

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

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

**APPELLEE’S BRIEF IN RESPONSE TO REVISED BRIEF OF
ROCKY WELL SERVICE, INC.**

I. AUTHORITY

Pursuant to 40 C.F.R. § 22.30(a)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules”), Appellee, the United States Environmental Protection Agency, Region 5 files the instant Brief in Response to the Revised Brief of Appellant/Respondent Rocky Well Service, Inc. (“Appellee’s Response”).

II. BACKGROUND

Appellee incorporates by reference the Background section set forth in its Brief in Response to the Revised Appellate Brief of Appellant/Respondent Edward J. Klockenkemper (“Appellee’s Response to EJK Rev. Brief”) at 1-6, and supplements it with the following: on March 9, 2009, Appellant Rocky Well Service, Inc. (“Appellant RWS”) filed the Revised Brief of Respondent Rocky Well Service, Inc. (“RWS Rev. Brief”) with the Clerk of the Environmental Appeals Board (“EAB” or “the Board”).

III. STATEMENT OF THE ISSUES ON APPEAL

Appellant RWS indicates that it adopts and incorporates by reference the issues and arguments raised by Appellant Edward J. Klockenkemper (“Appellant EJK”) in Appellant EJK’s Revised Appellate Brief (“EJK Rev. Brief”). *See* RWS Rev. Brief at 2. Appellant RWS emphasizes its objection to Regional Judicial Officer (“RJO”) Toney’s penalty decision, wherein she assessed a \$105,590 civil penalty, jointly against Appellants for their violations of the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-26 (“SDWA”). *See* Appellant RWS Rev. Brief at 2. *See also* 7/23/08 Penalty Decision at 24.

IV. STANDARD OF REVIEW

Appellee incorporates by reference the Standard of Review section presented in Appellee’s Response to EJK Rev. Brief at 7-9.

V. ARGUMENT

In response to Appellant RWS’s objections and issues that are incorporated from Appellant EJK’s Rev. Brief, Appellee incorporates by reference the discussion from its Argument section, presented in Appellee’s Response to EJK Rev. Brief at 9-70.

Appellant RWS attempts to provide additional support for his contention that RJO Toney erred in issuing her penalty decision assessing a joint \$105,590 penalty against both Appellants. Appellant RWS Rev. Brief at 3-4. Appellant RWS contends that the RJO was wrong to rely on *In the Matter of Sunbeam Water Company*, Docket No. 10-97-0066; 1999 EPA ALJ LEXIS 93, as support for assessing the joint penalty against Appellants. In particular, Appellant posits that *Sunbeam* does not apply to Appellant’s circumstances because allegedly: 1) the penalty in that case was “not strictly a statutorily-imposed penalty,” and 2) “. . . unlike the present case,

[*Sunbeam*] involved a piercing of the corporate veil.” See Appellant RWS Rev. Brief at 3-4.

Appellant RWS’s analysis of the *Sunbeam* case is wrong on both counts. The enforcement action in *Sunbeam* was based on an administrative order that was issued to respondents in that case under Section 1414(g)(1) of the SDWA, 42 U.S.C. § 300g-3(g)(1) for their violations of the SDWA. *Sunbeam* at [*1]. When the respondents in *Sunbeam* failed to comply with the administrative order, U.S. EPA filed an administrative action against them, pursuant to Section 1414(g)(3) of the SDWA, which provides as follows:

Any person who violates, or fails or refused to comply with, an order under this subsection shall be liable to the United States for a civil penalty of not more than \$25,000 per day of violation.

42 U.S.C. § 300g-3(g)(3). Therefore, it is untrue that the penalty in *Sunbeam* was not issued under the SDWA.

With regard to piercing the corporate veil, the ALJ in *Sunbeam* indicated that it was not necessary to resolve the issue of derivative liability in that case because there was ample basis for finding the individuals *directly* liable for their violations alleged in the complaint. See *Sunbeam* at 23. Accordingly, RJO Toney was not remiss in relying upon *Sunbeam* as a basis to find both Appellants jointly liable in this matter.

The *Sunbeam* decision is consistent with the district court’s decision in *United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 937-938 (N.D. Cal. 2000), *aff’d*, 431 F.3d 643 (9th Cir. 2005), *cert. denied*, 547 U.S. 1113 (2006) in which corporate and individual respondents were found jointly and severally liable for their violations of the SDWA. *Alisal* provides additional support for RJO Toney’s assessment of a joint penalty against both Appellants in this matter. *Id.*

Moreover, it is Appellant RWS's burden to prove that joint and several liability does not apply and that he and Appellant EJK are not subject to the joint penalty assessment in this case. *See In re: Grand Pier Center, L.L.C.*, 12 E.A.D. 403, 427-428 (EAB 2005) (petitioner failed to meet its burden that joint and several liability under CERCLA does not apply to it). *See also, United States v. B & W Investment Properties*, 38 F.3d 362, 367-368 (7th Cir. 1994) (assessment of a joint \$1,500,000 civil penalty against an individual and corporation was proper; both found jointly and severally liable for violations of the CAA); *United States v. JG-24, Inc.*, 331 F. Supp 2d. 14, 70-71, (D.C. P.R. 2004) (substantial joint penalty assessed against violators who were found jointly and severally liable under RCRA was appropriate). Therefore, RJO Toney did not err in assessing a joint penalty against both Appellants for their violations of the Illinois UIC Program and the SDWA.

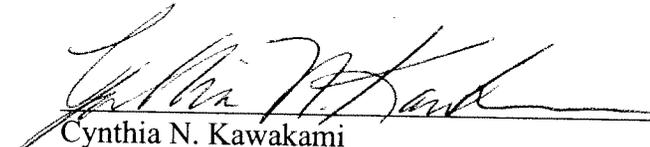
Appellant RWS contends that the RJO failed to consider its inability to pay argument, and erred in not reducing or eliminating the penalty against Appellants. RWS Rev. Brief at 4. This argument, too, fails. RJO Toney carefully considered the economic impact of the penalty on the violator, and fully discussed Appellant RWS's financial status with regard to this statutory penalty element. 7/23/08 Penalty Decision at 16-17. She determined that a further reduction in the penalty was not warranted, however, because: 1) both Appellants were jointly and severally liable for their violations under the SDWA; and 2) pursuant to Appellants' stipulation, Appellant EJK did not have an inability to pay the full amount of the penalty. 7/23/08 Penalty Decision at 16-17. Therefore, the RJO properly refused to further reduce or eliminate the joint penalty assessed against Appellants. *Id.*

VI. CONCLUSION AND PRAYER FOR RELIEF

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

Respectfully submitted,

March 27, 2009
Date


Cynthia N. Kawakami

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

CERTIFICATE OF SERVICE

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

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

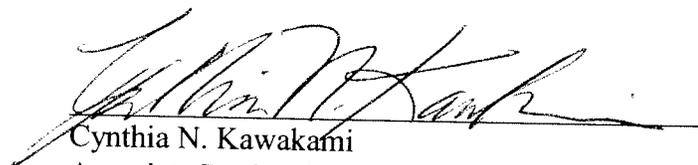
I further certify that, on the date below, I sent via electronic delivery through the EAB's Central Data Exchange, a PDF of *Appellee's Brief in Response to the Revised Brief of Appellant Rocky Well Service, Inc.*, along with this Certificate of Service, to the Clerk of the Board.

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

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Dated: March 27, 2009



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