

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

IN THE MATTER OF: )  
 )  
Rocky Well Service, Inc., )  
 and )  
Edward J. Klockenkemper, ) DOCKET NO. SDWA-05-2001-002  
 )  
 Respondents. )

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**ORDER ON COMPLAINANT’S MOTION TO COMPEL DISCOVERY  
RELATED TO RESPONDENTS’ ABILITY TO PAY**

In a Partial Accelerated Decision issued December 27, 2006, I determined that both Respondents Rocky Well Service, Inc. (Rocky Well) and Edward J. Klockenkemper are liable for certain violations of the Safe Drinking Water Act (SDWA) alleged in the Amended Complaint. Specifically, I determined that Respondents failed to perform requisite mechanical integrity testing on six underground injection control wells and failed to file certain Annual Well Status Reports for the years 1996 to 1998. A hearing on the appropriateness of the proposed penalty is scheduled to commence on April 24, 2007.

Complainant has now moved to compel the production of certain financial information related to the ability of both Respondents to pay the \$107,817 penalty Complainant proposes in this matter. If Respondents fail to produce the information it seeks, Complainant requests an order finding that: (1) Rocky Well has failed to establish its inability to pay the penalty in this matter; (2) that Mr. Klockenkemper waives his right to raise a claim of inability to pay; and (3) that both are barred from proffering any testimony or other evidence relating to the issue of the ability to pay the proposed penalty in this matter.

Section 1423(c)(4)(B) of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(c)(4)(B), requires the Administrator, to take into account certain factors in assessing a civil penalty under this subsection. One of the factors the Administrator is **required** to consider is “the economic impact of the penalty on the violator.” *Id.* In its Initial Prehearing Exchange (filed January 23, 2006, at p. 22), Complainant states that “Respondents have not provided any formal evidence or other information indicating that payment of a penalty will have an adverse economic impact” on them and that “at this time, [it] has made no reduction based on an inability to pay a penalty.” Complainant states that it will, however, evaluate financial records if Respondents produce them and “consider adjusting the penalty should [they] provide credible financial information which demonstrates an inability to pay.” *Id.* Rocky Well has claimed an inability to pay the proposed

penalty<sup>1</sup> and produced copies of its tax returns for the years 1997 through 2004 in its Initial Prehearing Exchange. Rocky Well has also submitted the financial statements the government has requested. Mr. Klockenkemper to date has not claimed an inability to pay the proposed penalty or produced any of the financial information Complainant seeks.

Complainant specifically seeks the following financial information from Respondents: (1) the last five years of federal income tax returns for Mr. Klockenkemper; (2) completed Financial Statements for Mr. Klockenkemper and his wife; (3) the last five years of federal income tax turns for Rex Resources, Inc.;<sup>2</sup> (4) information regarding a \$1.1 million judgment awarded to Mr. Klockenkemper on September 23, 2003; and (5) Rocky Well's 2005 federal income tax return. Complainant requested most of this information in February of 2006, but, to date, this information has not been produced.

Respondents have been ordered by this Presiding Officer to produce information regarding their ability to pay the proposed penalty several times. In a Prehearing Order dated December 5, 2005, both Respondents were ordered to furnish supporting documentation for such a claim by January 23, 2006. In an Order dated June 27, 2006, Mr. Klockenkemper was ordered to determine whether he would make a claim of inability to pay and both Respondents were ordered to determine whether they would produce the information sought by Complainant and so advise the Presiding Officer at the next conference call. At that conference call held on July 13, 2006, counsel for Rocky Well represented that the corporation would submit a copy of its 2005 federal tax return once that return was completed. The Presiding Officer ordered Rocky Well to submit both the 2005 tax return and the completed financial statement by August 21, 2006.<sup>3</sup> Counsel for Mr. Klockenkemper restated his objections to the Presiding Officers orders and refused to comply. *See Report of Conference Call and Order (July 17, 2006).*

The Consolidated Rules of Practice<sup>4</sup> which govern this matter are straightforward. In its Answer, a respondent shall state, among other things, "the basis for opposing any proposed relief," which would include an inability to pay a penalty. *See* 40 C.F.R. § 22.15(b). In a

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<sup>1</sup> *See* Rocky Well Service Incorporated's Answer to Amended Administrative Complaint and Request for Hearing, filed March 25, 2003, at 4.

<sup>2</sup> Complainant asserts, and Respondent Klockenkemper does not contest, that he is the President, Secretary, Treasurer and Director of Rex Resources, Inc., and at the time of incorporation, he was the sole shareholder. *See* Declaration of Gail B. Coad ¶ 14b (Attachment 2 to Complainant's Motion to Compel Discovery Related to Respondents' Ability to Pay, filed December 12, 2006).

<sup>3</sup> Rocky Well submitted the financial statement on August 28, 2006.

<sup>4</sup> The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22.

proceeding such as this, a respondent shall explain in its prehearing exchange “why the proposed penalty should be reduced or eliminated.” 40 C.F.R. § 22.19(a)(3). Certainly an inability to pay would be one such reason. Rocky Well has pled an inability to pay a penalty in this matter. Mr. Klockenkemper has been silent on the issue.

The Consolidated Rules further provide that a party may move for and the Presiding Officer may order additional discovery after completion of the prehearing exchange under certain circumstances, those being if the discovery:

(I) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e).<sup>5</sup> Finally, one of the Part 22 Subpart I rules specifically governing this proceeding prohibits the authorization of discovery other than that conducted during the prehearing exchange *except* for “discovery of information concerning respondent’s economic benefit from alleged violations and *information concerning respondent’s ability to pay a penalty.*” 40 C.F.R. § 22.52. Thus, the Consolidated Rules require a respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange.

Further, the Environmental Appeals Board (EAB) has found that “in any case where ability to pay is put in issue, the Region must be given access to the respondent’s financial records before the start of such hearing.” *In re New Waterbury, Ltd. (New Waterbury)*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (EAB Oct. 20, 1994). Moreover, the EAB has held that “where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may properly conclude that any objection to the penalty based upon ability to pay has been waived.” *Id.*

In this case, Complainant has met its burden under § 22.19(e). The hearing in this matter is now set for April 24, 2007, and the timely production of the documents Complainant seeks will not delay this proceeding. Neither Respondent argues in its response to Complainant’s motion that production of the requested documents will be an unreasonable burden. The

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<sup>5</sup> Where a party fails to provide information as required under § 22.19, the Presiding Officer may: (1) infer that information would be adverse to that party; (2) exclude the information from evidence; or (3) issue a default order under § 22.17(c). 40 C.F.R. § 22.19(g).

information Complainant seeks is most reasonably obtained from Respondents. Most importantly, the information Complainant seeks is of significant probative value on the issue of whether each Respondent has the financial wherewithal to pay the penalty the government seeks in this case. Finally, Respondent Klockenkemper has ignored the specific orders of the Presiding Officer on this matter for several months, and that can no longer be permitted.<sup>6</sup>

For these reasons, Complainant's Motion to Compel Discovery Related to Respondents' Ability to Pay is GRANTED it is hereby ORDERED as follows:

- (1) Respondent Rocky Well Service, Inc. shall produce a copy of its 2005 federal tax return by February 16, 2007;
- (2) if he chooses to raise an inability to pay claim in this case, Respondent Klockenkemper shall provide the following information to Complainant by February 16, 2007:
  - (a) Copies of personal federal income tax returns for the last five years, including all schedules, forms, balance sheets and other attachments, signed and certified;
  - (b) a completed Financial Statement for Individuals and, if any trusts are involved, a completed Statement for Trusts for Mr. Klockenkemper and his wife;
  - (c) copies of the last five years of federal income tax returns for Rex Resources Inc., another business entity owned by Respondent Klockenkemper; and
  - (d) information regarding the payment on the judgment of \$1.1 million granted in favor of Respondent Klockenkemper against Christopher Swiecick;
- (3) if either Respondent fails to produce the required documentation by February 16, 2007, they will be deemed to have waived any claim of inability to pay the proposed penalty and no evidence regarding their inability to pay will be admitted at hearing; and
- (4) on or before February 20, 2007, Complainant shall submit a status report (not to exceed one page in length) to the Presiding Officer stating whether each Respondent has complied with the

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<sup>6</sup> Respondents request in their Response to Complainant's motion that they be allowed at least until March 1, 2007, to produce the requested documentation. Given that both Respondents have been on notice for over a year that this information was being sought, that they both have continuously ignored orders of the Presiding Officer and that prejudice to Complainant will result from further delay, I am setting an earlier production date of February 16, 2007.

terms of this Order and each Respondent shall submit a status report (not to exceed one page in length) to the Presiding Officer stating whether it has complied with the terms of this Order.

Dated: January 31, 2007

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Marcy A. Toney  
Presiding Officer

IN THE MATTER OF Rocky Well Service, Inc., and Edward J. Klockenkemper, Respondents  
Docket No. SDWA-05-2001-002

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Complainant's Motion for Additional Discovery on Ability to Pay, dated January 31, 2007, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Copy hand delivered to  
Attorney for Complainant:

Cynthia Kawakami  
Mary McAuliffe  
U.S. Environmental Protection  
Agency, Region 5  
Office of Regional Counsel  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Copy by U.S. Mail,  
First Class, and facsimile  
(618/829-3340) to:

Richard J. Day, P.C.  
Attorney at Law  
413 North Main Street  
St. Elmo, Illinois 62458

Copy by U.S. Mail,  
First Class, and facsimile  
(773/278-6226) to:

Felipe Gomez  
P.O. Box 180118  
Chicago, Illinois 60618

Dated:

By: \_\_\_\_\_  
Darlene Weatherspoon  
Administrative Program Assistant