

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

IN THE MATTER OF: )  
)  
Rocky Well Service, Inc., )  
and )  
Edward J. Klockenkemper, ) DOCKET NO. SDWA-05-2001-002  
)  
Respondents. )

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**Record of Conference Call and Order**

A conference call was held in this matter on Wednesday, July 11, 2007, at 1:30 p.m. to discuss the parties' motions to conform the transcript, filed on June 18, 2007, and Respondents' Joint Motion to Modify Briefing Schedule (Respondents' Joint Motion), filed July 5, 2007. Present were: Ms. Cynthia Kawakami and Ms. Mary McAuliffe, counsel for Complainant, Mr. Richard Day, counsel for Rocky Well Service, Inc., and Mr. Felipe Gomez, counsel for Edward J. Klockenkemper.

The Presiding Officer reported to counsel that she spoke earlier that day to a representative of Sullivan Court Reporting Company, who advised her that the copy of the transcript that had been sent to the Region 5 Hearing Clerk and Respondents' counsel had not been proofread or certified. She further advised that a proofed and certified copy of the transcript will be sent to the Region 5 Hearing Clerk and to Respondents' counsel on or about July 23, 2007.

The Presiding Officer then discussed the standard applicable to a motion to conform the transcript under Consolidated Rule 22.25 (40 C.F.R. § 22.25). The Consolidated Rules do not explicitly set forth a standard to be applied to such motions.<sup>1</sup> Neither do the Federal Rules of Civil Procedure or the Federal Rules of Evidence.<sup>2</sup> The Presiding Officer will, however, look for guidance to 28 U.S.C. § 753(b) which governs reporters in federal district courts. That section provides in part:

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<sup>1</sup> The Environmental Appeals Board has, however, indicated that such changes must be to conform the transcript to the "actual testimony," and not to "add words or phrases that clearly were not spoken by the witnesses." *In re Tennessee Valley Authority*, 9 E.A.D. 357, 371-2 n.12 (EAB 2000).

<sup>2</sup> Mr. Klockenkemper's counsel argues that Federal Rule of Civil Procedure 30(e) should guide the Presiding Officer's consideration of the motions to conform in this matter and that his client should be permitted to submit an errata sheet to the court reporter before the transcript is certified. The Presiding Officer disagrees that Rule 30(e) should govern in this instance, as that rule applies to deposition transcripts, and allows changes to be made by the deponent and appended to the original transcript. If used later at a trial, a transcript with appended changes would be subject to objections and cross-examination by opposing counsel. In this matter, the hearing has already occurred, and Complainant's counsel will have no opportunity to cross-examine Mr. Klockenkemper on any changes.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. . . .

Motions to correct "clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission" are permitted by Federal Rule of Civil Procedure 60(a). Thus, under federal statute and the Federal Rules, a certified transcript is presumed to be correct, subject to correction by the court upon motion by the parties. Accordingly, the Presiding Officer will accord the certified transcript in this matter a similar presumption of correctness, subject to motions by the parties to conform such transcript to the actual testimony pursuant to Consolidated Rule 22.25.

Mr. Klockenkemper's counsel points out that 28 U.S.C. § 753(b) also provides that the "original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge." Thus, he argues, Mr. Klockenkemper is entitled to any recordings or tapes of the hearing that are in the possession of the court reporter. This portion of section 753(b), however, cannot apply to this administrative matter where the court reporter is not an employee of this agency and where the Presiding Officer has no authority over a private court reporting company. A copy of the transcript as received by the Region 5 Hearing Clerk is, of course, available to Respondents during normal business hours.

As previously explained in the Record of Conference Call filed in this matter on July 3, 2007, Complainant's counsel had obtained an electronic version of an audio recording of the hearing in this matter. Mr. Klockenkemper's counsel complains that "it is unfair and prejudicial not to be allowed to review the audio as has the EPA. . . ."<sup>3</sup> The Presiding Officer notes that the Region 5 Hearing Clerk attempted to provide Respondents' counsel with the same electronic audio files that she had provided to Complainant's counsel, but apparently neither of Respondents' counsel's computers were able to accept such large electronic files. The Presiding Officer also offered to make arrangements to make the electronic audio files available to Mr. Klockenkemper's counsel for review at the offices of the EPA. Counsel declined that offer and inquired as to whether he could make a Freedom of Information Act request for the electronic audio files. The Presiding Officer advised him that he could certainly make such a request. The Presiding Officer fails to see any unfairness or prejudice to Respondents on these facts.

Given that a certified copy of the transcript of the hearing in this matter will not be available until at least July 23, 2007, the current briefing schedule in this matter set by Order dated June 4, 2007, is temporarily suspended. Each party is hereby ORDERED to review the certified transcript once it becomes available and, in light of the corrections made thereto, report

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<sup>3</sup> Respondents' Joint Motion at 3 (para. 17).

to the Presiding Officer **within thirty days of receipt of the transcript**,<sup>4</sup> the extent it wishes to pursue its previously filed motion to conform the transcript pursuant to Consolidated Rule 22.25. A new briefing schedule will be set thereafter.

IT IS SO ORDERED.

Date: July 12, 2007

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Marcy A. Toney  
Presiding Officer

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<sup>4</sup> The previously established deadline of August 13, 2007, is hereby changed to conform with Consolidated Rule 22.25.

IN THE MATTER OF Rocky Well Service, Inc., and Edward J. Klockenkemper, Respondents  
Docket No. SDWA-05-2001-002

CERTIFICATE OF SERVICE

I certify that the foregoing Record of Conference Call and Order dated July 12, 2007, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Copy hand delivered to  
Attorney for Complainant:

Cynthia Kawakami  
Mary McAuliffe  
U.S. Environmental Protection  
Agency, Region 5  
Office of Regional Counsel  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Copy by U.S. Mail,  
First Class, and facsimile  
(618/829-3340) to:

Richard J. Day, P.C.  
Attorney at Law  
413 North Main Street  
St. Elmo, Illinois 62458

Copy by U.S. Mail,  
First Class, and facsimile  
(773/278-6226) to:

Felipe Gomez  
P.O. Box 180118  
Chicago, Illinois 60618

Dated:

By: \_\_\_\_\_  
Darlene Weatherspoon  
Administrative Program Assistant