



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

Mail Code: C-14J

May 1, 2009

Eurika Durr
Clerk of the Board - - Environmental Appeals Board
U.S. Environmental Protection Agency
Washington, D.C. 20005
Facsimile Number: (202) 233-0121

In Re: Rocky Well Service, Inc. & E. J. Klockenkemper; SDWA Appeal Nos. 08-02 & 08-03

Dear Ms. Durr:

Attached, please find *Appellee's Response to Appellant Klockenkemper's Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA and Appellant Rocky Well Service, Inc.'s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA*, for filing with the Environmental Appeals Board in the above-mentioned case. A PDF of this document is also being forwarded to you through the Central Data Exchange.

Sincerely,

A handwritten signature in black ink, appearing to read "Cynthia N. Kawakami".

Cynthia N. Kawakami
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Enclosures

cc: Felipe Gomez, Esq.
Richard Day, Esq.

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

In Re:)	
)	
Rocky Well Service, Inc. & E. J. Klockenkemper)	SDWA Appeal Nos. 08-02 & 08-03
)	
Docket No. SDWA-05-2001-002)	
)	

**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**

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.30(e) of 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), Appellee, the United States Environmental Protection Agency, Region 5 (Appellee), files the instant Appellee’s Response to *Appellant Klockenkemper’s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA* and *Appellant Rocky Well Service, Inc.’s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA* (Appellee’s Response).

On or about April 22, 2009, Appellant Rocky Well Service, Inc. (Appellant RWS) filed its *Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA* (“Appellant RWS’s Motion for OA” or “the Motion”). On or about that same date, Appellant E. J. Klockenkemper (Appellant EJK) filed his *Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA* (“Appellant EJK’s Motion for OA” or “the

Motion”).¹ Appellee does not believe that oral argument is required or necessary in this case for the reasons set forth herein, and, accordingly, does not support Appellants EJK’s and RWS’s Motions for OA.

Oral Argument Is Not Necessary In This Matter And Would Not Significantly Aid The EAB

Appellants EJK and RWS suggest that oral argument “would assist the Board in its deliberations and *focus it* on the important issues presented by the case.” See Appellant EJK’s Motion at 1, ¶ 1. (Emphasis added). See also Appellant RWS’s Motion at 1, ¶ 1. Appellee does not agree. The facts and legal arguments underlying each of the issues emphasized by Appellants in their Motions have been thoroughly presented by the parties to this litigation in hundreds of pages of briefs, pleadings, and evidence that were previously filed in this matter, and, therefore, the Environmental Appeals Board’s (“EAB’s” or “the Board’s”) decisional process would not be significantly aided by oral argument. See Fed. R. App. Pro. 34(a)(2)(C). Accordingly, the EAB’s, as well as Appellee’s resources would be better directed to other matters with genuinely complicated issues that have not been fully developed and/or explored in the record.

Appellant EJK complains that “he has not been given full opportunity to present his arguments . . . due to . . . [the EAB’s] unprecedented post-facto imposition of a 70 page

¹Appellant EJK again used the wrong facsimile number to serve Appellee with a copy of the Motion on April 22, 2009. The incorrect facsimile number used by him is no longer dedicated to the machine that, at one time, was located in Appellee’s counsel’s offices on the 14th floor. To date, Appellee’s counsel has not received the facsimile copy of Appellant EJK’s Motion for OA, but did receive a hard copy of the pleading that was mailed by him through the U.S. Postal Service. The correct facsimile numbers for Appellee’s counsel are contained in *Appellee’s Notice of Change of Facsimile Numbers* that was filed with the EAB and served on Appellants’ counsel on March 3, 2009, and the facsimile number for the undersigned has been included in each pleading filed by Appellee since that date.

limitation even though no page limit rule existed for appellate briefs when . . . [his] initial Oct. 30, 2008, 2-part brief was submitted.” Appellant EJK’s Motion at 3, ¶ 11. This complaint is without merit. Underlying Appellant EJK’s complaint is the assumption that his initial 221-page brief fully presented his arguments in a clear manner that was of value to the EAB, and that the Board’s rejection of the same was improper. This was not the case. Appellant EJK squandered his first opportunity to fully present his arguments to the EAB by providing the Board with a 221-page brief that was “unnecessarily verbose and redundant, resulting in a lack of clarity and an excessive page count.” See 12/15/08 EAB Order at 1. Appellant EJK’s 221-page brief did little to assist the EAB in evaluating the issues in this case, and, instead, did much to obfuscate matters of significance. By ordering Appellant EJK to file a revised brief of no more than 70 pages in length, the EAB provided Appellant with a second opportunity to fully brief the pertinent issues in this case in a clearer and more efficient manner.² If Appellant EJK now feels that he should have presented the arguments in his revised brief in a more straightforward and succinct fashion, that is an error of his own making. It is not the fault of the EAB. Appellant EJK was not denied the opportunity to fully present his arguments to the Board and he should not be given yet a third opportunity to reiterate the same contentions at oral argument.

²The 70-page limit for Appellant EJK’s revised brief, as set by this Board that has reviewed and decided hundreds of appeals, was more than ample for him to fully present his arguments in support of his appeal. Indeed, Fed. R. App. Pro. 32(A)(7) provides for a more stringent page limit, requiring that “[a] principal brief may not exceed 30 pages unless it complies with Rule 32(a)(7)(B) and (C).” The exception to the 30-page limitation in the rule provides for a *safe harbor* 50-page limit that can be verified by either counting words or lines. See Fed. R. App. Pro. 32, 1998 Amendments, Paragraph (a)(7). *Type-Volume Limitation*. (30-page limit is imposed for briefs not subject to any other volume control other than page limit, and the *safe harbor* 50-page limit is for those briefs where the author certifies compliance with the limits of 14,000 words or 1,300 lines of text in the brief).

Appellant RWS claims that “oral argument is . . . appropriate given . . . that *they* have not been given full opportunity to present *their* arguments. . .” Appellant RWS Motion at 2, ¶ 6. (Emphasis added). Appellant RWS does not elaborate on how it was deprived of a “full opportunity” to present its arguments, but since it argues in the plural, apparently on behalf of both Appellants at that point in its Motion, it is assumed that Appellant RWS is basing its alleged deprivation on the EAB’s order rejecting Appellant EJK’s brief and requiring him to file a revised brief of no more than 70 pages. Accordingly, Appellee adopts its discussion above regarding Appellant EJK’s inaccurate contention that he was deprived of a full opportunity to present his arguments because of the EAB’s 12/15/08 Order that rejected his original 221-page brief and required him to file a revised brief of no more than 70 pages.

If Oral Argument is Ordered, It Should Be Limited To Those Issues That The EAB Determines Will Significantly Aid The Board’s Decisional Process

As discussed above, Appellee does not share Appellants EJK’s and RWS’s beliefs that oral argument “would assist the Board in its deliberations and *focus it* on the important issues presented by the case,” [Cindy, I wouldn’t re-emphasize “focus it” here] because the facts and legal arguments underlying each of the issues emphasized by Appellants in their Motions for OA have been thoroughly presented by the parties to this litigation in previously filed briefs and pleadings in this matter. If, however, the EAB decides that oral argument would significantly aid the Board’s decisional process, Appellee respectfully suggests that the Board strictly limit the oral argument to those matters that the Board determines require additional argument or clarification.³

³It is respectfully submitted that an order by the Board delineating each issue to be discussed during oral argument, as well as the time limits for each party’s arguments, *inter alia*,

If Oral Argument is Ordered, Appellants EJK and RWS Should Make Their Own Arrangements For Oral Argument and Bear The Costs For Their Own Participation in The Oral Argument That They Have Requested

Appellants EJK and RWS request that the Board force Appellee to facilitate and provide the space and equipment for their oral argument, as well as finance the oral argument that they have requested, through Appellee's teleconferencing facilities in Chicago, Illinois. Appellant EJK's Motion at 1 and Appellant RWS's Motion at 1. Moreover, Appellants request that the EAB compel Appellee to present its responsive oral argument from a remote location, in Chicago, Illinois, which is contrary to Appellee's choice of venue for argument. *Id.* Appellee disagrees with Appellants' request to the EAB for the reasons provided herein.

Appellee previously notified Appellants EJK and RWS that it did not believe that oral argument was necessary in this case, but that if oral argument was ordered by the EAB, Appellee's counsel would appear before the EAB, in person, in Washington, DC, to argue its position. Accordingly, it further notified Appellants EJK and RWS that Appellee's counsel would not be using video-teleconferencing equipment in its Chicago, Illinois offices to make its responsive arguments in this matter. Knowing this information that was conveyed to them prior to filing their Motions for OA, Appellants EJK and RWS still ask this Board to: 1) force Appellee to engage in oral argument from Chicago, Illinois, against its choice of venue for argument, (assuming, *arguendo*, that the EAB orders oral argument in this case); 2) compel Appellee to facilitate the oral arguments that were requested by Appellants; 3) compel Appellee to provide the space and video-teleconferencing equipment for Appellants' oral arguments; and

would greatly assist the parties and facilitate an efficient and uncluttered oral argument process, to whatever extent that is possible.

4) require Appellee to assume the costs of such video-teleconferencing arrangements for Appellants' oral arguments.

Appellants' foregoing requests are improper and should be rejected outright because Appellants EJK and RWS are not *pro se* appellants. There is no hint that they are each *in forma pauperis*, or are without the funds to pursue the oral argument that they have requested. Indeed, Appellant EJK and Appellant RWS have each retained, paid, and, subsequently, been represented by separate, private counsel in this case for many years. Therefore, there is no valid reason why Appellants EJK and RWS should not facilitate and pay the costs related to their own counsels' oral argument that they requested. While Appellants may wish to reduce their costs and respect "the spirit of resource conservation," they cannot do so by shifting the costs related to their counsels' oral argument to Appellee. This is particularly true where Appellee's counsel plan to appear in Washington, DC, if oral argument is ordered, and will not be using video-teleconferencing equipment in its Chicago, Illinois offices for this matter. Therefore, if Appellants EJK and RWS wish to limit the costs of their ". . . air travel and other costs and impacts attendant to travel to and lodging in Washington D.C. . . .," they should make their own private video-teleconferencing arrangements for oral argument in this case, if such argument is ordered by the Board.⁴

For the reasons presented above, Appellee respectfully requests that the EAB deny

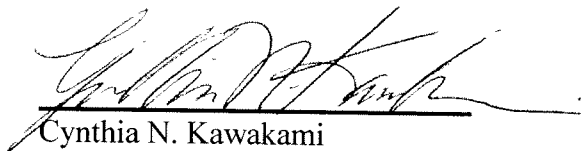
⁴A quick internet search indicates that numerous companies, including, but not limited to ubiquitous franchises such as *Kinkos*, have video-teleconferencing facilities that can be rented by private parties on an hourly basis for a fee. If Appellants do not wish to assume the costs of private video-teleconferencing for their oral argument in this case, there are other options such as participating by telephone before the EAB. In any case, it is entirely up to Appellants to make whatever private arrangements they deem appropriate to facilitate their oral argument before this Board, if such argument is ordered.

Appellant EJK's and RWS's Motions for OA. If the EAB decides that oral argument is appropriate in this matter, however, it is respectfully requested that the EAB issue an order, limiting the oral argument to specific issues, as identified by the Board, and setting forth a time-specific, limited schedule for such oral argument, for the reasons set forth above. Lastly, for the reasons set forth above, Appellee respectfully requests that, if the EAB determines that oral argument is appropriate in this case, it deny Appellant EJK's and RWS's requests that Appellee be forced to engage in oral argument from Chicago, Illinois, against its choice of venue for argument; that Appellee facilitate the oral arguments that were requested by Appellants; that Appellee provide the space and video-teleconferencing equipment for Appellants' oral arguments; and that Appellee assume the costs of such video-teleconferencing arrangements for Appellants' oral argument.⁵

Respectfully Submitted,

Date:

May 1, 2009



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⁵If oral argument is ordered by the EAB, Appellants should make their own arrangements for oral argument, should their counsel decide not to appear in person before the Board.

**In Re: Rocky Well Service, Inc. &
Edward J. Klockenkemper
SDWA Appeal Nos. 08-02& 08-03**

CERTIFICATE OF SERVICE

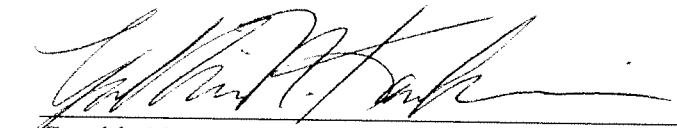
I certify that, on the date below, I caused to be filed by facsimile, *Appellee's Response to Appellant Klockenkemper's Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA and Appellant Rocky Well Service, Inc.'s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA*, along with this Certificate of Service, with the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board, at facsimile number: (202) 233-0121. I further certify that, on the date below, I sent via electronic delivery through the EAB's Central Data Exchange, a PDF of *Appellee's Response to Appellant Klockenkemper's Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA and Appellant Rocky Well Service, Inc.'s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA*, along with this Certificate of Service, to the Clerk of the Board.

I further certify that, on the date below, I caused to be delivered by facsimile, and by First Class United States Mail, postage prepaid, a copy of *Appellee's Response to Appellant Klockenkemper's Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA and Appellant Rocky Well Service, Inc.'s Motion for Oral Argument Via Video TeleConferencing Facilities At Region 5 EPA*, along with this Certificate of Service, to each person as follows:

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Dated: May 1, 2009



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