IN RE ROCKY WELL SERVICE, INC. & EDWARD J. KLOCKENKEMPER

SDWA Appeal Nos. 08-03 & 08-04

FINAL DECISION

Decided March 30, 2010

Syllabus

Rocky Well Services, Inc. ("RWS") and Edward J. Klockenkemper, referred to collectively as "Appellants," appeal from a July 23, 2008 Initial Decision issued by the Regional Judicial Officer for U.S. EPA Region 5 ("RJO") pursuant to the Safe Drinking Water Act and the Illinois Administrative Code. The Initial Decision assesses a joint civil penalty of $105,590 against both RWS and Mr. Klockenkemper for violations of certain provisions of the Illinois Administrative Code that are part of the State's underground injection control ("UIC") program approved, and enforceable by, EPA.. In particular, by complaint filed pursuant to SDWA § 1423, 42 U.S.C. § 300h-2, U.S. EPA Region 5 (the "Region") alleged that Appellants failed to subject six Class II UIC wells to mechanical integrity testing as required by the Illinois Administrative Code. The Region also alleged that Appellants violated the Illinois Administrative Code by failing to submit annual monitoring reports for the same six wells. The RJO found Appellants liable for these violations in an accelerated decision dated December 27, 2006. *See* Partial Accelerated Decision (Dec. 27, 2006) ("Accelerated Decision").

On appeal, Appellants raise the following arguments: (1) The Region lacked jurisdiction over Mr. Klockenkemper because the SDWA and applicable provisions of the Illinois UIC program apply only to permittees; (2) Certain allegations in the Amended Complaint are barred by the applicable five-year statute of limitations; (3) The Region failed to establish a prima facie case against Mr. Klockenkemper; (4) The RJO erroneously assessed a joint penalty against Appellants and failed to properly apply the SDWA penalty factors; and (5) Appellants were denied a fair hearing due to a lack of accommodation for Mr. Klockenkemper's hearing deficiency and because of errors in the preparation and handling of the official transcript.

Held: The RJO's Initial Decision is affirmed in its entirety. In particular, the Board holds as follows: (1) Jurisdiction under the SDWA and the applicable provisions of the Illinois UIC program extends not only to permittees but also to individuals engaged in regulated activities on behalf of a permittee; (2) The obligation to demonstrate, through required testing, that the mechanical integrity of a permitted UIC well is being maintained is continuing in nature and, therefore, tolls the applicable statute of limitations; (3) Because the record demonstrates that Mr. Klockenkemper was intimately involved in the operations and decision-making on behalf of RWS and was the individual responsible for ensuring compliance with the applicable UIC requirements, the Board agrees with the RJO that Mr. Klockenkemper is liable under the SDWA and the Illinois UIC program for the violations

at issue; (4) The RJO properly assessed a joint penalty against Appellants and properly applied the applicable penalty factors under the SDWA; and (5) The Board finds no evidence in the record indicating that Appellants were denied a fair hearing in this matter.

The Board assesses a joint civil administrative penalty of $105,590 against both Appellants.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *INTRODUCTION*

Rocky Well Service, Inc. ("RWS") and Edward J. Klockenkemper, referred to collectively as "Appellants," appeal from a July 23, 2008 Initial Decision issued by Marcy A. Toney, the Regional Judicial Officer for U.S. EPA Region 5 ("RJO"). The Initial Decision assessed a joint civil penalty of $105,590 against both RWS and Mr. Klockenkemper for violations of certain provisions of the Safe Drinking Water Act ("SDWA" or "Act") and the Illinois Administrative Code. In particular, by complaint filed pursuant to SDWA § 1423, 42 U.S.C. § 300h-2, against RWS, and amended thereafter to add Mr. Klockenkemper as a respondent, U.S. EPA Region 5 (the "Region") alleged that Appellants failed to subject six Class II underground injection control ("UIC") wells[1] to mechanical integrity testing ("MIT") as required by the Illinois Administrative Code. *See* Ill. Admin. Code tit. 62, § 240.760. The Region also alleged that Appellants violated the Illinois Administrative Code by failing to submit annual monitoring reports for the same six wells. *See* Ill. Admin. Code tit. 62, § 240.780(e). The RJO found Appellants jointly liable for these violations in an accelerated decision issued December 27, 2006. *See* Partial Accelerated Decision (RJO Dec. 27, 2006) ("Accelerated Decision"). Thereafter, in April of 2007, the RJO held a thee-day hearing limited to the assessment of an appropriate penalty. On July 23, 2008, the RJO issued the above-mentioned Initial Decision.

Both RWS and Mr. Klockenkemper have filed appeals with the Environmental Appeals Board ("Board"). *See* Revised Appellate Brief of Respondent Edward J. Klockenkemper (Mar. 1, 2009) ("EJK Appeal"); Revised Brief of Respon-

[1] A Class II well is one that injects fluids (generally brine and/or water) that are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production, or for enhanced recovery of oil or natural gas. *See* 40 C.F.R. §§ 144.6(b), 146.5(b).

dent Rocky Well Service, Inc. (Mar. 9, 2009) ("RWS Appeal").[2] Appellants raise numerous objections to the Initial Decision, Accelerated Decision, and various interlocutory orders issued during the course of the proceeding before the RJO. Upon review of the appeals and the record before us, the RJO's determination is affirmed in its entirety.[3]

II. *BACKGROUND*

A. *Statutory Background*

The SDWA, 42 U.S.C. §§ 300f to 300j-26, authorizes EPA to regulate the underground injection of fluids to protect underground sources of drinking water ("USDW"). The purpose of the UIC program is to protect underground water that "supplies or can reasonably be expected to supply any public water system." SDWA § 1421(d)(2), 42 U.S.C. § 300h(d)(2); *see In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Envotech, L.P.*, 6 E.A.D. 260, 263-64 (EAB 1996); *In re Brine Disposal Well*, 4 E.A.D. 736, 742 (EAB 1993). Part C of the Act directs the EPA to establish permitting and operating requirements for underground injection wells to prevent endangerment of drinking water sources. *See* SDWA §§ 1421, 1422(c), 42 U.S.C.A. §§ 300h, 300h-1(c). The EPA

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[2] By order dated December 15, 2008, the Board rejected Mr. Klockenkemper's initial appeal brief filed on October 31, 2008. The Board found the 221-page appeal brief "to be unnecessarily verbose and redundant, resulting in a lack of clarity and an excessive page count[,]" and ordered Mr. Klockenkemper to file a revised brief of no more than 70 pages. *See* Order Rejecting Brief Because of Excessive Length and Requiring Revised Brief (Dec. 15, 2008). Because RWS's initial appeal brief, also filed on October 31, 2008, incorporated and contained citations to Mr. Klockenkemper's initial appeal brief, the Board allowed RWS to file a revised appeal brief. *See* Order Denying Motion to Reconsider and Extending Time to File Revised Brief (Jan. 7, 2009). As indicated above, Mr. Klockenkemper filed its revised brief on March 1, 2009, and RWS filed its revised brief on March 9, 2009. In relevant part, RWS's Appeal incorporates the issues raised by Mr. Klockenkemper. *See* RWS Appeal at 2-3. Therefore, this decision will cite to the EJK Appeal.

Despite the Board's December 15, 2008 order limiting Mr. Klockenkemper's revised brief to 70 pages and expressing concern about the lack of clarity in Mr. Klockenkemper's brief, the revised brief suffers from the same lack of clarity, often making it difficult to determine the precise nature of the arguments. Nevertheless, this Board has conducted a thorough review of the parties' submissions and of the record on appeal.

[3] Appellants have filed motions seeking oral argument before the Board. *See* Respondent E.J. Klockenkemper's Motion for Oral Argument Via Video TeleConferencing Facilities at Region 5 EPA; Respondent Rocky Well Service, Inc.'s Motion for Oral Argument Via Video TeleConferencing Facilities at Region 5 EPA. The Region opposes the motions. *See* Appellee's Response to Appellant Klockenkemper's Motion for Oral Argument at the Expense of Appellee and Appellant Rocky Well Service, Inc.'s Motion for Oral Argument at the Expense of Appellee. Because the Board has determined that oral argument would not be of assistance in the Board's deliberations in this matter, the motions are hereby denied.

has promulgated such implementing regulations, including requirements relating to inspections, monitoring, record keeping, and reporting. *See* 40 C.F.R. pts. 144-147.

Congress designed the Act to give primary enforcement authority over drinking water safety to states, provided that the states develop UIC programs that are consistent with EPA regulations and receive EPA approval of their programs prior to implementation. *See* SDWA §§ 1421-1429, 42 U.S.C. §§ 300h to 300h-8. EPA approved the State of Illinois' UIC program for Class II wells on February 1, 1984 (effective March 3, 1984). *See* 40 C.F.R. § 147.701. Although Illinois has primary enforcement authority, where, as here, EPA provides notification of an alleged violation, and the state fails to act within thirty days, EPA may commence an enforcement action. *See* SDWA § 1423(a)(1), 42 U.S.C. § 300h-2(a)(1).

B. *Factual and Procedural Background*

It is undisputed that RWS is a Nevada corporation, that has been operating since 1982 and is licensed to do business in the State of Illinois. *See* Amended Administrative Complaint Preliminary Statement and Jurisdiction at 4 ("Amended Complaint"). It is also undisputed that since RWS's creation, Mr. Klockenkemper has served as RWS's President, Secretary, Treasurer, and sole officer and agent. *Id.*; Memorandum of E.J. Klockenkemper in Opposition to Complainant's Motion to Amend the Complaint at 3. Pursuant to permits issued by the State of Illinois, RWS engaged in the injection of fluids into six Class II UIC wells referred to as follows: Wohlwend #6, Zander #2, Lillian Z. Atwood #1, Logan Harrell #1, Reinhold Twenhafel #2, and Huelsing #1. *See* Amended Complaint at 6. This matter concerns the alleged failure to comply with the State of Illinois' MIT and reporting requirements associated with the operation of these wells.

By complaint filed on July 2, 2001, the Region alleged multiple violations of three provisions of the Illinois UIC program.[4] In particular, the Region alleged that RWS failed to comply with MIT requirements for the six wells at issue in this matter in violation of sections 240.760(e)(6) and (f) of the Illinois Administrative Code (Counts I and II),[5] and that RWS failed to submit annual reports for these

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[4] On September 8, 2000, the Region issued a federal notice of violation ("NOV") to RWS, along with a notification to the State of Illinois. Because the State did not commence an enforcement action within thirty days, the Region filed its complaint in this matter. *See* SDWA § 1423(a)(1), 42 U.S.C. § 300h-2(a)(1).

[5] Section 240.760(e) requires that an internal MIT be performed, "at least once every 5 years measured from the date of the last successful test unless a temporary abandonment is approved in accordance with Section 240.1132." Ill. Admin. Code tit. 62, § 240.760(e)(6). Under section 240.760(f), "[a]ll Class II wells not subjected to an internal mechanical integrity pressure test as of September 1, 1990 were required to be tested by September 1, 1995, unless Future Use status was approved prior to July 14, 2000." *Id.* § 240.760(f).

wells as required by section 240.780(e) (Count III).[6] Amended Complaint at ¶¶ 42-66. On May 1, 2002, the Region filed a motion with the RJO seeking to amend the complaint to add Mr. Klockenkemper as an additional respondent.[7] The RJO granted the Region's motion, and the Region filed the amended complaint on February 20, 2003. *See* Order Granting Leave to Amend Complaint (RJO Feb. 6, 2003).

On April 15, 2003, Mr. Klockenkemper filed a motion to dismiss the Amended Complaint for lack of jurisdiction. Specifically, Mr. Klockenkemper alleged, as he does before this Board, that no jurisdictional grounds exist under the SDWA to impose liability on Mr. Klockenkemper. *See* Edward J. Klockenkemper's Memorandum in Support of Motion to Dismiss Amended Complaint at 9. Similarly, Mr. Klockenkemper alleged that the applicable regulatory provisions of the Illinois Administrative Code apply only to permittees, and do not extend to owners, operators, agents, or others engaged in regulated activities on behalf of a permittee. *Id*. at 8. Thus, according to Mr. Klockenkemper, only RWS, as the permittee, can be liable for the alleged violations. The RJO rejected this argument. *See* Decision and Order Denying Respondent's Motion to Dismiss Amended Complaint (RJO May 3, 2005). The RJO concluded that the SDWA does not shield individuals responsible for violations of the Act because they were employed by or acting on behalf of a permittee.[8] *Id*. at 5 (citing *United States v. Alisal Water Corp*., 114 F. Supp. 2d. 927, 938 (N.D. Cal. 2000)). The RJO stated that the Region had alleged "sufficient facts to invoke statutory jurisdiction."[9] *Id*.

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[6] Section 240.780(e) states that "[t]he permittee of each Class II UIC well shall file an Annual Well Status Report on forms prescribed by the Department. The report shall be filed by May 1 of each year for the preceding calendar year for all wells which have not received Department approval for temporary abandonment or been plugged by the end of the reporting year." Ill. Admin. Code tit. 62, § 240.780(e).

[7] On January 25, 2002, the Region issued an NOV to Mr. Klockenkemper with a copy to the State of Illinois. The State did not initiate an enforcement action.

[8] The RJO also concluded that Region had alleged sufficient facts to demonstrate derivative liability ("piercing the corporate veil"). Decision and Order Denying Respondent's Motion to Dismiss Amended Complaint at 6 (RJO May 3, 2005) The Region did not pursue this theory of liability, however, nor was it the basis for the RJO's ultimate liability determination. Thus, the Board does not address this issue or rely on this theory in this decision.

[9] The RJO stated that the Region's Amended Complaint:

> alleges that [Mr. Klockenkemper] is a "person" within the meaning of Section 1401(12) of the SDWA; that he serves as corporate officer; that he is or was the individual who conducted the majority of Rocky Well Service Inc.'s day to day well maintenance and production operations with regard to the wells at issue in this case; [Mr. Klockenkemper] is the person who would have performed/arranged for mechanical integrity testing; [Mr. Klockenkemper] is subject to [the applicable sections of the

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at 6. The RJO therefore denied Mr. Klockenkemper's motion to dismiss.

On December 27, 2006, the RJO issued the Accelerated Decision finding Appellants liable for violations of the Illinois UIC program consisting of the failure to comply with MIT requirements for six UIC wells and the failure to submit annual monitoring reports for these wells.[10] *See* Accelerated Decision at 15. Thereafter, between April 24, 2007 and April 26, 2007, the RJO conducted a hearing limited to the issue of an appropriate penalty for the violations. On July 23, 2008, the RJO issued the Initial Decision in this matter assessing a joint penalty of $105,590 against RWS and Mr. Klockenkemper. *See* Initial Decision at 24. As stated above, both Mr. Klockenkemper and RWS have filed appeals with the Board. On appeal, Appellants raise the following arguments: (1) The Region lacked jurisdiction over Mr. Klockenkemper, EJK Appeal at 6-18; (2) Certain allegations in the Amended Complaint are barred by the applicable five-year statute of limitations, *id.* at 18-29; (3) The Region failed to establish a prima facie case against Mr. Klockenkemper, *id*. at 31-53; (4) The RJO erroneously assessed a joint penalty against Appellants and failed to properly apply the SDWA penalty factors, *id*. at 54-69; and (5) Mr. Klockenkemper was denied a fair hearing due to a lack of accommodation for his hearing deficiency and because of errors in the preparation and handling of the official transcript, *id*. at 70. *See also* RWS Appeal at 2 (incorporating issues raised by Mr. Klockenkemper). The Region has filed responses to the appeals. *See* Appellee's Brief in Response to Appellant E.J. Klockenkemper's Revised Brief in Support of his Amended Notice of Appeal ("Region's Response"); Appellee's Brief in Response to Revised Brief of Rocky Well Service, Inc.

C. *Standard of Review*

The Board reviews an RJO's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (the Board shall "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"). Nonetheless, the Board has stated on numerous occasions that it will generally give deference to a presiding officer's findings of fact based upon the credibility of witnesses because the presiding officer has the opportunity to observe witnesses and evaluate their credibility. *See, e.g., In re Adams*, 13 E.A.D.

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> Illinois Administrative Code]; and [Mr. Klockenkemper] violated the SDWA and the [Illinois Administrative Code]. If proven, these allegations are the basis for a prima facie case.

Decision and Order Denying Respondent's Motion to Dismiss Amended Complaint, at 6 (RJO May 3, 2005).

[10] *See supra* notes 5-6.

310, 318 (EAB 2007); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005) ("This approach recognizes that the ALJ is able to observe firsthand a witness's demeanor during testimony and is therefore in the best position to evaluate his or her credibility"); *In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000).

With these considerations as background, the Board now proceeds to analyze the issues on appeal.

III. *DISCUSSION*

A. *Jurisdictional Challenge*

1. *Appellants' Position*

As stated above, the Amended Complaint added Mr. Klockenkemper as a respondent in this matter. The Amended Complaint states the Mr. Klockenkemper "is an individual who serves as the President, Secretary, Treasurer, and Agent for Rocky Well Service Incorporated, and conducts the day-to-day operations of Rocky Well." Amended Complaint at 4. The Amended Complaint states further that Mr. Klockenkemper "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 in this matter. *Id*. at 5. Under these circumstances, the Region alleged that Mr. Klockenkemper is a "person" as the term is defined in the SDWA, and is therefore subject to liability under the Act. *Id*. at 4-5.

According to Mr. Klockenkemper, the Amended Complaint lacked a sufficient jurisdictional basis for imposing liability. In particular, Mr. Klockenkemper argues that the applicable provisions of the Illinois Administrative Code do not apply to owners or operators. *See* EJK Appeal at 5, 8. Rather, Mr. Klockenkemper argues that only a permittee, or an individual operating an injection well without a permit, is subject to jurisdiction under the State's approved UIC program. As support for this assertion, Mr. Klockenkemper cites to language in the Illinois regulations stating 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." *Id*. at 4 (citing Ill. Admin. Code tit. 62, § 240.330(d)). Thus, according to Mr. Klockenkemper, "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." EJK Appeal at 4-5. Mr. Klockenkemper concludes that the allegations in the Amended Complaint are deficient and should have been dismissed because they "do[] not contain the requisite jurisdictional allegations or facts allowing [the Region] to exercise jurisdiction against Mr. Klockenkemper as a 'permittee'" or as a person

who engaged in any unpermitted conduct.[11] *Id*. at 10.

2. *Region's Response*

The Region contends that Appellants' jurisdictional argument is without merit. *See* Region's Response at 10. The Region points out that the enforcement provisions of the SDWA authorize enforcement action against *any person* violating a requirement of an approved state UIC program. *Id*. at 11 (citing SDWA § 1423(a), (c); 42 U.S.C. § 300h-2(a), (c)). The Act, defines "person" as "an individual, corporation, company, association, partnership, State, municipality, or Federal agency (*and includes officers, employees, and agents of any corporation, company*, association, State, municipality, or Federal agency)." SDWA § 1401(12), 42 U.S.C. § 300f(12) (emphasis added). Given the broad scope of the Act's jurisdictional provisions, the Region contends that corporate officers and agents, such as Mr. Klockenkemper, are clearly subject to liability. Region's Response at 11-12.

The Region notes further that the enforcement provisions of Illinois' approved UIC program contain similarly expansive language. In particular, the program imposes liability for any violations of the State requirements by a permittee "*or any person engaged in conduct or activities required to be permitted* under [State law]." *Id*. at 12 (citing 225 Ill. Comp. Stat. 725/8a). Consistent with the SDWA, the State's underlying regulatory provisions define "person" broadly to include a corporation "or *representative of any kind*." *Id*. (citing Ill. Admin. Code tit. 62, § 240.10 (emphasis added)). Thus, according to the Region, liability under the approved Illinois UIC program, as with the SDWA, is not limited to permittees but extends to a broad range of "persons." *Id*. at 13. Under these circumstances, the Region argues that Appellants' objections to the sufficiency of the complaint are without merit and should be rejected by this Board.

3. *RJO's Determination*

In her Accelerated Decision, the RJO rejected Mr. Klockenkemper's assertion that he cannot be held liable for the violations at issue in this matter. In particular, the RJO agreed with the Region that Mr. Klockenkemper, as an owner/operator of the UIC injection wells, was within the scope of the applicable liability provisions. *See* Accelerated Decision at 12-15. The RJO found that under both the SDWA and the applicable Illinois statutory provision, liability extends beyond a permittee to "any person" subject to the requirements of a UIC program.

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[11] Mr. Klockenkemper also points out that certain provisions of Illinois' mechanical integrity requirements at issue in this matter impose requirements on permittees. *See, e.g.,* Ill. Admin. Code tit. 62, §§ 240.760(f) (requiring that permittees conduct certain internal mechanical integrity tests); .780(e) (requiring the permittee of a well to file annual well status reports).

Id. at 12. Because the enforcement provisions of both the SDWA and the approved state UIC programs define "person" broadly to include individuals, such as Mr. Klockenkemper, serving as officers, employees, or agents of a corporation, the RJO rejected Mr. Klockenkemper's assertion that jurisdiction did not extend beyond the permittee. *Id*. at 12-13.

The RJO found further that Mr. Klockenkemper was actively involved in overseeing the operations of the corporation and could therefore be held personally responsible for the violations. *Id*. at 13-14 (citing *In re Safe & Sure Prods., Inc.*, 8 E.A.D. 517 (EAB 1999); *In re Antkiewicz*, 8 E.A.D. 218, 230 (EAB 1999)).

4. *Analysis*

Upon review of the record on appeal, the Board agrees with the RJO that the scope of liability under both the SDWA and the approved Illinois UIC program is not, as Mr. Klockenkemper asserts, limited to permittees. Indeed, as discussed below, the Board finds that the applicable statutory and regulatory provisions unambiguously extend liability beyond permittees to a broad range of individuals, including individuals, such as Mr. Klockenkemper, acting on behalf of a corporation. Further, the Board agrees with the RJO that Mr. Klockenkemper was sufficiently involved in the decision making and activities of the corporation to be considered a liable party under the SDWA and the applicable State requirements.

a. *Scope of Liability*

As stated above, Mr. Klockenkemper argues that liability under the applicable provisions of the Illinois UIC program does not extend beyond the permittee. According to Mr. Klockenkemper, this limitation is consistent with the language of the SDWA. *See* EJK Appeal at 4-5; *see also id* at 10-11 (EPA lacks enforcement authority in this case under the SDWA), 12 (the Region may not rely on the SDWA to confer jurisdiction over Mr. Klockenkemper as a "person" within the meaning of the SDWA). The Board disagrees. The SWDA's enforcement provisions provide, in part, as follows:

> Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources * * * that *any person* who is subject to the requirement of an applicable underground injection control program in such state is violating such requirement, he shall so notify the State and *the person* violating such requirement. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administra-

> tor shall issue an order under subsection (c) of this section requiring *the person* to comply with such requirement or the Administrator shall commence a civil action under subsection (b) of this section.[12]

SDWA § 300h-2(a)(1), 42 U.S.C. § 1423(a)(1) (emphasis added). The Act defines "person" to mean "an individual, corporation, company, association, partnership, State, municipality, or Federal agency (and includes officers, employees, and agents of any corporation, company, association, State, municipality, or Federal agency). *Id*. at § 300f(12), 42 U.S.C. § 1401(12). Given the expansive definition of persons potentially liable for violations of applicable UIC requirements, the notion that Congress intended to limit liability only to permittees is contrary to the plain language of the statute. These provisions make clear that the Agency may enforce federally-approved state UIC program requirements, such as those at issue here, against any person violating any such requirement.

Similarly, as the RJO stated, the language of the approved Illinois UIC program and the regulations promulgated thereunder clearly and unambiguously extend liability to a broad range of individuals in addition to the permittee. Specifically, the Illinois program authorizes enforcement action for any violations of the UIC program against "any permittee, or any person engaged in conduct or activities required to be permitted" under the UIC program. 225 Ill. Comp. Stat. 725/8a (emphasis added). "Person" is defined as "any natural person, corporation, association, partnership, government agency or any other legal entity, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind." 225 Ill. Comp. Stat. 725/1 (2009) (emphasis added). The Board finds no suggestion that the State intended to limit liability to permittees. On the contrary, the Board finds the above-quoted language sufficiently broad to include permittees as well as individuals undertaking regulated activities on behalf of a permittee within the scope of liability under the UIC program.

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[12] The Act states further that:

> In any case in which the administrator is authorized to bring a civil action under this section with respect to any regulation, or other requirement of this part relating to –
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> (A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production, * * * the Administrator may also issue an order under this subsection either assessing a civil penalty of not more than $5,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000, or requiring compliance with such regulation or other requirement, or both.

Id. at § 300h-2(c)(2), 42 U.S.C. § 1423(c)(2).

Further, the enforcement provisions of the Illinois administrative code also contain language extending liability for UIC program violations beyond the permittee. In particular, the State may issue a notice of violation to "any permittee, *or any person* engaged in conduct or activities required to be permitted" in violation of any State requirement. Ill. Admin. Code tit. 62, § 240.150 (Notice of Violation). The term "person" is given the same expansive definition provided in the Illinois statutory definition. *See id.* § 240.10 (defining "person" to include "any natural person, * * * administrator, fiduciary *or representative of any kind*.") (emphasis added).

Thus, contrary to Mr. Klockenkemper's assertion, the Board concludes that under the approved Illinois UIC program, liability for failure to comply with the applicable mechanical integrity testing and reporting requirements at issue in this matter extends to both RWS as the permittee, and to Mr. Klockenkemper as a "person" acting as an officer and representative of the permittee. Mr. Klockenkemper does not cite to a single statutory or regulatory provision limiting liability to permittees, nor does the Board find any support for the notion that such a limitation was intended. Under these circumstances, the Board agrees with the RJO that Mr. Klockenkemper is a "person" as defined by the SDWA and the applicable provisions of the Illinois UIC program and the Board rejects the assertion that the Agency lacked jurisdiction over Mr. Klockenkemper in this matter.[13] *See United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 939 (N.D. Cal. 2000) (imposing direct liability under the SDWA against an individual managing or conducting the affairs of a permittee).

b. *Mr. Klockenkemper Was Engaged in Activities Regulated Under the Illinois UIC Program*

The RJO properly concluded that the record evidence indicates that Mr. Klockenkemper, an officer and representative of RWS, was engaged in activities subject to regulation under the Illinois UIC program. *See* Accelerated Decision at 14. In particular, the RJO stated:

> 1. Respondent Klockenkemper is the President, Treasurer and Secretary and Agent for Rocky Well Service, Inc.
>
> 2. Respondent Klockenkemper directly participated in the operational activities of Rock Well's business.

[13] Mr. Klockenkemper has also argued that the Notice of Violation issued by the Region was defective for lack of jurisdiction. *See* EJK Appeal at 15-18. This argument is rejected for the same reasons stated above.

> (a) He personally performed work at the wells.
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> (b) He also hired others to perform maintenance and operational activities at the wells.
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> (c) He sought access to the wells from property owners.
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> (d) He supervised and personally directed work being performed on the wells by others.
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> (e) He was the person in charge of Rocky Well Service and the operational and maintenance activities at the wells.
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> 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.

Id. (citations omitted). The RJO concluded that these facts were sufficient to find Mr. Klockenkemper liable for the violations at issue. The Board agrees.

On appeal, Mr. Klockenkemper devotes the bulk of his argument on this issue to disputing the RJO's determination in finding number 2 (quoted above) concluding that Mr. Klockenkemper directly participated in the operational activities for RWS. In essence, however, Mr. Klockenkemper's objection to the RJO's determination is simply an extension of Mr. Klockenkemper's previously rejected assertion that liability for the violations does not extend beyond the permittee. That is, Mr. Klockenkemper's assertions regarding the inadequacy of the evidence relied on by the ALJ focus on the alleged failure of this evidence to establish that Mr. Klockenkemper was engaged in illegal activity separate and apart from his actions as an agent for RWS. *See* Mr. Klockenkemper Appeal at 50 (stating that the evidence does not prove that Mr. Klockenkemper "himself illegally operated or injected into any of the wells").[14] According to Mr. Klockenkemper, such evi-

[14] *See also* EJK Appeal at 31 (asserting that evidence relied on by the RJO failed to prove that Mr. Klockenkemper was an "unpermitted violator"); *id* at 39 (stating that evidence does not establish that Mr. Klockenkemper was himself "engaged in conduct which required a permit"); *id*. at 49 (stating that evidence relied on by the RJO supports Mr. Klockenkemper's contention that "there was no illegal operational activity at the injection wells that required another permit").

dence is necessary in this case because liability for the violations alleged in the complaint does not extend beyond RWS as the permittee. As stated above, however, liability under the SDWA and the approved Illinois UIC program clearly extends beyond a permittee to "persons," such as Mr. Klockenkemper, undertaking regulated activities on behalf of the permittee.

Mr. Klockenkemper does not dispute that, at all relevant times, he served as President, Treasurer, Secretary and agent for Rocky Well Service Inc. *See* EJK Appeal at 31; *see also* Respondent Klockenkemper's Answer, Affirmative Defenses, and Request for Hearing ¶ 17, at 2; 40 CFR 22.22(c) Declaration of Rocky Well Service, Inc. ("EJK Declaration") at 2, ¶ 12 (Apr. 16, 2007). Further, Mr. Klockenkemper concedes that, at all relevant times, he was the individual responsible for compliance with RWS's obligations under the Illinois UIC program. *See* EJK Brief at 49 ("the *fact* that an officer was the contact between a company and environmental agencies and handled a company's environmental affairs is [an] insufficient basis to impose" liability) (emphasis added); EJK Declaration at 3, ¶ 13 ("As an officer of [RWS], I attempted at all times and in good faith to cause [RWS]'s compliance with Illinois SDWA UIC Class II regulations allegedly violated in the amended complaint as to the six wells" at issue in this matter). Indeed, the record contains numerous examples of correspondence signed by Mr. Klockenkemper, to either the State of Illinois or EPA, regarding compliance with RWS's obligations under the State's UIC program. *See, e.g.,* Respondent's Prehearing Exchange Exh. ("R. PHEx.") 32 (Letter from Mr. Klockenkemper, President RWS, to Jo Lynn Traub, Director, Water Division, U.S. EPA Region 5) (Oct. 13, 2000) (responding on behalf of RWS to notice of violation); R. PHEx. 40 (Letter from Mr. Klockenkemper to Michele Phillips, Illinois Department of Natural Resources) (Mar. 5, 2001); R. PHEx. 43 (Letter from Mr. Klockenkemper to Jeffrey McDonald, Underground Injection Control Branch, Region 5) (Mar. 15, 2001); R. PHEx. 54 (Letter from Mr. Klockenkemper, to multiple recipients, including Jo Lynn Traub, Director, Water Division, U.S. EPA Region 5) (Feb. 8, 2002); R. PHEx. 60 (Letter from Mr. Klockenkemper to Illinois Department of Natural Resources) (Apr. 27, 2002). This correspondence makes clear that Mr. Klockenkemper had a firm understanding of RWS's legal obligations and that he was the individual responsible for ensuring compliance with these obligations. Further, as mentioned above, the record contains declarations from individuals living near many of the wells at issue in this case demonstrating that Mr. Klockenkemper managed and personally performed work at various well sites. *See, e.g.,* Complainant's Exhibit ("Compl. Ex.") 60.14a at 2 (Decl. of Paul G. Flood) (stating that he had, on occasion, seen Mr. Klockenkemper working near the Zander wells); Compl. Ex. 60.14e (Declaration of Vincent J. Huelsing) (stating that Mr. Klockenkemper "is clearly the person in charge of [RWS] and activities at the Huelsing wells. He directs the men working for him and they do what he tells them. I base this on years of conversations and contacts with either Mr. Klockenkemper or his workers at the well sites."); Compl. Ex. 60.14g, at 3 (Declaration of Lyle L. Allen) (stating that he had seen Mr. Klockenkemper at the

Logan Harrell well site and that Mr. Klockenkemper "appears to be the person in charge of maintaining and operating the wells.").[15]

The record before us makes clear, and Mr. Klockenkemper does not dispute, that Mr. Klockenkemper was actively involved in the oversight, operations, and decision making in all relevant aspects of RWS's operations. In this capacity, Mr. Klockenkemper was required to ensure RWS's compliance with the applicable requirements of the Illinois UIC program. As this Board has previously stated, a corporate officer may be held liable for wrongful acts of a corporation in which he participated. *In re Antkiewicz*, 8 E.A.D. at 230.[16] Because the record demonstrates that Mr. Klockenkemper was intimately involved in the operations and decision making on behalf of RWS and was responsible for compliance with the applicable UIC requirements, the Board agrees with the RJO that Mr. Klockenkemper is liable, apart from RWS, under the SDWA and the Illinois UIC program for the violations at issue. *See United States v. Bestfoods*, 524 U.S. 51, 65 (1988) (interpreting CERCLA as allowing for direct liability of persons operating a polluting facility); *U.S. v. Alisal Water Corp*., 114 F. Supp. 2d 927, 939 (N.D. Cal. 2000) ("Nothing in the SDWA * * * suggests that Congress intended persons directly responsible for violations to be shielded from liability because they were employed by or acting on behalf of" a corporate entity); *In re Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 72-73 (EAB 2003) (discussing holding in *Bestfoods).*

B. *Statute of Limitations*

Count I of the Amended Complaint alleged that Appellants failed to comply with MIT requirements on two wells, Huelsing #1 and Zander #2, within five years of its last successful test (by December 19, 1996) in violation of the Illinois

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[15] In the proceedings before the RJO and before this Board, Mr. Klockenkemper raised several arguments questioning the probative value of these declarations. Mr. Klockenkemper asserted that some of declarations contain hearsay, are the result of bias, or contain discrepancies when compared to the investigator's report. As the RJO concluded, however, "[h]earsay and minimal discrepancies * * * do not rob the declarations of their probative value on the issue of [Mr. Klockenkemper's] involvement with the day-to-day operations" of RWS. Accelerated Decision at 14. The Board agrees. Further, because Mr. Klockenkemper does not dispute that at all relevant times he served as the President, Treasurer, Secretary and agent for RWS and was the individual responsible for environmental compliance, the Board would find Mr. Klockenkemper directly liable for the violations in this case even without these declarations.

[16] In *Antkiewicz*, the Board found a corporate officer liable for violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y. The Board found that the officer was within the definition of "person" under FIFRA, and was the individual "with the greatest responsibilities in the conduct of the corporation's business." *Antkiewicz*, 8 E.A.D. at 230; *see also In re Safe & Sure Prod., Inc.*, 8 E.A.D. 517, 528 (EAB 1999) (stipulation that corporate officer acted as president, operator, and owner and was the individual responsible for the actions of the business was, by itself, sufficient to establish individual liability under FIFRA).

UIC requirements. *See* Ill. Admin. Code tit. 62, § 240.760 (e)(6). Count II, also concerning the failure to comply with MIT requirements, alleged that Appellants failed to subject the remaining four wells (Lillian Z. Atwood #1, Logan Harrell #1, Reinhold Twenhafel #2, and Wohlwend #6) to internal mechanical integrity pressure testing by September 1, 1995, as required under the applicable State regulations. *See* Ill. Admin. Code tit. 62, § 240.760 (f). Finally, Count III alleged that Appellants failed to submit annual well status reports required by the Illinois UIC regulations for each of the six wells for the years 1996, 1997, and 1998.[17] Ill. Admin. Code tit. 62, § 240.780(e). Each of these reports was due by May of the following year (*i.e.*, May 1997, 1998, and 1999, respectively). *Id*.

As stated above, the Region filed its original complaint in this matter on July 2, 2001, naming RWS as the respondent. Thereafter, on May 1, 2002, the Region filed its Motion for Leave to Amend and Proposed Amended Complaint seeking to add Mr. Klockenkemper as a respondent. *See* Accelerated Decision at 6 n.2. The RJO granted the Region's Motion on February 6, 2003, and the Region filed its amended complaint on February 20, 2003. Appellants argued before the RJO that certain counts, or portions thereof, were barred by the five-year statute of limitations set forth in 28 U.S.C. § 2462.[18] In particular, RWS argued that all claims in Count II are time-barred, while Mr. Klockenkemper asserted that all of Counts I and II were time-barred. *See* Accelerated Decision at 3-4. In response, the Region argued that the claims were either filed within the five-year statute of limitations or were continuing in nature such that they were not barred by the statute.

In her Accelerated Decision, the RJO concluded that the violations were not barred by the five-year statute of limitations. Although some of the violations alleged in Counts I and II occurred more than five years before the Region filed its complaint, the RJO agreed with the Region that these violations were continuing in nature and, therefore, were not barred by the five-year limitations period. Accelerated Decision at 5-9. On appeal, Appellants argue that the MIT violations

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[17] The Region also alleged in Count III that Appellants failed to submit annual well status reports for each of the six wells for the years 1991 and 1993 through 1995, and for five of the six wells for the year 2001. However, because the RJO dismissed these claims in her Accelerated Decision and because the Region has not filed an appeal, the Board does not address issues raised relating to these claims.

[18] This provision states as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * * .

28 U.S.C. § 2462. The parties do not dispute that this statute of limitations is applicable in this SDWA UIC enforcement context.

alleged in Counts I and II of the Amended Complaint are "one-time" violations. In particular, Appellants assert that "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 period the following day." EJK Appeal at 20-21. Thus, according to Appellants, the RJO erred in failing to dismiss the applicable portions of Counts I and II. The Board disagrees.

The statute of limitations bars the government from commencing a penalty action after the limitations period has expired. Such statutes are designed to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *In re Mayes*, 12 E.A.D. 54, 62 (EAB 2005) (quoting *Order of R.R. Tel. v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944)), *aff'd*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008). Where, as here, a statute does not contain a limitations period, courts have applied the general federal statute of limitations provided by 28 U.S.C. § 2462. *See id* at 63. Under that statute, the limitations period begins to run when a violation first *accrues*. 28 U.S.C. § 2462. A claim normally accrues "when the factual and legal prerequisites for filing suit are in place." *3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994). Thus, a cause of action for negligence resulting from an accident at a construction site accrues on the day of the accident. The doctrine of continuing violations, however, provides an exception to this general rule in cases in which the wrongful conduct is the type that is capable of continuing for a period of time. *See Mayes*, 12 E.A.D. at 65; *In re Lazarus, Inc*., 7 E.A.D. 318, 364 (EAB 1997) (citing *Toussie v. United States*, 397 U.S. 112, 115 (1970) (doctrine of continuing offenses essentially extends the limitations period)). Under this special rule, the violation does not accrue, and the limitations period does not begin to run, until the illegal course of conduct is complete. Thus, if the violations at issue in this matter are considered continuing in nature, an action for civil penalties may be initiated up to five years after the violations have ceased. *See Lazarus*, 7 E.A.D. at 364-65 (citing *United States v. Blizzard*, 27 F.3d 100 (4th Cir. 1994) (government may prosecute continuing offenses anytime after the offense begins and for an additional period after the offense ends)). It is undisputed that the wells at issue in this case are now in compliance with applicable UIC requirements. *See* Joint Stipulations (Dec. 17, 2007). It is also undisputed that the earliest date on which any of wells came into compliance was March 14, 2001. *Id*.; *see infra* note 32. As stated above, the amended complaint was filed on February 20, 2003, less than five years from this date.[19] Thus, if the violations at issue in this matter are continuing

[19] For purposes of the statute of limitations analysis, the RJO concluded that "the Amended Complaint is deemed to have been filed on May 1, 2002, the date the Motion for Leave to Amend and Proposed Amended Complaint were filed by [the Region]." Accelerated Decision at 6 n.2 (citing *Greenfield v. Shuck*, 856 F. Supp. 705, 711 (D. Mass 1994)). We find nothing erroneous in this determination. *See, e.g,. Moore v. State of Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993) ("As a party has no
Continued

violations, they are not barred by the five-year statute of limitations.

In determining when violations are continuing in nature, the Board first looks to the underlying statutory language to determine if Congress intended to create continuing obligations on the part of the regulated community, and, second, to the regulatory provisions serving as the basis for any alleged violations. *See Mayes*, 12 E.A.D. at 65-66; *In re Newell Recycling Co.*, 8 E.A.D. 598, 615-619 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000); *Lazarus*, 7 E.A.D. at 366. The analysis focuses on discerning the intent and purpose of the legal requirements at issue. In this regard, "'[w]ords and phrases cannoting 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.'" *Mayes*, 12 E.A.D. at 66 (quoting *Lazarus*, 7 E.A.D. at 366-67).

In *Lazarus*, the respondent in a civil penalty case alleging violations of polychlorinated biphenyl ("PCB") regulations promulgated under the Toxic Substances Control Act ("TSCA") appealed from an Initial Decision in which the Presiding Officer rejected a statute of limitations defense. The Board noted that Congress had instituted a ban on PCB use beginning in 1978, subject only to exceptional uses specifically authorized by EPA. EPA had promulgated regulations establishing an excepted use for PCB transformers, and conditions on that use included, among other things, requirements that PCB transformers be registered with local fire departments and that access portals to PCB transformers be marked to ensure safety during fires and other emergencies. On review, the Board determined that Congress intended the PCB ban to be permanent and therefore the conditions of use authorizations for excepted uses, such as PCB transformers, were continuing obligations necessary to effectively implement the congressional ban.[20] 7 E.A.D. at 367-76. Accordingly, the Board held that failures to register PCB transformers and to mark PCB transformer access doors were continuing violations for statute of limitations purposes, as Congress had rendered unlawful the use of such transformers at any time after the imposition of the PCB ban in

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(continued)
control over when a court renders its decision regarding the proposed amended complaint, the submission of a motion for leave to amend, properly accompanied by the proposed amended complaint that provides notice of the substance of those amendments, tolls the statute of limitations, even though technically the amended complaint will not be filed until the court rules on the motion.").

[20] The Board also found that the failure to comply with annual document requirements were not continuing in nature. *Lazarus*, 7 E.A.D. at 377-79. In particular, the Board concluded that neither the applicable statutory or regulatory provisions provided evidence that the obligation to submit annual documentation used to assist in the tracking and disposal of PCB inventory at a facility were continuing in nature. *Id.* at 377-78.

1978 unless conducted in compliance with the conditions of authorized use.[21] *Id*.

In *Mayes*, Respondent, Mr. Norman C. Mayes, appealed from an Initial Decision holding, among other things, that Mr. Mayes violated the underground storage tank ("UST") provisions of RCRA by failing to notify state or local governments of the existence of USTs within certain time frames. Further, the Initial Decision found that Mayes failed to install and monitor release detection mechanisms on certain USTs.[22] Mr. Mayes argued that his alleged failures to comply with these requirements occurred more than five years prior to the filing of the complaint and the claims were therefore barred by the statute of limitations. In its analysis, the Board first noted that the UST provisions of RCRA were enacted to address the widespread problem of UST systems leaking gasoline and other contaminants into the ground and groundwater. *Mayes*, 12 E.A.D. at 67-68. These provisions, as well as EPA's implementing regulation, prohibit the use of USTs except in accordance with the comprehensive regulatory program. *See id.* at 68. The Board determined that the notification requirement was a condition precedent to the use of USTs and that the obligation to comply with this requirement extended beyond the registration deadline. *Id*. at 71 (citing *Lazarus*, 7 E.A.D. at 367-72 (existence of registration deadline does not render failure to register by that deadline a noncontinuous violation, but rather the violation is continuing in nature because registration is a condition on the use of PCB transformers)). Similarly, the Board held that Mr. Mayes' failure to maintain a leak detection system

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[21] Similarly, in two other cases the Board determined that certain violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and TSCA, respectively, were continuing in nature. *See In re Harmon Elec., Inc.*, 7 E.A.D. 1 (EAB 1997), *rev'd on other grounds sub nom. Harmon Indus. Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999); *Newell*, 8 E.A.D. 598.

Briefly, in *Harmon*, the Board held that the hazardous waste management title of RCRA and its implementing regulations establish continuing obligations to: (1) operate hazardous waste management facilities in accordance with permits; (2) conduct groundwater monitoring at such facilities; (3) obtain and maintain financial assurance for closure and postclosure conditions at such facilities; and (4) refrain from transporting, treating, storing, or disposing of hazardous waste unless notification of facility existence is given to regulatory authorities in accordance with the law. 7 E.A.D. at 16-43. The Board held further that violations of these obligations are continuing in nature and, as such, toll the general federal five-year statute of limitations. *Id*. (noting, among many other things, that purposes of RCRA to protect human health and the environment are thwarted if permits are not obtained).

In *Newell*, the Board held that the obligation to properly dispose of PCB-contaminated soil is continuing in nature and, thus, the failure to properly dispose of the soil is a continuing violation that tolls the statute of limitations. 8 E.A.D. at 614-19.

[22] Under the UST program, owners and operators of UST systems must, among other things: (1) implement spill and overfill control procedures; (2) install leak detection, inventory control/tank testing, or comparable systems to ensure timely discovery of leaks; (3) maintain records of release detection systems; and (4) report accidental releases. RCRA § 9003(c)-(d), 42 U.S.C. § 6991b(c)-(d); 40 C.F.R. §§ 280.30-.230.

as required by the statute and applicable regulations[23] was a continuing violation. The applicable regulatory provisions require the reporting of any releases on an ongoing basis and state that any UST system unable to meet release detection requirements must complete closure procedures.[24] The Board held that these requirements were "a condition on the use of USTs, as the UST must close if release detection is not present," and, as such, were continuing obligations that tolled the statute of limitations until USTs came into compliance or completed closure procedures. *Id*. at 73.

Turning to the case before us, the Board finds that the SDWA clearly contemplates that the obligation to protect underground sources of drinking water is an obligation that continues over the lifetime of UIC wells. As this Board has previously explained:

> In the 1930s-1940s, waste generators in government and industry devised a method of disposing of fluid wastes by pumping, or "injecting," the wastes into wells bored deep into the earth. Office of Water, U.S. EPA, Pub. No. 816-R-01-007, *Class I Underground Injection Control Program: Study of the Risks Associated with Class I Underground Injection Wells*, at ix, 5 (Mar. 2001).[25] Injection activities proliferated in the 1950s-1960s as hazardous waste generators found the practice to be less costly than other accepted disposal methods. By the early 1970s, a number of entities began to express concern about the "substantial hazards and dangers associated with deep well injection of contaminants" and the "indiscriminate 'sweeping of our wastes underground.'" H.R. Rep. No. 93-1185, at 29 (1974), *reprinted in* Senate Comm. on Env't & Pub. Works, No. 97-9, *A Legislative History of the Safe Drinking Water Act* 561 (Feb. 1982) [hereinafter *SDWA Legis. Hist.*]. These parties recognized the difficulties of monitoring the impacts of injected wastes on the subterranean environment, including underground aquifers containing drinking water, mineral deposits, and other resources, and urged caution in further use of the

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[23] *See* 40 C.F.R. § 280.40(a).

[24] 40 C.F.R. § 280.40(b), (d).

[25] *See also* U.S. General Accounting Office, GAO/RCED-87-170, *Hazardous Waste, Controls Over Injection Well Disposal Operations: Report to the Chairman, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives* 8 (Aug. 1987); Earle A. Herbert, *The Regulation of Deep-Well Injection: A Changing Environment Beneath the Surface*, 14 Pace Envtl. L. Rev. 169, 172 (1996).

> disposal technique. Congress subsequently became aware that deep-well injection of hazardous waste posed a potential threat to drinking water supplies and identified the practice as "an increasing problem," observing:
>
> > Municipalities are increasingly engaging in underground injection of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. Energy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods.
>
> *Id*. Accordingly, in 1974, Congress enacted the Safe Drinking Water Act to, among other things, protect underground sources of drinking water, or "USDWs," from contaminants introduced via underground waste disposal practices. *Id*. at 1-2, *reprinted in SDWA Legis. Hist.* at 533-34.

In re Envtl. Disposal Sys., Inc. 12 E.A.D. 254, 257-58 (EAB 2005). The Act prohibits any underground injection except in accordance with a permit satisfying applicable UIC program requirements. SDWA § 1421, 42 U.S.C. § 300h. Further, State UIC programs must insure that those engaged in underground injection will not endanger drinking water sources and such programs must include inspection, monitoring, record keeping, and reporting requirements. SDWA § 1421(b), 42 U.S.C. § 300h(b). This language makes clear that Congress intended to establish an ongoing and comprehensive mechanism for protecting underground sources of drinking water.[26]

This conclusion finds further support in the federal regulations promulgated under the SDWA, which establish the minimum requirements for State UIC programs. The regulations reiterate the statutory prohibition on any underground injection except into a well authorized by rule or permit issued under the UIC pro-

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[26] The Board notes that the Act's civil penalty framework provides for the assessment of penalties for *each day* that a violation continues. *See, e.g.*, SDWA § 1423, 42 U.S.C. § 300h-2. This language is consistent with the conclusion that Congress contemplated that certain SDWA violations may be considered continuing in nature. *See Lazarus*, 7 E.A.D. at 367-68 (language authorizing penalties under TSCA for "each day a violation continues," is evidence that Congress contemplated the possibility of continuing violations).

gram. *See* 40 C.F.R. § 144.11. Included in the elements that must be part of a State UIC program prior to EPA approval, is a duty to establish mechanical integrity prior to commencing injection, and to *maintain* mechanical integrity thereafter. *See id.* § 144.51(q) (duty to establish and maintain mechanical integrity).[27] As the Agency has stated, MIT requirements are necessary to insure that a well is functioning according to specifications and that there is no movement of injected fluids into underground sources of drinking water. Revisions to the SDWA UIC Regulations, 58 Fed. Reg. 63,890, 63,893 (Dec. 3, 1993). Where a UIC program director determines that a well lacks mechanical integrity, he shall give written notice to the owner or operator and, "[u]nless the Director requires immediate cessation, the owner or operator shall cease injection into the well within 48 hours." 40 C.F.R. § 144.51(q)(2). Consistent with the statutory language, these regulations impose a continuing obligation on the part of owners and operators of UIC wells to ensure compliance with UIC permitting requirements in general and with MIT requirements in particular. *See* 58 Fed. Reg. at 63,893 (mechanical integrity must be established and maintained and injection must cease when a well lacks mechanical integrity). Indeed, the Agency amended the regulations in 1993 to make clear that owners and operators had an ongoing obligation to maintain mechanical integrity.[28] In this regard, the preamble to the proposed addition of section 144.51(q) states, in part:

> The current regulations are clear about how often tests to demonstrate that a well has mechanical integrity must be run. They do not, however, contain specific language requiring well owners or operators to maintain mechanical integrity at all [times]. This obviously is an oversight, and was always the intent of the regulations. The Agency has always stressed the importance of mechanical integrity in the proper operation of injection wells in order to protect underground sources of drinking water (USDWs) from actual of potential contamination. *To interpret the mechanical integrity requirements to mean[] that a[] well only has to demonstrate mechanical integrity once every five years and that the integrity of the well need not be maintained during subsequent operation * * * makes no sense in terms of protecting USDWs. Wells must be tested and demonstrate[] mechanical integrity once every five years and they must maintain mechanical integrity at all times.*

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[27] *See* 40 C.F.R. § 145.11(a)(19) (requiring that State programs have legal authority to implement various UIC provisions, including section 144.51).

[28] *See* 58 Fed. Reg. 63,890, 63,898 (Dec. 3, 1993).

Revisions to the SDWA UIC Regulations, 55 Fed. Reg. 26,462, 26,465 (proposed June 28, 1990) (emphasis added).[29] Thus, the Agency clearly intended that owners and operators be subject to ongoing MIT requirements as part of their obligations to protect USDWs.

The regulations also make clear that the obligation to conduct ongoing mechanical integrity testing is essential to ensuring compliance with the duty to maintain mechanical integrity. Indeed, the preamble to the final rule adding section 144.51(g) contains a lengthy discussion on the importance of mechanical integrity testing. *See* 58 Fed. Reg. at 63,893-94 (Dec. 3, 1993) ("Mechanical Integrity Test (MIT)"). As the Agency stated, "EPA requires mechanical integrity testing to insure that there is no movement of injected * * * fluids into or between USDWs" and that the well is "functioning according to specifications." *Id.* at 63,893. Further, as the Region stated in its penalty calculation:

> Timely performance of internal MITs are critical to the SDWA's goal of protecting * * * USDWs. Internal MITs are required to be performed at least once every five years. Ground water can move up to 800 feet a year or more in some formations. Most of what occurs in an injection well happens underground, where one cannot see it. MIT's are the only way to determine if an injection well leaks underground. * * * A timely and correctly performed MIT can detect a leak at an UIC Class II well at a point in time before contaminants reach USDWs and, thus, harm human health, welfare and the environment.

Complainant's Exhibit 141 (Written Testimony and Affidavit of Lisa R. Perenchio) (explaining Region 5's penalty calculation and proposing a penalty of $105,600) (April 16, 2007). Thus, compliance with mechanical integrity testing requirements is necessary to ensure that mechanical integrity is being maintained in accordance with applicable provisions of the UIC program.

Finally, the Illinois State MIT regulations at issue in Counts I and II of the Amended Complaint, consistent with federal requirements, contain language connoting an ongoing obligation to maintain mechanical integrity as long as the wells continue to operate. In particular, the regulations state as follows:

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

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[29] These clarifications to the MIT requirements remained in the final rule. *See* 58 Fed. Reg. 63,890, 63,893 (Dec. 3, 1993) (stating that "[m]ost commentators agreed with the proposed clarification that wells must maintain [mechanical integrity] in order to operate").

* * *

> 6) at least once every 5 years measured from the date of the last successful test *unless a temporary abandonment is approved in accordance with section 240.1132.*
>
> f) All class II UIC wells not subjected to an internal mechanical integrity pressure test as of September 1, 1990 were required to be tested by September 1, 1995, *unless Future Use status*[30] *was approved prior to July 14, 2000.*

Ill. Admin. Code tit. 62, § 240.760(e), (f) (emphasis added).[31] Significantly, the same section of the Illinois regulations containing the above-quoted MIT requirements also contains the following provision:

> h) Any Class II UIC well which fails an internal mechanical integrity test, or on which an internal mechanical integrity test has not been performed when required by subsections (e) and (f), *shall be shut in until the well is plugged or until remedial work is completed and an internal mechanical integrity test is successfully completed.* The necessary work shall be completed and an internal mechanical integrity test successfully completed within 90 days, or within any greater length of time established by the Department due to weather conditions.

Id. at § 240.760(h) (emphasis added). This section essentially bars continued injection where a Class II well fails a mechanical integrity test or where a mechanical integrity test has not been performed.

These regulations make clear that permittees as well as persons engaged in regulated activities on behalf of a permittee must either comply with the MIT requirements within the specified deadline, or initiate applicable procedures for temporary abandonment, future use status, or plugging as specified above. Thus,

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[30] Under the Illinois regulations, a permittee may request Future Use status by submitting a written application, after which the State will place the well on temporary abandonment status for an initial 5-year period and issue a Future Use permit if the well meets various conditions. Ill. Admin. Code tit. 62, § 240.1130. Appellants do not assert that they applied for Future Use status.

[31] The Illinois regulations state that "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)." Ill. Admin. Code tit. 62, § 240.760(a). Compliance with these MIT requirements is essential to demonstrating that internal mechanical integrity is being maintained.

simply maintaining the status quo absent compliance with MIT requirements constitutes an ongoing violation. *See Mayes*, 12 E.A.D. at 73 (finding a continuing obligation where the employment of release detection mechanisms over the lifetime a UST system is a condition on the continued use of USTs, and where the UST must be closed if release detection is not present); *Harmon*, 7 E.A.D. at 38 (holding that ongoing disposal absent compliance with 90-day notification requirement is a continuing offense). As the RJO stated here, "[g]iven 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 program requirements is an obligation that must continue as the permit continues in effect if the permit is to serve as a means of protecting that resource." Accelerated Decision at 7.

Under these circumstances, the Board concludes that the alleged violations in Counts I and II of the Amended Complaint regarding the failure to perform mechanical integrity testing are continuing in nature.[32] The earliest date on which the violations ceased was March 14, 2001, the date internal mechanical integrity testing was completed for the Huesling #1 UIC well. *See* Joint Stipulations (Dec. 17, 2007).[33] Because the Region brought its action against both RWS and Mr. Klockenkemper well within five years of this date, the Region is not barred

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[32] Appellants cite to *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331 (11th Cir. 2006), as supporting its assertion that the violations in this case were not continuing in nature. *See* EJK Appeal at 21. That case, however, did not involve the five-year statute of limitations at issue here. Rather, that case concerned the six-year statute of limitations (at 28 U.S.C. § 2401(a)) that governs suits against the United States. "'Unlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed.'" *Center for Biological Diversity*, 453 F.3d at 1334 (quoting *Spannaus v. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987)). Moreover, the court held that the statute in that case contained language indicating that the violation accrued on the day following the applicable deadline. *Id* at 1335. That case is therefore distinguishable from the one at hand.

[33] The parties have stipulated as follows:

> The Parties agree and stipulate that with regard to the alleged violations in the Amended Complaint, the six wells at issue have either been mechanical integrity tested or plugged in accordance with the Illinois regulations, as follows:
>
> Huelsing #1: Internal Mechanical Integrity Test completed on March 14, 2001.
>
> Zander #2: Internal Mechanical Integrity Test completed on September 12, 2005.
>
> Logan Harrell #1: Plugged on July 29, 2004.
>
> Lillian Atwood #1: Plugged on July 7, 2005.

Continued

from maintaining an action for penalties as to these violations.[34]

C. *Laches*

Appellants argue that the doctrine of laches bars those claims not otherwise barred by the statute of limitations. Laches is an equitable defense applicable where there has been an unreasonable delay in bringing an action, and where the party raising the defense has suffered undue prejudice. *See Costello v. United States*, 365 U.S. 265, 281-82 (1961). The doctrine of laches, however, does not apply here, where the United States is acting in its sovereign capacity to protect the public interest. *Nevada v. United States*, 463 U.S. 110, 141 (1983) ("As a general rule, laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest * * * .") (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)); *Martin v. Consultants and Adm'rs, Inc.*, 966 F.2d 1078, 1090 (7th Cir. 1992) (as a general rule, the United States is not subject to the equitable defense of laches in enforcing its rights); *U.S. v. Arrow Transp. Co.*, 658 F.2d 392, 394 (5th Cir. 1981). Even if the doctrine were applicable in this case, there is no indication of any unreasonable delay. As the RJO stated:

> The undisputed facts are as follows. By letter dated May 19, 1999, the [State] referred this matter to EPA Region 5 for enforcement. U.S. EPA issued Notices of Violation to [RWS] on September 8, 2000, and to Mr. Klockenkemper on January 25, 2002. U.S. EPA subsequently filed this administrative action against [RWS] on July 9, 2001, and moved to amend its Complaint to add Mr.

(continued)

> Twenhafel #1: Transferred to Ed Huels January 25, 2002, and an Internal Mechanical Integrity Test was completed by Ed Huels on February 15, 2002.
>
> Wohlwend #6: Internal Mechanical Integrity Test completed on April 21, 2002.

Joint Stipulations at 1.

[34] Our determination that the applicable mechanical integrity testing requirements are continuing in nature is also consistent with the Agency's penalty policy concerning violations of underground storage tank ("UST") regulations. *See* OSWER Directive 9610.12 , *U.S. EPA Penalty Guidance for Violations of UST Regulations*, (Nov. 14, 1990) ("UST Guidance"). Under the UST Guidance, the Agency considers the number of days a violator remains in noncompliance with periodic testing requirements in determining an appropriate penalty amount. *Id.* at 5; *see also*, EPA General Enforcement Policy #GM – 22 (*A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA's Ploicy on Civil Penalties*) 9 (Feb. 16, 1984) (in determining the avoided costs to a violator for failure to conduct necessary testing, the Agency must consider the expenses avoided until the date compliance is achieved).

> Klockenkemper as a 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.

Accelerated Decision at 9. The Board agrees. Nothing in the record on appeal indicates that the Region's actions resulted in any unreasonable delay, nor have Appellants established that they suffered any significant prejudice during the course of this proceeding. Under these circumstances, even if the doctrine of laches applied, Appellants' laches defense would be rejected.[35]

D. *Selective Enforcement*

Appellants next assert, without record support, that the Region's determination to add Mr. Klockenkemper to the complaint in this matter was "punitive and selective" and based on an "improper motive." EJK Appeal at 52. As this Board has previously stated, however, "[o]ne who alleges selective prosecution or enforcement 'faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions.'" *In re Ram, Inc.*, 14 E.A.D. 357, 370 (EAB 2009) (quoting In *re B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998)), *appeal docketed*, No. 6:09-cv-00307-JHP (E.D. Okla. Sept 18, 2009). To prevail on a claim of selective enforcement, one must establish that "(1) the government 'singled out' a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights." *B&R Oil*, 8 E.A.D. at 51.

Upon review of the briefs and the record before us, the Board concludes that Appellants have failed to proffer any evidence that Mr. Klockenkemper was "singled out" for enforcement action or that the Region acted in bad faith or in any other impermissible manner. Appellants' claim of selective enforcement is therefore rejected.

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[35] Similarly, Appellants' invocation of the doctrine of estoppel is misplaced. Estoppel applies against the government only if the government's actions amount to "affirmative misconduct" and if other requirements, including reliance and substantial detriment, are satisfied. *See United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147, 1151 (7th Cir.1985); *In re BWX Tech., Inc.*, 9 E.A.D. 61, 80 (EAB 2000) (a party asserting equitable estoppel against the government not only must prove the traditional elements of estoppel – that it reasonably relied upon its adversary's actions to its detriment – but must also show that the government engaged in some affirmative misconduct). There is no indication of affirmative government misconduct in this case or any other conduct on the part of the Agency that would support Appellants' assertion.

E. *Impossibility of Compliance*

Appellants assert that compliance with the applicable regulatory requirements was impossible for two of the wells at issue (Twenhafel and Wohlwend) because they were not in RWS's legal possession or control on the dates of the alleged violations. EJK Appeal at 53. In particular, Appellants claim that an April 22, 1997 Illinois appellate court decision concluded that Appellants lacked control of these wells at the time of the violations. *Id.* (citing Compl. Ex. 32 (*Klockenkemper v. Fisher*, No. 5-96-0002 (Ill. App. Ct. Apr. 22, 1997) (unpublished order)).[36]

Upon review, the Board rejects Appellants' impossibility defense. Contrary to Appellants' assertion, the Illinois case cited above did not conclude that Mr. Klockenkemper lacked legal possession of the wells at the time of the violations. Rather, the court stated that as of 1980, Mr. Klockenkemper had the right to take control of the wells at issue yet "did little to protect his interests by allowing the matter to fall into a seven-year litigation hiatus" and that "any lack of production and/or related costs are attributable solely to Klockenkemper * * * ." *Klockenkemper v. Fisher*, slip op. at 7-8. Nothing in this decision or in the record before us suggests that Mr. Klockenkemper was barred from entering the property and ensuring compliance with his obligations under the Illinois UIC program. Mr. Klockenkemper's impossibility defense is therefore without merit.

F. *Penalty*

The rules governing this proceeding, 40 C.F.R. Part 22, make a presiding officer, including an RJO,[37] responsible for assessing a penalty based on the evidence in the record and the penalty criteria set forth in the relevant statute. 40 C.F.R. § 22.27(b). For proposed penalties under section 1423 of the SDWA, the statutory factors that must be considered in assessing a civil penalty are: "(i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require." SDWA § 1423(c)(4)(B), 42 U.S.C. § 300h-2(c)(4)(B). The Act authorizes imposition of a civil penalty of not more than $5,000 for each day of violation for any past or current violation, up to a maximum administrative penalty of $125,000. SDWA § 1423(c)(2), 42 U.S.C. § 300h-2(c)(2). Application of the penalty criteria in specific cases is highly discretionary. *See, e.g., In re Pepperell Assocs.*, 9 E.A.D. 83,

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[36] This case concerned an ongoing dispute in Illinois (initiated by Mr. Klockenkemper in 1977) between Mr. Klockenkemper and Charles E. Fisher concerning ownership and production rights on property where the Twenhafel and Wohlwend wells are located.

[37] *See* 40 C.F.R. § 22.4(b).

107 (EAB 2000), *aff'd*, 246 F.3d 15 (1st Cir. 2001). However, the RJO must "explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). In addition, a presiding officer must consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.27(b). Although the presiding officer is not compelled to use penalty policies in calculating penalties, if he or she chooses to depart from an applicable penalty policy he or she must explain the reasons for such a departure. *E.g*, *In re CDT Landfill Corp*., 11 E.A.D. 88, 117-18 (EAB 2003); *In re Capozzi*, 11 E.A.D. 10, 31 (EAB 2003).

As stated above, by Accelerated Decision dated December 27, 2006, the RJO determined that Petitioners were liable for violations of the Illinois UIC program concerning: (1) the failure to conduct mechanical integrity testing for two Class II UIC wells (Heulsing #1 and Zander #2) by December 19, 1996, in violation of Ill. Admin. Code tit. 62, § 240.760(e)(6) (Count I);[38] (2) the failure to conduct mechanical integrity testing for four Class II UIC wells (Atwood #1, Harrell #1, Twenhafel #2, and Wohlwend #6) by September 1, 1995, in violation of Ill. Admin. Code tit. 62, § 240.760(f) (Count II);[39] and (3) the failure to timely submit an annual well status report for the years 1996, 1997, and 1998 for any of the six wells at issue in this case in violation of Ill. Admin. Code tit. 62, § 240.780(e) (Count III). *See* Initial Decision at 5. After conducting a penalty analysis taking into consideration the above-listed statutory factors as well as the recommendations in the Region 5 UIC penalty policy, *See Region 5, Underground Injection Control Proposed Administrative Order Penalty Policy* (Sept. 21, 1994) ("Penalty Policy"),[40] the RJO assessed a civil penalty of $105,590 jointly against both RWS and Mr. Klockenkemper. *See* Initial Decision at 24. In so doing, the RJO essentially adopted the Region's proposed penalty calculation. *See* Complainant's Exhibit 141 (Written Testimony and Affidavit of Lisa R. Perenchio) (explaining Region 5's penalty calculation and proposing a penalty of $105,600) (April 16, 2007) (hereinafter "Perenchio Affidavit"). The penalty analysis is discussed below.

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[38] The parties have stipulated that Petitioners successfully completed mechanical integrity testing for the Heulsing #1 well on March 14, 2001 and for the Zander #2 well on September 12, 2005. *See* Joint Stipulations at 1.

[39] The parties have stipulated to the following: (1) Harrell #1 was plugged on July 29, 2004; (2) Atwood #1 was plugged on July 7, 2005; (3) Twenhafel #1 was transferred to a new owner on February 15, 2002, and a mechanical integrity test was successfully completed by the new owner on April 21, 2002; and (4) and internal mechanical integrity test for Wohlwend #6 was completed on April 21, 2002. Joint Stipulations at 1.

[40] Region 5 used the Penalty Policy to calculate its proposed penalty in this matter. The Penalty Policy states, in part, that "it should be used by Region 5 personnel to calculate administrative penalties assessed against owners and operators who violated the Safe Drinking Water Act and Underground Injection Control Regulations." Penalty Policy at "Preface."

1. *Seriousness of the Violations*

In determining the seriousness of the violation, the Region 5 Penalty Policy uses both a matrix, with ranges of penalty amounts for different types of violations, and a narrative approach to address all of the pertinent statutory factors in a particular case. Penalty Policy at "Preface." The penalty for the seriousness factor is calculated by multiplying a penalty number from the matrix (reflecting the level of seriousness and the number of wells in violation) by the duration of the violation. *Id*. at 1. The seriousness of the violation "reflects the *potential* of a particular violation to endanger" a USDW and is, "in turn, dependent on the number of wells in violation, as well as the importance of maintaining the integrity of the Act's regulatory scheme." Penalty Policy at 1 (emphasis in original). The seriousness of the violation and corresponding penalty ranges are as follows: Low: $200 – $1,000, Medium: $500 – $1,500, and High: $1,000 – $10,000. *Id*.

The Penalty Policy classifies the seriousness of the failure to demonstrate mechanical integrity as a "High Level category" violation. Penalty Policy at 1. In this regard, the Penalty Policy states:

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

Penalty Policy at 14-15.

In discussing the potential for environmental harm that can result from failure to conduct mechanical integrity testing, the Region stated, in part:

> There are about 35,000 oil production wells and about 8,000 Class II wells in Illinois, all of which can potentially leak and contaminate ground water. * * * Injection wells such as those in this case are designed to dispose of brine. If they leak, they are still serving their purpose of disposal, but could also contaminate ground water. Brine can contain contaminants such as chloride, sulfate, iron,

> sodium, barium, benzene, ethyl benzene, toluene, and zylene.

Perenchio Affidavit at 6-7. As stated above, the penalty range for such a high-level violation is from $1,000 to $10,000. In consideration of the size of the business and Mr. Klockenkemper's "advanced age," the Region determined that $1,000,[41] the lowest penalty multiplier for such violations, was appropriate for the mechanical integrity violations in Counts I and II.[42] *See* Perenchio Affidavit at 7-9. Further, the Region chose not to assess a penalty for each of the six wells in violation. Rather, for each count, the Region selected the well that had been in noncompliance for the shortest period of time (Huelsing #1 for Count I and Wohlwend #6 for Count II), and multiplied the $1,000 base penalty amount by the number of months of violation for that well only.[43] This resulted in a penalty of $54,800 for Count I and $60,000 for Count II. Perenchio Affidavit at 8-9; Initial Decision at 8.

For Count III of the Amended Complaint (the failure to submit annual well status reports for the six wells for the years 1996 through 1998), the Region determined that the violations should be characterized as posing a low level of seriousness, and therefore warranted a penalty in the range of $200 to $1,000. Perenchio Affidavit at 9-10; Penalty Policy at 3. The Region selected a base penalty of $300 for this violation (raised to $330 pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996) (codified at 40 C.F.R. pt. 19) (1997)). Perenchio Affidavit at 11. The Region then multiplied this figure by three for a total penalty of $990 for this count.[44]

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[41] Pursuant to the Civil Monetary Penalty Inflation Adjustment Rule, 61 Fed. Reg. 69,360 (Dec. 31, 1996) (codified at 40 C.F.R. pt. 19) (1997)), this amount was increased to $1,100 for violations occurring on or after January 31, 1997. *See* Perenchio Affidavit at 7; Initial Decision at 8 n.10.

[42] The Region chose the lowest penalty multiplier even though the Penalty Policy suggests that a higher penalty should be selected where, as here, multiple wells are in violation and where the violation impacts an important part of the regulatory scheme. *See* Penalty Policy at 2.

[43] Appellants argue that the Region and the RJO miscalculated the penalty amount by "lumping the wells together." EJK Appeal at 55. That is, Appellants assert that EPA erred by "grouping all six MIT violations as if they occurred at one well," and failed "to individually calculate, explain and document how it arrived at the gravity penalty for each violation for each well." *Id.* at 55-56. As stated above, however, the penalty proposed by the Region, and adopted by the RJO, did not group the six wells together for purposes of assessing an appropriate penalty. Rather, although the RJO concluded that Appellants failed to comply with MIT requirements for six wells, the penalty was calculated using only one well. Thus, Appellants' assertions in this regard are unfounded.

[44] As with Counts I and II, it appears that the Region calculated the penalty for Count III based on a violation at a single well rather than for violations at each of the six wells. Thus, the Region multiplied the base penalty amount of $330 by a factor of 3 to account for the failure to submit a well status reports at a single well on three separate occasions. *See* Perenchio Affidavit at 10-11.

Thus, in consideration of the seriousness of the violations, the Region calculated a total penalty of $115,790.[45] In her Initial Decision, the RJO concluded that the Region's penalty calculation for this factor (seriousness of the violations) had ample support in the record. Initial Decision at 12.

The remaining five statutory factors that must be considered in assessing a civil penalty are the economic benefit from the violations, any history of violations, any good faith efforts to comply with the applicable requirements, the economic impact on the violator (ability to pay), and such other matter as justice may require. The Region's penalty calculation under each of these factors was either uncontested or resulted in a reduction of the proposed penalty.[46] Having considered the requisite statutory penalty factors, the RJO imposed a civil penalty of $105,590 jointly against RWS and Mr. Klockenkemper.

In challenging the RJO's penalty calculation, Appellants assert that the RJO erred in concluding that the MIT violations in Counts I and II of the Amended Complaint were of a high level of seriousness. Appellants make two arguments in support of this assertion. First, Appellants argue that only violations involving the actual injection of fluids into a well should be designated as high level violations. EJK Brief at 56-57. Second, Appellants argue that violations may only be considered high level violations under the Penalty Policy if the Region demonstrates "actual harm" to a USDW. *Id*. at 57-58. Neither of these arguments has merit.

First, the Penalty Policy unambiguously designates both the failure to demonstrate mechanical integrity and the unauthorized injection into a well as

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[45] In its penalty calculation, the Region rounded this figure up to $115,800. Perenchio Affidavit at 15. The RJO declined to round the penalty upwards. Initial Decision at 12 n.24.

[46] With regard to these remaining five factors, the Initial Decision states as follows: (1) *Economic Benefit*: Although the Region calculated an economic benefit to Appellants from non-compliance of $2,217, the Region chose not to seek an economic benefit component as part of the penalty. Initial Decision at 12; Perenchio Affidavit at 12. (2) *Prior History*: Although the Region was aware that RWS had a prior history of UIC violations that had been identified and prosecuted by the State of Illinois, the Region chose not to increase the proposed penalty on this basis. Initial Decision at 13; Perenchio Affidavit at 12. (3) *Good Faith Efforts to Comply*: The RJO agreed with the Region that Appellants had failed to establish any good faith efforts to comply with the regulations and that no penalty reduction was justified on this basis. Initial Decision at 13-16; Perenchio Affidavit at 15. (4) *Economic Impact (Ability to Pay)*: The RJO rejected Appellants' assertion that the penalty should be discounted because RWS lacked the financial ability to pay a penalty. Initial Decision at 17. (5) *Other Factors as Justice May Require*: In its proposed penalty calculation, the Region stated that, in consideration of Mr. Klockenkemper's age "as well as possible interpersonal relationship difficulties that Respondents may have experienced with landowners and tenants near the wells at issue," it would reduce the penalty by approximately 19.19% or $10,200. Initial Decision at 18 (quoting Perenchio Affidavit at 15-16). Although the RJO concluded that the record did not support any further downward penalty adjustment, she nevertheless concurred in the "reduction of the penalty by $10,200 in recognition of Mr. Klockenkemper's age and difficulties with local tenant farmers." *Id*. at 21. Thus, the RJO assessed a total penalty of $105,590 jointly against RWS and Mr. Klockenkemper. *Id*.

high level violations. *See* Penalty Policy at 1. As the Penalty Policy explains, mechanical integrity "is the cornerstone of an effective UIC program because it is the simplest and most appropriate method to show mechanical soundness of the well both in construction and operation and lack of migration of fluids to USDWs." *Id.* at 14. As the RJO stated, "[g]iven that most of what occurs with respect to the operations of an underground injection well takes place underground, mechanical integrity tests are the only way to determine if a well is leaking and posing a threat to the surrounding environment."[47] Initial Decision at 10-11. Given the importance of mechanical integrity to the UIC program, the Board agrees with the RJO that the violations should be considered at a high level of seriousness for penalty assessment purposes.

Second, Appellants are incorrect in asserting that the Region was required to demonstrate actual harm to the environment in order to assess a high level penalty in this matter. As the RJO stated in her Initial Decision:

> [The] 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, [the Region] applied the statutory factors to the facts of these violations as directed by the UIC Penalty Policy. The Policy permits the [A]gency 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 [A]gency is not required to demonstrate actual harm to a specific aquifer in order to assess a penalty of a high level of seriousness * * * .

Initial Decision at 9. Contrary to Appellants assertion, the record contains substantial evidence of both the importance of MIT testing to the UIC program and the potential for environmental harm should mechanical integrity fail. *See* Initial Decision at 6-7; Perenchio Affidavit at 6.[48] Nothing in the briefs on appeal or in the record before us demonstrates that the RJO determination in this regard was

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[47] Moreover, as stated above, absent a demonstration of mechanical integrity, the applicable regulations require that a well cease operations. *See* Ill. Admin. Code tit. 62, § 240.760(h).

[48] Appellants have also argued that the Region failed to establish that the MIT violations resulted in any "programmatic harm." EJK Appeal at 58-64. The Board disagrees. As stated above, the Board concludes that the Agency has presented sufficient evidence regarding the importance of maintaining mechanical integrity and the potential danger to USDWs should mechanical integrity fail. Appellants' arguments in this regard are therefore rejected.

erroneous.[49] *See, e.g., In re Carroll Oil Co.*, 10 E.A.D. 635, 657 (EAB 2002) (holding that the seriousness of a RCRA violation can be based on *potential* rather than actual harm); *In re Everwood Treatment Co.*, 6 E.A.D. 589, 602-04 (EAB 1996), *aff'd*, No. 96-1159-RV-M (S.D. Ala. Jan. 21, 1998) (violations having serious implications for a regulatory program can have a major potential for harm regardless of the actual impact on humans health and the environment); *see also supra* notes 29-30 and accompanying text (discussing importance of mechanical integrity testing).

Appellants argue further that the RJO erred in crediting the testimony of the Region's penalty witness, Ms. Lisa Perenchio, and discounting the testimony of Appellants' witness, Mr. John Morgan. *See* EJK Appeal at 64-66. Mr. Morgan testified that, in his opinion, given the lack of data on any actual harm to a USDW, the Region's proposed penalty was unreasonably high. *See* Initial Decision at 10. However, this Board typically grants deference to a presiding officer's determinations regarding witness credibility and the factual findings based thereon because the Board recognizes that the ALJ had "the opportunity to observe the witnesses testify and to evaluate their credibility." *In re Ram, Inc.*, 14 E.A.D. 357, 364 (EAB 2009), *appeal docketed*, No. 6:09-cv-00307-JHP (E.D. Okla. Sept 18, 2009); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). Although such deference does not translate into a blanket endorsement of such determinations and findings, *see, e.g., Everwood*, 6 E.A.D. at 612 n.39, where, as here, an RJO's conclusions have ample support in the record, this Board declines to substitute its judgment for that of the RJO.[50] Thus, upon review, the RJO's determina-

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[49] Appellants also assert that the $990 assessed for the violations alleged in Count III of the Amended Complaint, concerning Appellants' failure to submit annual wells status reports of the years 1996, 1997, and 1998, should be withdrawn because the wells were not operating during this time period. As the Region has stated, however, Appellants were responsible for compliance with applicable UIC requirements during the relevant time period even if the wells were not operating. *See* Region's Response at 60 n.33. Under the Illinois regulations, annual well status reports are required for "all wells which have not received * * * approval for temporary abandonment or been plugged by the end of the reporting year." Ill. Admin. Code tit. 62, § 240.780(e). Appellants do not allege, nor does the record indicate, that the six wells at issue in this matter had been approved for temporary abandonment or been plugged by the end of the applicable reporting years. *See* Joint Stipulations at 1.

[50] Further, as the RJO stated in her Initial Decision:

> At the hearing, I ruled that Mr. Morgan's testimony as to the appropriateness of the penalty assessed in this matter would not be considered "expert" testimony because that subject matter is not appropriate for expert testimony. [RJO Hearing Transcript ("RJO Tr.") at 211-212, 222.] Further, on voir dire, Complainant's counsel presented evidence that Mr. Morgan was not currently a licensed geologist in either Illinois or Indiana, and he admitted as such. [*Id.* at 212-18.]

Initial Decision at 10 n.16.

tion regarding the seriousness of the violations is affirmed. *See* Initial Decision at 8-11.

Appellants argue further that the penalty should be reduced in light of Appellants' good faith efforts to comply with the regulations.[51] "Good faith" efforts to comply include the prompt reporting of noncompliance and the prompt correction of an environmental problem prior to discovery by EPA or the state. Penalty Policy at 6-7. The RJO rejected Appellants' assertions in this regard, concluding that Appellants' had failed to demonstrate any good faith efforts to comply with the applicable regulations. *See* Initial Decision at 13-15. Upon review, the Board agrees with the RJO. At best, Appellants have established that they made some unsuccessful attempts at compliance after learning of the violations. These attempts, however, are insufficient to justify a good faith penalty reduction, nor does the Board find any additional indicia of good faith that would justify a penalty reduction.[52] Under the circumstances, the RJO's determination in this regard is affirmed. *See, e.g., Carroll Oil*, 10 E.A.D. at 660 (declining to apply good faith reduction where respondent failed to demonstrate "a minimum degree of diligence, concern, or initiative").[53]

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[51] As stated above, under the Region 5 Penalty Policy, a civil penalty may be reduced by as much as 50% if the respondent has attempted in good faith to comply. Penalty Policy at 6. Penalties may also be increased by 50% if the violator has taken no steps to comply or has ignored the violations. *Id.*

[52] Appellants assert, without support, that they were denied a fair hearing "based on a combination of lack of accommodation at [the] hearing for Mr. Klockenkemper's auditory deficiency" and a "highly irregular transcription." EJK Appeal at 70. Upon review, the Board finds no evidence that Appellants were denied a fair hearing. First, the record clearly demonstrates that the RJO considered and made accommodations for Mr. Klockenkemper's auditory difficulties during the proceeding and that Mr. Klockenkemper did not object to the sufficiency of these accommodations. *See* RJO Tr. at 82-86. The RJO made these accommodations even though she was not informed prior to the hearing "that this was going to be an issue and that [Mr. Klockenkemper's] ability to hear questions from counsel would be a problem." *Id.* at 82. Under these circumstances, the Board rejects Appellants' assertion that Mr. Klockenkemper was denied a fair hearing. Second, appellants provide no support for their argument that they were denied a fair hearing because of alleged irregularities in the preparation of the transcript. Although not clearly stated in Mr. Klockenkemper's appeal, the alleged "irregular transcription" apparently resulted from the inadvertent release by the court reporter of an unproofread transcript from the April 26, 2007 hearing (and the subsequent re-editing "to remove misspellings, duplicate words and correct the punctuation"), *see* RJO's Order on Motion to Conform (Oct. 2, 2007) and the RJO's "failure to grant conformations [to the transcript] requested." EJK Appeal at 70. Upon review, the Board finds nothing in the record suggesting that this process resulted in an unfair hearing.

[53] Finally, appellants argue that the RJO erred by failing to reduce the penalty because of RWS's alleged inability to pay. However, because the Appellants stipulated that "the ability to pay and the finances of Rocky Well Service, Inc., and Edward J. Klockenkemper are not at issue for hearing," Joint Stipulations at 2, the Board concludes that Appellants waived any ability to pay objections to the penalty amount. Moreover, even if RWS lacked the ability to pay the proposed penalty, the Board agrees with the RJO that "this should not result in the reduction of a penalty in this matter because

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The Board has the discretion to review the RJO's penalty assessment on a *de novo* basis and assess a penalty, which may be "higher or lower than the amount recommended to be assessed in the [Initial D]ecision * * * or from the amount sought in the complaint." 40 C.F.R. § 22.30(f). However, where an RJO considers the statutory criteria and the penalty assessment falls within the range of penalties provided in any applicable penalty guidelines, the Board will generally not substitute its judgment for that of the RJO absent a showing that the RJO has committed an abuse of discretion or a clear error. *E.g. In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 536 (EAB 1998). For the reasons stated above, the Board affirms the RJO's penalty calculation in its entirety.[54]

IV. *CONCLUSION*

For the reasons stated above, the RJO's Accelerated Decision and Initial Decision are affirmed.[55] Appellants payment of the entire amount of the civil penalty of one hundred five thousand five hundred ninety dollars ($105,590) shall be made within thirty (30) days of service of this Final Decision, by cashier's check or certified check payable to the Treasurer, United States of America. The check should contain a notation of the name and docket number of this case. 40 C.F.R. § 22.31(c). Payment shall be remitted to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

A copy of the payment shall be mailed to:

Regional Hearing Clerk
U.S. EPA Region 5
77 W. Jackson Blvd. E-13J
Chicago, IL 60604-3590

(continued)
Mr. Klockenkemper has been found personally [and jointly] liable for the violations and has not demonstrated an inability to pay." Initial Decision at 17 (footnote omitted).

[54] Although the Board has some concerns about the failure of the RJO to include an economic benefit component in assessing the penalty, the Board will defer to the RJO in this case because the Region did not include an economic benefit component in its penalty calculation and because no party has objected to the RJO's determination in this regard.

[55] Any arguments raised by Appellants that have not been specifically addressed in this Final Decision have been considered and rejected.

So ordered.[56]

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[56] By motion dated April 15, 2009, Mr. Klockenkemper seeks to strike portions of the Region's Response brief. *See* Respondent Klockenkemper's Motion to Strike and Exclude New Material from EPA's Appellant Response Brief ("Motion to Strike"). In support of this motion Mr. Klockenkemper contends that the Region's response contains "new material and two new arguments * * * that were not made by EPA in the case below." *Id*. at 1.

First, Mr. Klockenkemper argues that the Region's Response raises for the first time the assertion that Mr. Klockenkemper's jurisdictional arguments are affirmative defenses and that, as a result, the Region's arguments should be stricken from the record. *See id.* at 1. Upon review, the Board finds no merit to Mr. Klockenkemper's assertion. In particular, the Board note sthat Mr. Klockenkemper himself refers to his jurisdictional argument as an "affirmative defense." *See* EJK Appeal at 6 (referring to the jurisdictional argument as the "First Affirmative Defense"). Further, as the Region states in response to the Motion to Strike, the Region responded to the jurisdictional argument on the merits and did not assert that Mr. Klockenkemper's jurisdictional arguments were barred because he failed to raised them as affirmative defenses. *See* Appellee's Response to Appellant Klockenkemper's Motion to Strike and Exclude Material From Appellee's Response Brief ("Region's Response to Motion to Strike"); *see also* Region's Response at 9-14. The Board therefore finds no basis to strike any portion of the Region's Response on this issue.

Second, Mr. Klockenkemper asserts that the Region's Response raises a "new argument that the Illinois UIC program must be found to regulate operators of an operator [*sic*] of a UIC well, since, by EPA's argument, these provisions use the term 'owner and operator' of a UIC well." Motion to Strike at 2. According to Mr. Klockenkemper, the Region's citation to federal regulations governing the UIC program (at 40 C.F.R. parts 144 and 145) in support of the argument that the SDWA and the applicable provisions of Illinois' approved UIC programs apply to owners and operators in addition to permittees was not raised before the RJO and should therefore be stricken from the record. The Board disagrees. First, contrary to Mr. Klockenkemper's assertion, the Region's argument in this regard was raised before the RJO. *See* Complainant's Memorandum in Support of Motion for a Partial Accelerated Decision as to the Liability of Respondent, Rocky Well Service, Inc. And Respondent, Edward J. Klockenkemper, at 36-40 (July 21, 2006). Moreover, even had the Region cited the applicable federal regulations for the first time on appeal, the Board has discretion to take notice of any relevant statutory provisions, regulations, or caselaw that may bear on its deliberations. *See* 40 C.F.R. § 22.22(f) (official notice); *see also In re Desert Rock Energy Co.*, 14 E.A.D. 484, 487 n.3 (EAB 2009) (taking administrative notice of state court decision); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 145 n.86 (EAB 2005) (taking official notice of relevant non-record information contained in judicial proceedings and stating that the Board "generally regards public documents of this kind as appropriate for official notice"); *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of guidance document). Under these circumstances, Mr. Klockenkemper's Motion to strike is denied.