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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 - Penalty Only)
Respondents _____)	

NOTICE AND CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this date, October 30, 2008, I e-filed and express mailed, guaranteed overnight delivery, the original Part 1 and Part 2 of Respondent Klockenkemper's two-volume Appellate Brief, and a separate combined table of contents for both volumes, in this matter to: 1) the EPA Environmental Appeals Board, Clerk of the Board, 1341 G. Street, N.W., Suite 600, Washington, D.C. 2005; and mailed a copy to 2) Mr. Richard Day, Esq., 413 North Main Street, St. Elmo, IL. 62458. I also certify that on October 31, 2008, I hand delivered a copy of Parts 1 and 2 of the Appellate Brief to: 1) EPA Counsel Ms. Cynthia Kawakami; and 2) EPA Counsel Ms. Mary McAuliffe, both at Office of Regional Counsel (C-14J), 77 W. Jackson, Chicago, IL. 60604-3590.

Signed: s:/Felipe N. Gomez Date: October 30, 2008
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3. EPA Failed to Pierce Corporate Veil Despite 2/6/03 Grant of Leave To Amend Based On Assertion the Veil Would Be Pierced

Officer Kossek's 2/6/03 Order granting leave to amend to add Mr. Klockenkemper assumed the he was not the "permittee" (finding the both sides agreed he was not), but rather was expressly based upon EPA's assertion that it would pierce the corporate veil under "hornbook principals concerning corporate law", and did not authorize EPA to pursue Mr. Klockenkemper directly under the SDWA as if he were the permittee:

"Without even addressing the interplay between the SDWA definition of "person" and the IAC definition of "Permittee", EPA should not be precluded, at this stage of the proceeding, from attempting to prove Mr. Klockenkemper is liable based upon standard principles of hornbook corporate law. EPA is attempting to "pierce the corporate veil". Mr. Klockenkemper will have ample opportunity to raise the corporate status and his actions as affirmative defenses...It will become a question of fact to be developed in the administrative record." 2/6/03 Kossek Order at 10.

However, the amended complaint EPA filed on 2/20/03 did not plead piercing the corporate veil, but rather improperly attempts to subject Mr. Klockenkemper to SDWA requirements, and thus to 42 USC 300h-2, by way of pleading him as authorized to inject by RWS's permits, when in fact only the permittee is authorized to do so. 62 IAC 240.10; Amended Complaint at para. 25. Officer Toney's 12/27/06 Decision acknowledges EPA's failure to pierce the corporate veil as Officer Kossek assumed it would:

"Complainant argues that Respondent Klockenkemper is directly liable as an individual for the violations it alleges; it does not argue derivative liability based on a 'piercing the corporate veil' theory." 12/27/06 Toney Decision at 12.

Thus, EPA never did and cannot establish SDWA jurisdiction over Mr. Klockenkemper, and did not pierce the corporate veil to reach him as it asserted it would in 2003, and thus the 12/27/06 Decision granting EPA's Motion on liability must be vacated and he must be dismissed with prejudice since he is neither the permittee or an unpermitted violator, is not subject to RWS's permit requirements, and was not shown to have operated RWS as a sham. 42 USC 300h-2; 225 ILCS 725/8a; 62 IAC 240.150(a).

Respectfully Submitted By:  Date: October 30, 2008

XII. PROPOSED FINDINGS OF FACT AND LAW

- A. EPA's 1/25/02 NOV and 2/20/02 amended complaint fail to plead jurisdictional facts, and thus fail to confer jurisdiction to EPA over Mr. Klockenkemper under 225 ILCS 725/8a, and as a result the and the Officer's Order of 12/27/06 is declared null and void as to Mr. Klockenkemper, and the Orders of 2/6/03 and 5/3/05 are reversed and vacated as to non-Respondent Klockenkemper for lack of facial and subject matter jurisdiction as pleaded in 2/20/03 amended complaint.
- B. EPA failed to plead or prove a prima facie 40 CFR 22.24 case against Mr. Klockenkemper under 225 ILCS 725/8a, 42 USC 300h-2 for the violations alleged, and did not attempt to pierce the corporate veil of Rocky Well Service, Inc., thus the 12/27/06 Order is in error and null and void, and vacated as to Mr. Klockenkemper, and he is found not jointly and severally liable under the SDWA and otherwise not liable for the violations alleged.
- C. EPA failed to meet its 40 CFR 22.24 burden as to the proposed penalty assessment against either Respondent, no harm was shown, no USDW was shown to be threatened, and there was insufficient evidence to support the Officer's own assessment, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent.
- D. EPA and the Officer failed to properly apply 42 USC 300h-2 statutory penalty factors to each violation at each well, and failed to recognize numerous good faith efforts and other matters, and thus the 7/23/08 Order is vacated and no penalty is assessed as to either Respondent.
- E. The Officer committed reversible error in striking Respondent's affirmative defenses, and in the conduct of the April 24-26, 2007, hearing and post hearing procedures, that denied Respondents due process, proper disability accommodations for Mr. Klockenkemper, a fair trial and an accurate record thereof, and the Officer's orders of 5/17/06, 7/12/07, 8/27/07 and 10/2/07 and 11/29/07 where in error and are vacated and reversed as to both Respondents, and this matter is dismissed with prejudice/remanded for further hearing as directed.

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