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By Facsimile, E-Filing and U.S. Mail

October 2, 2009

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: ***EPA v. Rocky Well Service, Inc. and E.J. Klockenkemper, et al.*** (SDWA 05 - 2001 - 002)
Dkt. Nos. 08-03 and 08-04: **Respondents' Joint Response Declining Alternative Dispute Resolution**

Dear Clerk of the Board:

Appellants acknowledge and extend their appreciation for the Board's September 18, 2009, invitation to participate in the Board's nascent alternative dispute resolution program ("ADR") in this matter, as well as the Board's provision of the outline of ADR procedures recently forwarded. Appellants also acknowledge and extend their appreciation for Region 5's time in discussing this matter and the Region's interest in participating in the program relative to this matter.

Appellants agree in principal with EPA that ADR may be an effective tool in some circumstances during an appeal, and possibly at a different juncture in this matter. However, in this case, after review of the proposed ADR procedures and after consultations and discussions among Appellants and between Appellants and Region 5, Appellants respectfully decline to engage in the type of ADR outlined in the information brochure provided by your office at this time, as indicated by the lack of submission of a formal written acceptance for filing by today.

For your information and feedback, please know that primary to Appellant's position is the fact that substantial funds have already been expended for the defense and hearing below and for this initial step in the appeal process. Appellants feel that, under the current circumstances, remaining efforts are more economically focused on any potential appeal (or defense of a Region 5 appeal, or both) of the forthcoming EAB decision.

Also, from a programmatic aspect, the mature posture of this case cuts against one primary purpose of ADR, which is to try to foment an early settlement to avoid the very work-intensive efforts and expenditures already incurred to this point by Appellants and the Region. *See 65 FR 81858 (EPA Policy on ADR - 12/27/00)*. Further, given the legal (versus factual) nature of the threshold issues (28 USC 2462 limitations and 42 USC 1431 jurisdiction), and the firmness of the parties' exhaustively-briefed opposing positions on these legal issues, Appellants are not convinced of the economy or effectiveness of ADR at this point.

However, please also know that in the event that the EAB decision results in a potential partial or full remand for additional discovery and/or another hearing, Appellants would be more inclined to participate in ADR, prior to actual remand, since potentially significant additional efforts and costs for retrial below might thereby be avoided by all parties. Even without a remand, given the significant costs for appeal of the EAB decision by one or more parties to district court and beyond, an ADR “window” immediately after the EAB decision might engender ADR participation by both parties in attempt to avoid further appellate efforts and costs.

Consequently, while declining now, Appellants wish to indicate their willingness to consider ADR again after EAB issues its decision (regardless of who prevails or the nature of the decision), in attempt to potentially resolve the issues (going back or forward) under the circumstances created by the decision. Region 5 EPA has previously been informed of Appellants’ decision and position in this matter in regard to the declining of EAB’s ADR proffer.

Also, please know that Appellant Rocky Well Service has authorized and adopted this communication to be a statement of its position relative to ADR at this point. Thank you for your time and efforts in this matter.

Sincerely,

Felipe N. Gomez

Felipe N. Gomez, Esq.
On behalf of Appellants

cc: Day, R.
Kawakami, C
McAuliffe, M