



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  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

VIA Federal Express -- Next Business Day Morning Delivery

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

Dear Ms. Durr:

Enclosed please find *Appellee's Motion for Leave to File Instanter its Original Response to Appellant E. J. Klockenkemper's Motion to Strike and Exclude Material from Appellee's Response Brief* and the attached *Appellee's Response to Appellant Klockenkemper's Motion to Strike* and accompanying Certificate of Service, and a new Certificate of Service for the Motion, 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 "Mary T. McAuliffe".

Mary T. McAuliffe  
Associate Regional Counsel  
U.S. Environmental Protection Agency - Region 5  
77 West Jackson Blvd. (C-14J)  
Chicago, IL 60604-3590  
Telephone No.: (312) 886-6237  
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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. &	)	SDWA Appeal Nos. 08-02 & 08-03
E. J. Klockenkemper	)	
	)	
Docket No. SDWA-05-2001-002	)	
_____	)	

**APPELLEE’S MOTION FOR LEAVE TO FILE *INSTANTER* ITS ORIGINAL  
RESPONSE TO APPELLANT E. J. KLOCKENKEMPER’S MOTION TO STRIKE AND  
EXCLUDE MATERIAL FROM APPELLEE’S RESPONSE BRIEF**

Pursuant to 40 C.F.R. §§ 22.16(a) 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), respectfully requests that the Environmental Appeals Board (“the EAB” or “the Board”), accept the original Appellee’s Response to Appellant Klockenkemper’s Motion to Strike (Appellee’s Response) that is attached to this Motion filed *instanter*.

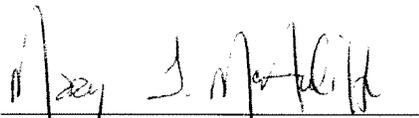
On April 24, 2009, Appellee sent a copy of Appellee’s Response to the Clerk of the Board via facsimile and PDF through the Central Data Exchange. Copies of Appellee’s Response were sent by facsimile to counsel for Appellant E. J. Klockenkemper (Appellant EJK) and Appellant Rocky Well Service, Inc. (Appellant RWS). Hard copies of Appellee’s Response were also sent via First Class, United States Mail to Appellants’ EJK’s and RWS’s counsel. This afternoon, Appellee discovered that it had inadvertently neglected to send the original Appellee’s

Response to the Clerk of the Board for filing in this case. In accordance with Section 40 C.F.R. §§ 22.16(b) and 22.30(e), Appellee should have filed the original Appellee's Response on or before today, May 1, 2009. Appellee can offer no excuse for its oversight, and prays the EAB's indulgence in accepting the attached original Appellee's Response for filing on May 4, 2009, the date when it is anticipated that the Clerk of the Board will receive this Motion and attached original Appellee's Response.<sup>1</sup>

Appellants EJK and RWS will not suffer any prejudice if the Board accepts Appellee's Response for filing on May 4, 2009 because Appellants were served by facsimile on April 24, 2009, well before the expiration of the 15-day filing period for the response.

Therefore, for these reasons, Appellee respectfully requests that the EAB accept the original Appellee's Response for filing on May 4, 2009.

Respectfully Submitted,



Mary T. McAuliffe  
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<sup>1</sup>This Motion and the attached original Appellee's Response is being sent to the Clerk of the Board by Federal Express, Next Business Day, Morning delivery. As today, May 1, 2009 is a Friday, it is expected that this Motion and attachment will be delivered to the Clerk of the Board on the morning of May 4, 2009.

**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 delivered by Federal Express, Next Business Day, Morning Delivery, the original *Appellee's Motion for Leave to File Instantly its Original Response to Appellant E. J. Klockenkemper's Motion to Strike and Exclude Material from Appellee's Response Brief* and the original *Appellee's Response to Appellant Klockenkemper's Motion to Strike* and accompanying original Certificate of Service, along with this Certificate of Service, for filing with the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board at the address as follows:

U.S. Environmental Protection Agency - Clerk of the Board  
Environmental Appeals Board (1103B)  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

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 Motion for Leave to File Instantly its Original Response to Appellant E. J. Klockenkemper's Motion to Strike and Exclude Material from Appellee's Response Brief* and the attached *Appellee's Response to Appellant Klockenkemper's Motion to Strike* and accompanying Certificate of Service, and this Certificate of Service, to the Clerk of the Board.

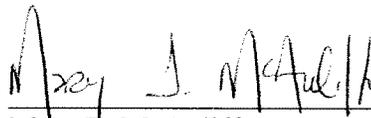
I further certify that, on the date below, I caused to be delivered by First Class United States Mail, postage prepaid and sent via facsimile, a copy of *Appellee's Motion for Leave to File Instantly its Original Response to Appellant E. J. Klockenkemper's Motion to Strike and Exclude Material from Appellee's Response Brief* and the attached *Appellee's Response to Appellant Klockenkemper's Motion to Strike* and accompanying Certificate of Service, along with this Certificate of Service, to each person as follows:

Richard J. Day, P.C.  
Attorney at Law  
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**In Re: Rocky Well Service, Inc. & Edward J. Klockenkemper**  
**SDWA Appeal Nos. 08-02& 08-03**

Dated: May 1, 2009



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

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	)	
	)	

**APPELLEE’S RESPONSE TO APPELLANT KLOCKENKEMPER’S  
MOTION TO STRIKE AND EXCLUDE MATERIAL FROM  
APPELLEE’S RESPONSE BRIEF**

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 to strike (Appellee’s Response).<sup>1</sup>

On or about April 15, 2009, Appellant E. J. Klockenkemper (Appellant EJK) filed his motion to strike and exclude certain material from Appellee’s main response brief (“Appellant’s

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<sup>1</sup>Appellant EJK used the wrong facsimile number to serve Appellee with a copy of the Motion on April 15, 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 14<sup>th</sup> floor. A U.S. EPA employee found a copy of Appellant EJK’s motion by happenstance and forwarded it to Appellee’s counsel on the following day. 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.

Motion to Strike” or “the Motion”).<sup>2</sup> Appellee objects to Appellant EJK’s motion for the reasons set forth herein.

Appellant EJK inaccurately contends that Appellee’s main response brief (MRB) presented “new material and two new arguments . . . that were not made by U.S. EPA in the case below . . .” and, therefore, should be stricken in part. Appellant’s Motion at #1. Appellant EJK’s argument is without merit.

***Appellee Is Entitled To Argue Case Law, Regulations, and Other Authorities Not Previously Cited In Prior Pleadings, As Well As Make New Legal Arguments, In Defending Its Case On Appeal.***

Appellant EJK suggests that Appellee cannot discuss cases, regulations and other authorities, and make legal arguments in defending the Regional Judicial Officer’s (RJO’s) decisions before the EAB unless Appellee had previously presented the same in underlying pleadings.<sup>3</sup> See Appellant’s Motion at #s 2, 4. This suggestion is meritless.

Appellant EJK seems perturbed at the fact that he was unfamiliar with certain cases and regulations presented by Appellee in its MRB. However, this is of little consequence because “. . . an appellee's answering brief may raise for the first time new arguments or new reasoning to support the judgment.” Eclavea, Martin, Oakes and Harnad, *Appellate Review, VII. B. Briefs, In General*, Am. Jur.2d Appellate Review § 499 (2008). The issue on appeal is the correctness of an order or judgment. See, *Spokane County v. Air Base Housing, Inc.*, 304 F.2d 494, 497 (9<sup>th</sup> Cir. 1964), citing *Wichita v. Luther*, 217 F.2d 262, 266. There is “. . . no reason why . . . [an appellate

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<sup>2</sup> Appellant EJK’s Motion is, in essence, an untimely filed reply to Appellee’s MRB.

<sup>3</sup> Appellee did not make any “new” legal arguments in its MRB, but assuming *arguendo*, that it had done so, such legal argument would still be proper for the reasons set forth in this response above.

tribunal] should make an erroneous decision, because the applicable law was not insisted upon by one of the parties.” *Spokane County*, 304 F.2d 494, 497, citing *Smith Engineering Co. v. Rice*, 102 F.2d 492, 499 (9<sup>th</sup> Cir.).

In citing to and discussing the Supreme Court’s decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) and the Environmental Appeals Board’s (EAB’s) decision in *In re: J. Phillip Adams*, 13 E.A.D. \_\_\_, 14 (EAB 2007), (where certain statutory provisions were found not to be jurisdictional elements), Appellee provided legal analysis that merely illustrated the correctness of the RJO’s decisions with regard to the issue of jurisdiction. Similarly, Appellee’s discussion and legal analysis of the provisions of 40 C.F.R. Part 144 highlight the propriety of the RJO’s decisions with regard to Appellant EJK’s individual, direct liability as an operator. Therefore, Appellant EJK’s challenge to Appellee’s citation and discussion of “new” cases and regulations in its MRB is invalid, and his request to strike portions of Appellee’s MRB should be denied.<sup>4</sup> Appellant’s Brief at #s 2, 4.

**Appellee’s Alleged “New” Arguments Are Not New**

Appellant EJK misconstrues Appellee’s position in its MRB by claiming that Appellee argues for the first time that Appellant EJK’s jurisdictional arguments are affirmative defenses. Appellant’s Motion at #s 2, 3. Contrary to Appellant EJK’s suggestion, Appellee did not argue that Appellant EJK’s jurisdictional argument was barred because he failed to raise it as an affirmative defense in or before his answer to the complaint. MRB at 9-14. Indeed, in the

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<sup>4</sup>Appellee discussed provisions of 40 C.F.R. Part 144 in its MMPAD at 36-39. Assuming, *arguendo*, that it had not previously discussed these regulations, however, Appellee would still be allowed to discuss provisions of 40 C.F.R. Part 144 in its MRB for the reasons presented above.

pertinent portion of its brief, Appellee does not even use the term *affirmative defense*. *Id.* Appellee's response regarding the issue of jurisdiction is straight-forward and does not rely on whether Appellant's claim is characterized as an affirmative defense. *Id.* Appellant EJK's argument fails because the jurisdictional provisions of Section 1423 of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300h-2(a) and (c), authorize an enforcement action against a *person* who violates a requirement of a state UIC program that has been approved by U.S. EPA, under the SDWA, and Appellant EJK is such a *person* as contemplated by the SDWA.<sup>5</sup> Because Appellant EJK misconstrues Appellee's argument regarding the basis for subject matter jurisdiction in this case, his request that the EAB strike the portions of Appellee's MRB that discuss jurisdiction is baseless, and should be denied.

Appellant EJK next claims that Appellee raises a “. . . new argument that the Illinois UIC program must be found to regulate . . . an operator of a UIC well . . . [because] these provisions use the term ‘owner or operator’ of a UIC well.” Appellant's Motion at #4. This is incorrect. In *Complainant's Memorandum in Support of Its Motion for Partial Accelerated Decision As To the Liability of Respondent Edward J. Klockenkemper* (Complainant's MMPAD), Appellee previously made the argument that the federal UIC program, that sets forth the mandatory regulatory framework and specific requirements for a State seeking U.S. EPA approval of the State's UIC program and for the State's primary enforcement authority under the SDWA, contains requirements that apply, *inter alia*, to *owners or operators* of Class II wells; and,

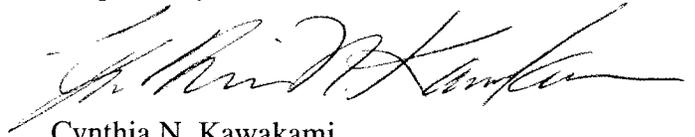
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<sup>5</sup>Appellant EJK also requests that the EAB strike Appellee's arguments regarding the jurisdictional basis for this case because Appellee's alleged “jurisdictional versus affirmative defense arguments . . . [are] *immaterial*.” Appellant's Motion at # 3. As explained above, Appellee did not make such “jurisdictional versus affirmative defense arguments” in its MRB at 9-14. Therefore, Appellant EJK's request is invalid and should be denied.

therefore, the Illinois UIC program, that can be no less stringent than the federal program, must apply to at least those same classes of persons.<sup>6</sup> See MMPAD at 36-40. Appellant EJK improperly characterized Appellee's legal argument regarding operator liability as "new." Therefore, his request to strike the pertinent portions of Appellee's MRB regarding operator liability is invalid, and should be denied.

For the reasons presented above, Appellee respectfully requests that the EAB deny Appellant EJK's Motion to Strike.

Respectfully Submitted,



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<sup>6</sup>Appellant EJK claims that Appellee's arguments regarding his liability as an operator are *immaterial* and should be stricken because "the cited provisions . . . use the term *permittee* the great majority of the time, and only use the term *owners and operator* interchangeably, rather than exclusively . . ." Appellant's Motion at #5. This argument is meritless. *Cf.* MRB at 14-20.

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

**CERTIFICATE OF SERVICE**

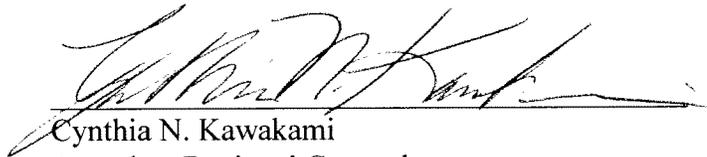
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Dated: April 24, 2009



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