

**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 FOR
LEAVE TO FILE AMENDED NOTICE OF APPEAL**

Respondent Edward J. Klockenkemper, by and through his counsel, Law Office of Felipe N. Gomez, ("Respondent") respectfully moves and requests that the Environmental Appeals Board ("EAB") grant leave to file an Amended Notice of Appeal for Mr. Klockenkemper simultaneously with his Appellate Brief on or before October 31, 2008, a proposed copy of which Amended Notice is attached hereto. Respondent states in support of this Motion:

1. Mr. Klockenkemper's initial Notice of Appeal, filed shortly after issuance of the 7/23/08 Initial Decision and based upon a quick review of the voluminous file and the Initial Decision, stated that Respondent Klockenkemper intended to appeal the Initial Decision in this matter, as well as "other decisions and orders" of "Region 5 Presiding Officer Marcy Toney".
2. However, a subsequent closer review of the record revealed that two of the interlocutory orders to be appealed were actually issued by Ms. Toney's predecessor, Regina Kossek, (2/6/03 Grant of Leave to Amend to Add Mr. Klockenkemper, 5/18/05 Denial of Motion to Dismiss Amended Complaint,), the latter of which pre-dated undersigned counsel's involvement in this matter.
3. Consequently, Respondent's amendment of his notice of appeal merely seeks to clarify the fact that Ms. Toney was not the only Presiding Officer whose final and applicable interlocutory orders are being appealed, and to allow notice of record to Ms. Kossek (who left the Agency approximately 4 years ago, and thus is not amenable to direct service by way of the Presiding Officer's office).
4. Respondent's proposed amendment is a matter of form rather than substance, is supported in fact and law, and there is no prejudice to EPA, since:

- A. under extant appellate caselaw interpreting the Federal Rules of Appellate Procedure ("FRAP") 3 and 4 (containing nearly identical language regarding timing and content of federal notices of appeal as that of 40 CFR 22.30), the appeal of a final order disposing of all issues encompasses all interlocutory orders issued leading to the final judgment (e.g. the Interim Decision), regardless of whether the Notice of Appeal lists only the final judgment. *James v. York County Police Department*, 160 Fed. Appx. 126; 2005 U.S. App. LEXIS 26876(3rd Cir 2005)(Although Rule 3 of the Federal Rules of Appellate Procedure requires an appellant to designate the "judgment, order, or part thereof appealed from," an appeal from a final judgment will implicate all non-final orders and rulings which produced the judgment); *City of New York v. Smokes-Spirits.com, Inc.*, 2008 U.S. App. LEXIS 18930 (2nd Cir. 2008)("We generally interpret an appeal from a specific order disposing of the case as an appeal from the final judgment, which incorporates all previous interlocutory judgments in that case and permits their review on appeal. *Anobile v. Pelligrino*, 303 F.3d 107, 115 (2d Cir. 2002)("When a district court enters a final judgment in a case, interlocutory orders rendered in the case typically merge with the judgment for purposes of appellate review."); 16A *Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure* § 3949.4 at 72 (3d ed. 1999) ("[A] notice of appeal that names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment under the general rule that appeal from a final judgment supports review of all earlier interlocutory Orders."))"
- B. 40 CFR 22.30(c) provides: "The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction." (Emphasis added).
- C. jurisdiction may be challenged at any time and at any phase of litigation, including for the first time on appeal even if the objection was not raised below, and thus all orders preceding the Initial Decision dealing with and rejecting Respondent's threshold jurisdictional defenses or attacks are included in the appeal as a matter of course, without having to list each such order (such as Ms. Kossek's two aforementioned orders, and Ms. Toney's 12/27/06 Partial Decision, rejecting Respondent's jurisdictional attacks) in the Notice itself. See 40 CFR 22.30(c), and 64 FR 40167. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)(Subject matter jurisdiction, as a limitation on the judicial power, "can never be forfeited or waived").
- D. Respondents' objections to liability and jurisdiction were raised on the record numerous times below, including on 12/21/07 when both Respondents specifically and expressly submitted their 12/21/07 post-hearing joint brief under protest of the Presiding Officers' prior findings of the presence of jurisdiction and liability of Respondent Klockenkemper, and such Brief was submitted "subject to Respondents' standing objections to jurisdiction and liability, without any admission of liability or fault, and reserving all objections stated in Respondents' pleadings and otherwise, for appeal". See *Respondents' 12/21/07 post-hearing brief at 1*.

- E. Respondent's specification of the 7/23/08 Initial Order in the current Notice of Appeal directly provides notice to EPA that the 12/27/06 Partial Accelerated decision is subject to appeal, since Officer Toney, in keeping with the appellate rule including all interlocutory orders within the scope of an appeal of a final order, expressly merged her 12/27/06 Order on Partial Accelerated Decision (erroneously finding, *inter alia*, SDWA jurisdiction Respondent and refusing to apply 28 USC 2462 to bar most of the claims against both Respondents under the "continuing violations" doctrine), into her 7/23/08 Initial Decision on penalty, "in full", thus making her prior liability findings and rejections of Respondent's defenses thereto a part of the Initial Decision. (See 7/23/08 Initial Decision at 1, fn 1 - "The Partial Accelerated Decision is hereby incorporated in full").
- F. Appellant's brief is yet to be submitted, and EPA thus will still be afforded specific notice of precisely what errors will be alleged and argued on appeal when the brief is submitted, and Appellant will then be able to more specifically outline the specific interlocutory orders and issues on appeal in the Amended Notice of Appeal to be submitted with his Brief (assuming leave of the EAB to Amend).
5. The EAB has recognized that liberal construction and amendment of administrative pleadings is to be freely allowed to ensure a decision on the merits rather than on technicalities, and has in at least one instance allowed EPA to amend a notice of appeal on the fly to clarify a citation to the wrong regulation even after EPA's appellate brief was filed. *City of Marshall, Minnesota, CWA 00-9 10 E.A.D. 173 (10/31/2001)* ("Because an error of this nature is harmless and we adhere to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended, we will read the notice of appeal as referring to section 22.27(b)").
6. EPA counsel were notified in advance of Respondent's intent to move the EAB to amend his Notice of Appeal and were forwarded a copy of a proposed amendment substantially similar to that attached, but EPA declined to agree to allow such amendment and would not state EPA was not opposed to such amendment.

WHEREFOR, Respondent Klockenkemper respectfully MOVES for LEAVE to FILE an Amended Notice of Appeal similar to that attached hereto (give or take an interlocutory order or two), simultaneously with his Brief, on or before October 31, 2008, for the reasons set forth above.

Respectfully Submitted By:


s:/Felipe N. Gomez

Date: October 7, 2008

Felipe N. Gomez, Esq.

NOTICE AND CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this date, October 7, 2008, I facsimiled and e-filed the original, and mailed the 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 October 7, 2008, 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 that on October 8, 2008, I personally hand-delivered a copy of this Motion to each of Ms. Kawakami and Ms. McAuliffe at the address listed above.

Signed: _____


s./Felipe N. Gomez

Date: October 7, 2008

Felipe N. Gomez, Esq.

Law Office of Felipe N. Gomez
P.O. Box 220550
Chicago, IL. 60622
Ph: 312-399-3966
Fax: 773-278-6226

ATTACHMENT A

MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

DRAFT

BEFORE THE ENVIRONMENTAL APPEALS BOARD

DRAFT

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

Rocky Well Service Inc., and
Edward J. Klockenkemper,

Respondents

} SDWA-05-2001-002 (40 CFR Part 22)

} E.A.B. Docket No. 08-03

**RESPONDENT KLOCKENKEMPER'S
AMENDED NOTICE OF APPEAL
(Amendments in **Bold Type**)**

Respondent Edward J. Klockenkemper, by and through his counsel, Law Office of Felipe N. Gomez, respectfully files this Amended Notice of Appeal seeking review with regard to Region 5's July 23, 2008, Initial Decision assessing a civil penalty of \$105,590 under Section 1423(c) of the Safe Drinking Water Act, and other decisions and orders by Region 5 Presiding Officer Marcy Toney, Esq., and former Presiding Officer Regina Kossek, Esq. in the above-captioned matter, summarized as follows:

- | | |
|----------|---|
| 2/6/03 | R. Kossek Order Improperly Granting Leave to Amend to Add Mr. Klockenkemper, Personally, Over Objections to Lack of SDWA Jurisdiction |
| 5/18/05 | R. Kossek Order Improperly Denying Respondent Klockenkemper's Motion to Dismiss Amended Complaint For Lack of Jurisdiction |
| 5/17/06 | M. Toney Order Improperly Striking Certain Affirmative Defenses and Refusing to Compel EPA to Answer Respondents' Requests To Admit To EPA Regarding Lack of Jurisdiction |
| 12/27/06 | M. Toney Order Improperly Granting Partial Accelerated Decision on Liability To EPA and Denying Respondents' Motion For Accelerated Decision and Rejecting Respondent's Jurisdictional and 28 USC 2462 Statute of Limitations and Other Objections |
| 10/2/07 | M. Toney Order Improperly Denying EJK Motion to Conform Transcripts (Respondent also appeals as to various serious irregularities in the scheduling, conduct and transcription of the April 24-26, 2007, Hearing on penalty in this matter, related to the Hearing and 10/2/07 Toney Order). |

Submitted By: _____ Date: _____
Felipe N. Gomez, Esq.

Law Office of Felipe N. Gomez
P.O. Box 220550
Chicago, IL 60622
Ph: 312-399-3966
Fax: 773-278-6226