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Date & Time: 5/11/2009 2:58:26 PM
Pages: 3
Re: In Re Rocky Well Service - App. No. 08-03

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ENV. APPEALS BOARD
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Reply to EPA Response to Motion to Strike

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD**

IN THE MATTER OF: Rocky Well Service, Inc., and <u>Edward J. Klockenkemper, Respondents.</u>)))	Appeal No. 08-03 Docket No. SDWA-05-2001-0002
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**RESPONDENT EDWARD J. KLOCKENKEMPER'S REPLY TO EPA RESPONSE
TO MOTION TO STRIKE**

Now Comes Respondent E.J. Klockenkemper ("EJK"), by and through undersigned counsel and submits this Reply to EPA's April 24, 2009, Response to EJK's April 15, 2009, Motion to Strike, and Respondent states in reply as follows.

1. EPA's response to Appellant's Motion to Strike contends that new legal theories may be presented to the EAB on appeal in support of Appellee's position, but cites only the Am. Jur. In support thereof. *EPA Response at 2-3.*

2. However, actual appellate caselaw indicates that a party may not raise new legal theories on appeal where they were not presented to the court below, and to which the opposing party did not have the opportunity to respond to below. *Puerto Rico Aqueduct and Sewer Authority v. Constructora Iluch, Inc., et al.*, 1999 U.S. App. LEXIS 643 (1st Cir. 1999)(Appellees' new legal theory of liability not considered on appeal where Appellee did not present theory to finder of fact below); *Laura A. Martinez v. Texas Department of Criminal Justice, et al.*, 300 F.3d 567; 2002 U.S. App. LEXIS 14915, 14930-31) (5th Cir. 2002)(Appellate courts, absent extraordinary circumstances, will not entertain legal issues raised for the first time in a response brief by an appellee on appeal); *Planned Parenthood of the Rocky Mountains Services Corporation v. William Owens*, 287 F.3d 910; 2002 U.S. App. LEXIS 7049 (10th Cir. 2002)(Litigant may not raise new theories on appeal where other party did not have the opportunity to respond to and challenge the theory, and develop facts, below); *Charlotte Ann Plotner, v. AT&T Corporation*, 224 F.3d 1161; 2000 U.S. App. LEXIS 22398 (10th Cir. 2000)(Plaintiff may not choose to advance on appeal a new theory of liability arising out of the same transaction where they could have

- been raised below).
3. EPA does not point to the record as to where it made this argument below, and in fact by its argument in response admits that it was not made below. *EPA Response at 2-3.*
 4. Concomitantly, the Respondent did not have the opportunity to develop counter-arguments or contrary theories/facts below.
 5. WHEREFORE, the EAB should strike/not consider EPA's new arguments.

Submitted By: s: Felipe N. Gomez Date: 5/11/09

Felipe N. Gomez, Esq.

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 Reply 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 Reply 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 Reply to each of Ms. Kawakami and Ms. McAuliffe at the address listed above.

Signed: s: Felipe N. Gomez Date: May 11. 2009

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