

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

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

**RESPONDENT KLOCKENKEMPER’S MOTION TO STRIKE AND EXCLUDE NEW  
MATERIAL FROM EPA’S APPELLATE RESPONSE BRIEF**

**NOW COMES RESPONDENT KLOCKENKEMPER**, by and through his undersigned counsel, and without waiving objections to this action, including as to jurisdiction, and files this **Motion to Strike** portions of EPA’s March 31, 2009, Response Brief, as follows:

1. Respondent states in support of this motion that EPA’s March 31, 2009, Response Brief in this matter contains new material and two new arguments relative to jurisdiction that were not made by EPA in the case below and which are not responsive to the issues set forth in Respondent’s Revised Brief in this matter.
2. *Jurisdictional Bar versus Affirmative Defense.* EPA raised on appeal for the first time the argument that Respondent EJK’s jurisdictional arguments (that, by law, he is not the permittee or an unpermitted operator and thus is not within the SDWA’s Illinois UIC program’s jurisdiction) are affirmative defenses, and not jurisdictional arguments, relying for the first time on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) and *In Re J. Phillips*, 13 E.A.D. \_\_\_(EAB 2007). See *EPA Response Brief at 10*. Given EPA’s Response is limited to the issues raised on appeal, and given that EPA never raised this distinction and issue below the material appearing at page 10 of the EPA Brief should be stricken.
3. EPA’s jurisdictional versus affirmative defense arguments should also be stricken as immaterial, since Respondent EJK, unlike Appellee in *Arbaugh*, timely raised the issue below, thus in either case it is properly before the EAB and since, unlike both *Arbaugh* and *Phillips*, EJK is not attempting to utilize a fact and conduct-based exception to jurisdiction that exists and would otherwise attach, but rather is relying on the direct jurisdictional language that establishes that jurisdiction never existed or attached because he was not within the initial class of regulated parties (See *Arbaugh*, acknowledging that jurisdictional elements are indicated by statutes specifying particular types of defendants, e.g 7 USC 2707(e)(3) - “persons subject to Egg Board” or 28 USC 1348 - National Banking Associations).
4. *Federal Equivalency Requires “Operator Liability”.* Secondly, EPA for the first time cites regulations at 40 CFR 144 in support of its new argument that the Illinois UIC

program must be found to regulate operators of an operator of a UIC well, since, by EPA's argument, these provisions use the term "owner or operator" of a UIC well. *EPA Brief at 17-20, esp. at 18.* Given EPA's Response is limited to the issues raised on appeal, and given that EPA never raised this argument below in relation to jurisdiction (EPA did raise these sections in relation to statute of limitations), the material appearing at pp 17-20 (Section V.B.2) of the EPA Brief should be stricken.

5. EPA's "operator liability" arguments should also be stricken as immaterial, since an inspection of the cited provisions reveals that they use the term "permittee" the great majority of the time, and only use the term "owners and operator" interchangeably, rather than exclusively, of the term "permittee" (e.g. the last sentence of the regulation cited at p18 of EPA's Brief - which sentence EPA omitted - states that "The applicant for a permit" has the burden of meeting the requirements cited by EPA - *See 40 CFR 144.12(a)*). Thus, the very provision cited by EPA indicates that permittees or permit applicants are considered an "owner or operator", and that the regulation does not create a separate category of regulated entities.

**WHEREFORE, for the reasons set forth Respondent Klockenkemper MOVES that the arguments at p10 (Section V.A.) and at pp17-20 (Section V.B.2) be stricken with prejudice from USEPA's Response Brief and that USEPA be precluded from utilizing or referring to these arguments or text for any purpose adverse to Mr. Klockenkemper in this matter.**

Submitted By: *s:/Felipe N. Gomez* Date: **April 15, 2009**  
Counsel for Respondent Klockenkemper

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#### **NOTICE AND CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this date, I facsimiled and e-filed an e-signed copy of the original, and mailed the signed original by U.S. First Class Mail, of this **Motion** to: 1) the EPA Environmental Appeals Board Clerk, Ariel Rose Building (MC 11038), 1200 Pennsylvania Ave, N.W., Washington D.C., 20460-0001 (Fx: 202-233-0121); and facsimiled and mailed a copy to 2) Mr. Richard Day, Esq., 413 North Main Street, St. Elmo, IL. 62458. I also certify that on this day I facsimiled a copy of this Motion to: 1) EPA Counsel Ms. Cynthia Kawakami; and 2) EPA Counsel Ms. Mary McAuliffe, both at Office of Regional Counsel (C-14J), 77 W. Jackson, Chicago, IL. 60604-3590 (Fx: 312-886-0747), and on same day I mailed U.S. First Class mail, a copy of this Motion to each of Ms. Kawakami and Ms. McAuliffe at the address listed above.

Signed: *s:/Felipe N. Gomez* Date: April 15, 2009  
Felipe N. Gomez, Esq.

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