

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

IN THE MATTER OF:) **Appeal No. 08-03**
Rocky Well Service, Inc., and)
) **Docket No. SDWA-05-2001-0002**
Edward J. Klockenkemper, Respondents.)

**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

