

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

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In Re: )  
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Rocky Well Service, Inc. & ) SDWA Appeal Nos. 08-02 & 08-03  
E. J. Klockenkemper )  
 )  
Docket No. SDWA-05-2001-002 )  
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**JOINT OBJECTIONS TO EAB DECEMBER 15, 2008, ORDER  
IMPOSING PAGE LIMITS AND REVISION OF RESPONDENT  
KLOCKENKEMPER'S APPELLATE BRIEF**

**AND**

**JOINT MOTION TO RECONSIDER, AND/OR GRANT ADDITIONAL PAGES AND TO  
GRANT TIME TO REVISE BOTH RESPONDENTS' APPELLATE BRIEFS**

**NOW COME RESPONDENTS** E.J. Klockenkemper and Rocky Well Service, Inc., by and through undersigned counsel, who respectfully and for the record Object and Move the EAB to reconsider and/or amend its December 15, 2008, Order rejecting Respondent Klockenkemper's Appellate Brief in this matter, to either allow such brief as submitted regard to length, or, if such relief is not granted, to allow additional pages and time to revise the Respondents briefs to comply with the newly created 70 page limit for appellate briefs.

Respondents state in objection and for the record that the order is arbitrary and capricious and unfairly prejudicial to Respondents, that the Order must be modified, and request such and other relief as stated below.

**Additional Time Needed**

1. Without regard to any other issue, the January 12, 2009, EAB deadline for revision and refiling is impossible to meet, since, inter alia, Respondent Klockenkemper's counsel has been and is out of state for the holidays on a long planned trip to visit his cancer-stricken mother, and will not return to work until January 2, 2009, thus allowing only 6 business days for counsel to attempt to coordinate with Rocky Well's counsel, and accomplish what was ordered by the EAB (assuming that counsel could even dedicate all six days to this matter, which he cannot due to pre-existing litigation and other personal obligations).<sup>1</sup>

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Such absence necessitated the filing of this joint motion by Respondent Rocky Well's counsel, and prevents either counsel from addressing this matter in detail until at earliest January 2, 2009.

2. To wit, upon his return, Respondent Klockenkemper's counsel has a previous commitment to be fully engaged in the first three weeks of January 2009 in reviewing, processing and negotiating complex and numerous discovery issues in this matter *Marx v. Northwestern Hosp.*, 05 L 8614, (See attached state court discovery order), where the discovery court status date of January 21, 2009, was chosen in part to allow counsel to turn his attention to the EPA response that was expected to be received on that date, according to the previous schedule in this matter, as well as to other matters.

3. Such deadline is also inadequate to allow Rocky Well's counsel the time for the withdrawal, revision, potential expansion, and refile of Rocky Well's brief (which incorporated large portions of the 221 page Klockenkemper brief, including making specific page number references which will have to be and can only be changed after finalization of any revised Klockenkemper brief).

4. Thus, regardless of whether additional relief beyond the 70 page limit for Mr. Klockenkemper's brief is granted, substantial additional time is needed and requested to allow counsel to coordinate, and, if ordered after reconsideration of the December 15, 2008, order, attempt to reduce the length and content of the filed brief to the extent possible (subject to Respondents standing objections), to allow for Rocky Well's motion for leave to withdraw, and Rocky Well's withdrawal of its brief, and to allow both Respondents counsel to coordinate and make concomitant adjustments to their respective briefs. An extension until at least February 28, 2009 is required.

### **Objections and Request for Allowance of Original Or Additional Pages**

5. Respondents object that neither 40 CFR 22 nor EAB rules provide for any page limitations on appellate briefs, nor does the cited 40 CFR 22 authority mention or contemplate the authority for the EAB to either reject a brief based upon length, or to impose page limits, *post-facto*, after submission of a brief drafted where there were no prior page limitations and where EAB and EPA were aware that a lengthy brief was in preparation.

6. Respondent Klockenkemper's October 2008, brief, appealing 9 separate orders, each of substantial length and addressing multiple issue, going back to 2003, was prepared in accordance with such large number of orders under attack, and in good faith reliance on the lack of page limitations on an EAB appellate brief appealing a single order, let alone multiple legally and factually complex orders as were issued in this matter.

7. The EAB order arbitrarily selecting a 70 page limit seems to disregard the fact that 9 orders are under appeal, and the fact that Respondent Klockenkemper's brief addressed both Respondents' similar arguments, and that, combined, both briefs allot a combined average of only approximately 26 pages per order for the 2 respondents.

8. The EAB 70 page limit amounts to an unreasonable and prejudicial allotment of less than 8 pages per order, and is inadequate to allow Respondents to fully brief both the liability and penalty aspects of the 9 orders, let alone one or the other, thus prejudicially limiting the record for

later judicial appeal in favor of EPA.

9. Respondent Rocky Well's brief was drafted and submitted without the knowledge that the primary brief would be limited in this fashion, thus depriving it of the opportunity to expand and adjust its brief accordingly in view of and to accommodate some of the material that could not be included in Respondent Klockenkemper's brief.

10. In the event of any revisions, Rocky Well's brief, referring to specific page numbers and sections of Respondent Klockenkemper's brief for arguments pertinent to certain common defenses of both entities (e.g. statute of limitations, penalty) would also have to be withdrawn and adjusted after Mr. Klockenkemper's brief is redrafted, causing further unfair prejudice to Respondent Rocky Well.

11. No prejudice existed to EPA Region 5, which requested and received an extension of time from the EAB to file its response, specifically to allow it time to address the length of Respondent Klockenkemper's appellate brief in this matter, and EPA Region 5 did not claim, and did not suffer any prejudice from the length of the initial brief.

WHEREFORE, Respondents respectfully **Move** the EAB to rescind its December 15, 2008, order, and to issue an order resetting the due date for EPA response to the previously filed briefs accordingly. If that relief is not granted, Respondents **Move** the EAB to revise its order to require only the Respondent Klockenkemper reduce the length of his brief to the extent possible and practicable, without a page limitation consistent with 40 CFR 22. In either event, due to preexisting commitments in January 2009, and the significant time and repleading Respondents will be required to perform in event of a denial of relief requested herein, Respondents, without waiving objections, **Move** the EAB to grant until at least February 28, 2009 to submit revised briefs, and accomplish Rocky Well ancillary motive for leave to withdraw and refile to be required in this matter.

Respectfully filed by: /s/ Richard J. Day Date: 12/26/08  
Richard J. Day, on behalf of Respondents Rocky Well Service, Inc. and E. J. Klockenkemper

NOTICE AND CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this date I facsimiled and e-filed the original, and mailed the original by U.S. First Class Mail, of this Motion to Reconsider, and/or Grant Additional Pages and to grant time to Revise Both Respondents Appellate Briefs and this Notice/Certificate to the USEPA Environmental appeals Board Clerk, Ariel Rose Building (MC 11038), 1200 Pennsylvania Ave., N.W., Washington D.C., 20460-0001 (Fx: 202-2330121). I also certify that I facsimiled and mailed, U.S. First Class Mail postage paid, a copy of this Motion/Notice to: 1) Counsel Ms. Cynthia Kawakami and 2) Counsel Ms. Mary McAuliffe, both at Office of Regional Counsel (C-14J), 77 W. Jackson, Chicago, IL 60604-3590, and to 3) Mr. Felipe Gomez, Post Office Box 220550, Chicago, IL 60622.

Signed: /s/ Richard J. Day Date: December 26, 2009

Order

(2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MARX

v.

No. 05 L 8614

NORTHWESTERN MEMORIAL HOSP ET AL

ORDER

THIS MATTER COMING BEFORE THE COURT ON STATUS AND ON PLAINTIFFS MOTION TO COMPEL RESPONSES TO DISCOVERY, DUE NOTICE HAVING BEEN GIVEN, AND THE COURT INFORMED OF THE PREMISES, IT IS HEREBY ORDERED THAT:

- 1) DEFENDANTS SHALL TENDER <sup>to PLAINTIFF</sup> ALL RESPONSES, AND DATES FOR DEPOSITIONS, UNDER PLAINTIFFS <sup>OUTSTANDING</sup> WRITTEN INTERROGATORIES, REQUESTS FOR PRODUCTION AND NOTICES OF DEPOSITION NO LATER THAN 1/15/09;
- 2) STATUS DATE IS NOW SET FOR 1/21/09, AT 12:30 P.M. COURTROOM 1906.
- 3) MOTION FOR GOOD FAITH FINDING SET FOR 12/17/08, 12:30 P.M.

Atty. No.: 37279

Name: FELIPE N. GOMEZ

ENTERED:

Atty. for: PLAINTIFF

Address: P.O. BOX 220550

Dated: Judge Thomas L. Hogan

City/State/Zip: CHICAGO IL

DEC 12 2008

Telephone: 312-399-3966

Judge Circuit Court-1739

Judge's No.