |
| Rocky Well Service Inc., and Edward J. Klockenkemper, | ) | (SDWA-05-2001-002 40 CFR Part 22) |
| | ) | |
| Respondents | ) | |
| | ) | |

**NOTICE AND CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this date, March 1, 2009, I e-filed and sent by Fed Ex guaranteed same day delivery (for a.m. delivery on March 2, 2009), a signed original of Respondent Klockenkemper's foregoing Revised Appellate Brief in this matter to: 1) the EPA Environmental Appeals Board, Clerk of the Board, 1341 G. Street, N.W., Suite 600, Washington, D.C. 20005; and mailed a copy to 2) Mr. Richard Day, Esq., 413 North Main Street, St. Elmo, IL. 62458. I also certify that on March 2, 2009, I mailed a copy by U.S. First Class Mail, postage prepaid, to EPA Counsel Ms. Cynthia Kawakami at Office of Regional Counsel (C-14J), 77 W. Jackson, Chicago, IL. 60604-3590.

Signed: _____***s:/Felipe N. Gomez***_____ Date: March 1, 2009
Felipe N. Gomez, Esq.

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