

Reopen the cause. The cause was re-opened on December 9, 2011 for further testimony and submission of new evidence. The Report of the Administrative Law Judge Upon Re-opening of Cause by Motion was filed on the 2nd day of February, 2012, to which Exceptions were timely filed and proper notice given of the setting of the Exceptions.

The argument concerning the Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 20th day of April, 2012. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

STATEMENT OF THE CASE

BENTLEY & BRIDGES AND ENERCON APPEAL the Administrative Law Judge's recommendation that Bentley & Bridges' request for damages to property be denied and that a usage fee of \$10 per well per year is reasonable compensation for use of the Bentley & Bridges property. This cause first came on for hearing before the Administrative Law Judge ("ALJ") on August 10, 2011. After taking testimony and admission of exhibits, the ALJ took this matter under advisement and a Report of the ALJ issued on August 31, 2011. Exceptions to the ALJ's Report were not filed, however, a Motion to Re-open the Record was filed on September 12, 2011 and heard on October 10, 2011. An order granting the Motion to Re-open, Order No. 590626, was issued on November 1, 2011. This Cause was re-opened on December 9, 2011 for further testimony and submission of new evidence. After the ALJ heard the matter on December 9, 2011 the ALJ filed a Report on February 2, 2012, upon re-opening the cause by motion.

This Cause PSD 201100023 was filed on July 12, 2011 and is the application of Gary S. Walker, Director of the Petroleum Storage Tank Division ("PSTD") of the Oklahoma Corporation Commission (collectively "applicant"), alleging that the Commission made a determination that releases had occurred at the three facilities known as the Former Smith Fina, 402 West Cole Street, Fletcher, Oklahoma; Former Malone Ford, 409 West Cole Street, Fletcher, Oklahoma; and Former Champlin Station, 102 North Central, Fletcher, Oklahoma. Enercon made attempts to gain access to properties owned by Bentley & Bridges, James Collier, Dorothy Butler, Tom and Diane Flood, and Alma Meier, all properties being located in Fletcher, Oklahoma. Enercon wanted to install remediation wells on Bentley & Bridges' property and other property owners listed above, at the direction of PSTD to delineate the plume caused by the release of regulated substances from the three facilities named above. Bentley & Bridges and the other property owners denied access to Enercon. Access has been resolved with all property owners (Collier, Butler, Flood and Meier) except for Bentley & Bridges, who are seeking reimbursement from the

Indemnity Fund for damages. Bentley & Bridges seek \$1,000 per month for damages, as stated in the filed Motion, caused by the remediation wells until case closure. The Indemnity Fund may reimburse for damage done to property during the course of the remediation. The Indemnity Fund however is limited as to what expenditures are authorized. The Motion to Re-open the Record did not address compensation for use of property, only for damages.

ENERCON TAKES THE POSITION:

(1) The ALJ effectively states that the property owners Bentley & Bridges are entitled to be compensated for the use of their land in the future for the drilling of "new wells". The ALJ recommended that the owners be paid \$10 per well per year for "all new wells drilled and located on property owned by the parties after issuance of an Order in this Cause." Enercon does not object to that recommendation. However, the ALJ also found in his Report that the applicable statutes are "silent as to who will pay this compensation." The ALJ found no statutory authority granting the Commission the power to require such compensation be paid from either the Petroleum Storage Tank Release Fund or the Leaking Underground Storage Tank Fund. The ALJ's last conclusion is that "the burden for paying compensation should fall to the responsible persons who caused the release." Enercon's exceptions in PSD 201100023 go to the ALJ's latter conclusions and recommendations.

(2) The statutes which control the issues presented in this cause provide the absolute discretion for the Commission to approve the payment of the compensation the ALJ recommends; and, to authorize reimbursement of those costs to eligible persons. The recommended compensation is for access to property for remediation, which access is an integral part of the corrective action approved by the PSTD. Clearly, 17 O.S. Section 356 covers this circumstance. These monies are not payment for damages, but for access to perform the corrective action.

(3) Assuming the ALJ is correct in concluding that the Commission cannot authorize reimbursement of the monies at issue, then his attempt to define fair compensation; and, saddle the "responsible persons" with the burden of the payment of same violates the due process rights of all such persons. No "responsible person", as such term is used by the ALJ, was named as a respondent in this application; or, given notice thereof. As a result those persons were not given any opportunity to defend against the ALJ's findings as to reasonable compensation; or, their liability for payment. It is the Commission which sought the access Order. If the ALJ believed that the governmental action filed in this cause should result in a judgment against any party, those parties must be notified of such potential claim and provided opportunity to defend against same.

(4) Finally, the ALJ recommends that no wells be drilled "within 30 feet of functional doors or windows of any inhabited residence." There was no evidence taken in the two hearings which address that issue. Further, no party objected to the configuration of wells as regards this issue. The plan for corrective action in this matter is aimed at remediation of the subsurface existing beneath such structures. Enercon must warrant the effectiveness of its efforts to remediate the area of the release. The plan for corrective action should not be unilaterally modified without evidence being taken concerning the effect upon results which accrue. If there are concerns about placement of wells those should be addressed by the PSTD in its consideration of the proposed plan. In any event such concerns should have been outlined in these hearings so that proper evidence could have been submitted in response.

(5) Wherefore Enercon takes exception to those portions of the ALJ's Report which conclude that the Commission has no discretion to authorize reimbursement of the payments of owner's claims for compensation from the stated "funds"; which find that "responsible persons" under statute are responsible for payment of such monies and, which seek to modify the plan for corrective action as previously approved.

BENTLEY & BRIDGES TAKE THE POSITION:

(1) The recommendations of the ALJ as to the reasonable compensation to be paid to Bentley & Bridges for the use of their respective lands to investigate, remediate or perform corrective action under 17 O.S. Section 310 (E)(3) are arbitrary and unsupported by evidence.

(a) The ALJ recommended the payment of \$10 per well per year as reasonable compensation for use of the property.

(b) The record of the case is devoid of evidentiary support for the ALJ's recommendation. Hence the recommendation is wholly arbitrary and should be reversed.

(2) The ALJ erroneously rejected competent and unrefuted evidence as to the reasonable compensation to be paid to Bentley & Bridges for the use of their respective lands to investigate, remediate or perform corrective action under 17 O.S. Section 310 (E)(3):

(a) Bentley & Bridges testified in detail as to the location of his lands that the PSTD/Enercon plans to use for investigation, remediation and/or corrective action associated with subsurface petroleum storage tank pollution. (Transcript of December 9, 2011 at page 21)

(b) Bentley & Bridges testified that reasonable compensation for the PSTD/Enercon's use of his lands for investigation, remediation and/or corrective action associated with subsurface petroleum storage tank pollution is \$1,000 per month or \$500 per well. (Id. at 34)

(c) Bentley & Bridges testified that he had personal knowledge that the nearby Baptist Church was being paid \$1000 per month for use of a tract of land, substantially smaller in size than his lands, by the PSTD/Enercon. (Id. at 27)

(d) The ALJ refused to consider Bentley & Bridges' testimony as to the payments to the Baptist Church as "uncorroborated." (Report of ALJ at page 10)

(e) Bridges testified that reasonable compensation for the PSTD/Enercon's use of his lands for investigation, remediation and/or corrective action associated with subsurface petroleum storage tank pollution is \$1,000 per month. He testified that the Baptist Church tract being used by the PSTD/Enercon is of comparable size to his lands which are to be used by the PSTD/Enercon. (Transcript of December 9, 2011 at page 52)

(f) The testimony of Bentley & Bridges was unrefuted by PSTD/Enercon despite the presence of Enercon representatives at the hearing, namely Mr. Harry Bruster and Mr. Joe Foster.

(g) "It is generally recognized that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the value of such property[.]" *H.D. Youngman Contractor v. Girdner*, 1953 OK 277, ¶13, 292 P.2d 693, 696, quoting 20 Am. Jur., Evidence, Section 892.

(h) The ALJ erroneously concludes that use of the Baptist Church property by the PSTD/Enercon Services, Inc. "is not comparable" to their use of the Bentley & Bridges property. The ALJ stated that "Enercon has complete control of the [church] property they are using[,] [while] Mr. Bentley's property [and Mr. Bridges' property] remain under [their respective] control." (Report of ALJ at page 10)

(3) During the time the PSTD/Enercon uses Bentley & Bridges' property and Bridges' property, each will lose complete dominion and control over their respective lands. The PSTD/Enercon will have unfettered access to enter and conduct operations upon the Bentley & Bridges property. The loss of their respective right to quiet and peaceful enjoyment of their property will be

identical to the right voluntarily granted to the PSTD/Enercon by the Baptist Church.

(4) The ALJ's Report as it pertains to the reasonable compensation for the use of the lands of Bentley & Bridges should be reversed and the Commission should determine that the reasonable compensation therefor is \$1,000 per month.

(5) The ALJ erroneously concluded that "The burden for paying compensation should fall to the responsible persons who caused the release." (Report of ALJ at page 11)

(a) Compensation for use of property to investigate, remediate or perform corrective action on a release from a petroleum storage tank is contemplated by Section 310 of the Oklahoma Storage Tank Regulation Act ("OSTR Act") (17 O.S. Section 310 (E)(3).

(b) Section 315 of the OSTR Act creates the Corporation Commission Storage Tank Revolving Fund. (17 O.S. Section 315)

(c) Per the provisions of Section 315, "All monies accruing to the credit of said revolving fund are hereby appropriated and may be budgeted and expended by the Commission for the purpose of implementing the provisions of the OSTR Act."

(6) The ALJ's Report should therefore be modified to direct that liability for compensation for use of the lands of Bentley & Bridges should lie jointly and severally with the Corporation Commission Storage Tank Revolving Fund and the persons who caused the release.

(7) Bentley & Bridges request that the Report of the ALJ upon Reopening of Cause by Motion be reversed and modified as set out hereinabove.

THE ALJ FOUND:

(1) From the evidence, it is clear Bentley & Bridges have not suffered any actual damages to their property that may be compensated from the Indemnity Fund. The true character of the relief sought by Bentley & Bridges, at this time, is for the usage of their property. No actual damage has occurred on either gentleman's property. The ALJ will not make a recommendation regarding prospective damages.

(2) Bentley & Bridges testified he was offered a \$5,000 one-time payment for the use of his properties by Enercon. Bentley & Bridges thinks a more

reasonable compensation would be \$1,000 a month or a usage fee based on a per well basis. Bentley & Bridges mentioned rates between \$300 and \$500 per well. Bentley & Bridges will have between 80 and 100 wells on his properties. Bentley & Bridges' properties include two operational businesses. One business is the Fletcher Funeral Home. The other is a day care center. There is one vacant building and another under construction. The other properties Bentley & Bridges owns, consist of vacant lots with no visible development on the premises. Bentley & Bridges owns 12 lots in the plume area.

(3) Bentley & Bridges' basis for determining \$1,000 per month is that it is comparable to the amount Enercon is paying to a church to lease vacate property for their operation in Fletcher. The usage of the properties is not comparable. Enercon has complete control of the property they are using. Bentley & Bridges' properties remain under his control. Bentley & Bridges' per well recommendation was based on parties who received a lump sum for the use of their properties that had very few proposed wells. His testimony was uncollaborated as to the amounts these other parties received.

(4) Bridges owns residential property. He lives in the residence. He was offered a one-time payment of \$1,000 for the use of his property for the remediation. His lot is over sized, similar in size to the lot leased by the church to Enercon. Of the 67 wells to be drilled on his property, approximately 30 of those will be located on the adjacent two rights-of-way. Bridges maintains the two rights-of-way as part of his front yard. Bridges' basis for requesting \$1,000 a month was because that is what the church received for its property. Bridges also said it was a great inconvenience to him to have people on his property daily. He also is indifferent as to whether or not the plume is remediated.

(5) To address the relief originally sought in the application, the ALJ recommends access under the following conditions: use the least intrusive and least disruptive entry; give 48 hour notice to property owners prior to entry, and confirmation of same to the Commission; flagging of all remediation well locations and marking of all proposed pipeline routes; provision of all reports or correspondence to PSTD to be provided to property owners; and all remediation wells to be closed in accordance with Oklahoma Water Resources Board's ("OWRB") standards and restoration of all surface properties after installation and decommissioning of the remediation system to its original condition prior to the drilling of the wells. The ALJ also recommends Enercon place in its agreements with property owners a hold harmless clause to indemnify the property owners in the event persons are harmed or damaged by the wells or while accessing the wells. The ALJ further recommends as a condition of access, Enercon coordinate with the property owners as to the scheduling of access to their properties. The ALJ also recommends no wells be drilled within 30 feet of functional doors or windows of any inhabited residence.

(6) As to the issues brought forward in the cause re-opening, the ALJ recommends the payment of \$10 per well per year as reasonable compensation for the use of the property. This would include all new wells drilled and located on property owned by the parties after issuance of an order in this cause. This does not include wells located on adjacent right-of-way lands where the owner owns the adjacent land burdened by the right-of-way. It does not include wells already in existence prior to the filing of this application. Title 17 O.S. Section 310 gives the Commission the authority to determine reasonable compensation to be paid to the owner of property that is accessed. This statute is silent as to who will pay this compensation. Title 17 O.S. Sections 353, 356 and 365, which govern the Oklahoma Petroleum Storage Tank Release Indemnity Program and Oklahoma Leaking Underground Storage Tank Fund are also silent as to payment for usage of property. The ALJ can find no statutory authority granting the Commission the power to require the usage payment to be paid from either the Petroleum Storage Tank Release Fund or the Leaking Underground Storage Tank Fund. The burden for paying compensation should fall to the responsible persons who caused the release.

(7) Finally, the ALJ recommends that Enercon have express authority from the Commission to install, operate and decommission the remediation system proposed at Fletcher, Oklahoma, so long as the operation is conducted in a reasonable and prudent manner.

POSITIONS OF THE PARTIES

BENTLEY & BRIDGES

- 1) **John E. Lee, III**, attorney, appearing on behalf of Bentley & Bridges states this case involves the Judicial Determination for Conditions of Access and Order Granting Access. The matter concerns Fletcher, Oklahoma, a town of 1,200 people.
- 2) Bentley & Bridges contend that Enercon prepared an ORBCA Report dated June 23, 2010 which addresses the PSD cases – the Former Smith-Fina, the Former Malone Ford, and the Former Champlin Station. Bentley & Bridges assert that these cases are cited in the pleadings and the ORBCA Report.
- 3) Bentley & Bridges contend that within the ORBCA Report, at page 8, section 4, Enercon describes the chronology of events concerning the release of pollution. Bentley & Bridges assert within that summary of events, there was a Lust Trust investigation undertaken between June 1987 and August 1994. Bentley & Bridges contend pollution was known in 1987.

4) Bentley & Bridges assert that, per the report, in August 1994, Sunrise installed monitoring wells 1 through 5 and submitted an Initial Site Characterization Report. Bentley & Bridges contend that the report addresses activities in 1995, 1999, and 2000, where Mr. Jeff Lawler of the DEQ witnessed gasoline impacted soils.

5) Bentley & Bridges note that, according to the report, Summit completed gauging, purging, and sampling all monitor wells for the purpose of a Tier 1 ORBCA Report in 2001.

6) Bentley & Bridges assert that Enercon has been involved in this matter since November of 2001, and that the last entry on Enercon's chronology of events was entered for June 2010, the date of the report.

7) Bentley & Bridges contend that the ORBCA Report is a risk report. Bentley & Bridges contend that on paragraph 3, page 21, of the report, Enercon recommends: locating the improperly plugged wells; plugging the inactive residential water wells on the First Baptist Church property; plugging the inactive residential water well at 409 West Harper; plugging the active residential irrigation well at 103 South Shelby; remediating petroleum impacted soils and groundwater; freeing product gasoline by Surfactant Flush and Oxidizer Treatment; and following Surfactant Flush and Oxidizer Treatment, remediating the petroleum impacted utility corridor and utilities by excavating and replacing the compromised sanitary sewer main, sanitary sewer feeder lines, water lines, and removing and disposing of impacted utility fill material.

8) Bentley & Bridges reassert that the alleged sources of the leaking storage tanks are set out in the ORBCA report and in the Enercon pleadings. Bentley & Bridges reference Exhibit 13.

9) Bentley & Bridges assert that the ALJ was asked to determine, for the purposes of 17 O.S. Section 310 (E)(3) reasonable compensation as understood by the PSTD due to Enercon's entry onto the property, drilling of the wells, and continued occupation of the property.

10) Bentley & Bridges contend that they are seeking relief under 17 O.S. Section 310(E)(3), which states: "The Commission shall determine the reasonable compensation, if any, to be paid to the owner of the property which is to be accessed for the use of the property to investigate, remediate or perform corrective action as the result of a release."

11) Bentley & Bridges assert that they are seeking a determination of reasonable compensation. Bentley & Bridges assert that a reason for appeal was the ALJ's recommendation of \$10 per well per year compensation. Bentley & Bridges contend that there is nothing in the record to fit this determination. Bentley & Bridges assert the only evidence in the record was the testimony that the landowners believed that reasonable compensation would be \$1,000 per month for the occupancy and use of the property.

12) Bentley & Bridges assert that Exhibit 13 shows that there are more than 100 wells on Mr. Steve Bentley's property. Bentley & Bridges contend

that the rectangular areas with no markings for wells on the map on Exhibit 13 signify buildings.

13) Bentley & Bridges contend that Enercon has represented this project as a \$4 million project that will last 4 to 5 years. The PSTD and Enercon are using State funds to pay Enercon \$4 million to clean up this site.

14) Bentley & Bridges assert that the Commission has known of pollution in the area for more than 20 years, and that the residents of Fletcher would prefer that the operation not take place. Bentley & Bridges contend that if the operations are to take place, the residents of Fletcher ought to be compensated for the use of their property.

15) Bentley & Bridges cite 17 O.S. Section 315, which concerns the Corporation Commission Storage Tank Regulation Revolving Fund.

16) Bentley & Bridges assert that the ALJ stated in his report that the responsible party should be responsible for remuneration. Bentley & Bridges contend that the responsible party is no longer around, and that the landowners are attempting to use state funds – much like the PSTD and Enercon – to receive compensation.

17) Bentley & Bridges reassert that compensation is supported by 17 O.S. Section 315.

18) Bentley & Bridges assert that the wells are located on streets and alleyways, and that there is no potential for release of the injected surfactant into the atmosphere.

19) Bentley & Bridges contend that none of the wells are located beneath houses,. They are all vertical wells, and there are no directional diagonal wells in the area. Bentley & Bridges assert that consequently there is no risk of contamination of homes or other buildings.

20) Bentley & Bridges assert that the only wells located on areas without asphalt acting as a seal are the properties of Bentley & Bridges. Bentley & Bridges contend that Enercon plans to drill many wells on Bentley & Bridges' property, rendering Bentley's funeral home parking lot unusable. Bentley & Bridges assert that the injection activities require a near-constant occupation by Enercon.

21) Bentley & Bridges contend, contrary to the statements of the ALJ, that the use of the property is comparable to the use of the First Baptist church property by Enercon. Bentley & Bridges assert that Enercon will have dominion and control over the Bentley funeral home property because the wells are located on Bentley & Bridges' property.

22) Bentley & Bridges request that the Commission find that the ALJ's recommendation was not based on competent evidence, and thus arbitrary and capricious. Bentley & Bridges request that the Commission find that the only competent evidence in the record is the evidence provided by Bentley & Bridges.

23) Bentley & Bridges cite *H.D. Youngman Contractors v. Girdner*, 262 P.2d 693 (Okl. 1953). Bentley & Bridges assert that in that case the Supreme

Court of Oklahoma found that a property owner does not have to be an expert to testify about the reasonable value of his property.

24) Bentley & Bridges reassert that therefore the only competent evidence in the record is the testimony of the land owners. Bentley & Bridges contend that at the hearing Enercon had two representatives present and had the opportunity to present contrary evidence.

25) Bentley & Bridges ask that the Commission find that reasonable compensation is \$1,000 per month, as supported by the only competent evidence. Bentley & Bridges ask that the source of funds be as directed by 17 O.S. Section 315.

PSTD

1) **Jeffrey P. Southwick**, attorney, appearing on behalf of the PSTD of the Oklahoma Corporation Commission.

2) PSTD contends that, as the enabling statutes for the indemnity fund became effective in 1989, the Commission did not and could not have knowledge of this matter in 1987.

3) PSTD asserts that the Corporation Commission has no relationship with Enercon, except to the extent that Enercon is a licensed environmental consultant that has been licensed by the Commission to undertake this type of work. PSTD contends that Enercon submits proposals to the Commission in its role as a regulatory body, and that Enercon's actual clients are three responsible, impacted parties in Fletcher – W.A. Smith or Chris Smith of Former Smith-Fina; David Malone and Eddie Malone of the Former Malone Ford; and Dick Herron for the city of Fletcher, which acquired a Former Champlin station after the station closed. They are the impacted responsible parties.

4) PSTD asserts that the Corporation Commission has not made a determination that there are unknown owners. There are known owners. PSTD contends that the Indemnity Fund for reimbursement, whether it be remediation costs or investigation costs, was created out of a penny assessment against gasoline and other motor fuels and blending fuels. PSTD contends that the assessment is a substitute to other financial assurance required by the Commission and the EPA. PSTD asserts that the Indemnity Fund does not have to be utilized, and that a letter of credit, private insurance, self-insurance, and a bond can be used as alternatives.

5) PSTD contends that the majority of persons utilizing the Indemnity Fund do so for financial assurance. PSTD asserts that these parties are known persons. These parties make applications to the Indemnity Fund. They are being reimbursed on claims that are submitted by their environmental consultants and signed off by them. There are no unknown owners.

6) PSTD asserts that around 2004 or 2005, the access provisions of 17 O.S. Section 310 were changed to give the Director of the PSTD the

opportunity to file an Application for Access. PSTD contends that this provision acted as an expedient, and that it established the PSTD as a neutral arbiter. PSTD contends that the purpose of this change was non-monetary.

7) PSTD asserts that the Bentley & Bridges' interpretation of 17 O.S. Section 315 as a funding mechanism for land owners is incorrect. PSTD contends that if 17 O.S. Section 315 is considered in its entirety, it is clear that the funding mechanism relates to the PSTD's regulatory side. PSTD asserts that the funding mechanism operates to pay salaries and pay direct and indirect costs of agency operations.

8) PSTD contends that in 17 O.S. Section 310 there is no mention of a party responsible for payment. PSTD asserts that Bentley & Bridges want the Corporation Commission's regulatory division to pay costs to the property owners. PSTD contends that under the budgetary provisions under 17 O.S. Section 310, the Commission does not budget access costs. PSTD asserts that the fund is established for operating costs, salaries, automobiles, etc. PSTD asserts that it is logical for the parties responsible for the present problems to pay remediation, rather than the state agency.

9) PSTD contends that it filed the Application in this matter on behalf of Enercon or the tank owner for the purpose of getting an Order from the agency to get access into the Bentley & Bridges property.

10) PSTD asserts that Enercon is a named respondent because Enercon is essentially an agent for the party that hired it to do the work. PSTD contends that an access order places affirmative obligations upon Enercon.

11) PSTD contends that the access order also imposes duties upon the property owners to not unduly interfere with operations. PSTD asserts that in the event of a conflict between property owners and operators, either party can come to the Commission to make a complaint and seek an enforcement action.

12) PSTD contends that in the 23 year existence of the regulatory department, no monies have been paid out under 17 O.S. Section 315 for access to property. PSTD asserts, in accordance with the recommendation of the ALJ, that the responsible parties ought to pay for property access.

13) PSTD contends that the use of the property of Bentley & Bridges is unlike the use of the Baptist Church property because the Baptist Church has forfeited all use of the property for the term of the lease. PSTD asserts that Bentley retains use of this property for the operation of his funeral home, and that Bridges retains the residential use of his property.

14) PSTD contends that the ALJ correctly associated the \$10 per year per well fee with the appropriate parties, the persons responsible for the release.

15) PSTD asserts that though the responsible persons were not named parties, the responsible parties deferred to the Corporation Commission under 17 O.S. Section 310 by not filing an access application themselves. PSTD contends that the responsible parties' agent, the environmental consultant, Enercon, was present at hearing and participated fully. PSTD asserts that

because the responsible parties did not follow the mandatory procedures under statute, the responsible parties waived their procedural due process claim.

16) PSTD contends that under these proceedings, if the order is not followed within the given time constraints, the Commission will seek enforcement not against the environmental consultant, but the operator or otherwise responsible persons.

17) PSTD asks that the portion of the ALJ's recommendation prohibiting drilling within 30 feet of a door or window be stricken. PSTD contends that this prohibition creates a hardship because to effect a clean-up and remediation, it is necessary to be as close to the building as possible.

ENERCON

1) **Richard A. Grimes**, attorney, appeared on behalf of Enercon contends that, because structures cannot be internally accessed for remediation, it is necessary to locate remediation wells immediately adjacent to a structure.

2) Enercon asserts that it must essentially warrant, under the rules and statute, the result of its work. Enercon contends that the warranty is required in order for it to receive the compensation it is entitled to.

3) Enercon contends that if the plan is changed by the recommendation of the ALJ, such alteration inhibits Enercon's ability to warrant its work because the work will not be done in accordance with the plan as approved by PSTD staff.

4) Enercon asserts that no party at hearing requested modifications to the plan. Enercon contends that the ALJ altered this portion of the plan that had not been evaluated on his own, without need or justification.

5) Enercon asserts that the plan was the result of a mutual effort between Enercon and PSTD staff to best result in the clean-up or remediation of the project. Enercon contends that the ALJ, without expertise or recommendations from parties to the plan, should not make modifications to the remediation plan. Enercon reasserts that the modification inhibits both the ability to warrant and the ability to complete the project.

6) Enercon asserts 17 O.S. Section 356 governs reimbursement. Enercon contends that that statute provides compensation for access as an integral part of corrective action approved by the Commission. Enercon asserts that if access is an integral part of the corrective action, Enercon should have the right to seek reimbursement from the fund for that payment.

7) If the Commission finds that access has been requested and compensation for access owed, then it is logical that Enercon should be able to seek compensation for access payment from the Fund.

8) Enercon asserts that the Commission, rather than Enercon, sought access and did not name the responsible party in the action.

9) Enercon contends that it is a fundamental principle of law that a party who is to be adversely affected by a proceeding must be given notice and the opportunity to be heard. Enercon asserts that the responsible party was not given notice or opportunity to be present.

10) Enercon asserts that it is in contract with the responsible party, but it is not an agent of the responsible party. Enercon has a private agreement under which we deal with the responsible party. Enercon reasserts that the responsible parties are not among the named parties in this matter.

11) Enercon contends that there is nothing in the Commission's Application that would denominate the unnamed responsible parties as the only and ultimate parties responsible for payment.

12) Enercon asserts that the due process issues in the Application are two-fold: (1) that the responsible parties were not given notice and opportunity to be heard; and (2) even if the responsible parties had been so notified, there was nothing contained in the Application to alert the responsible parties. They would be obligated for payment. Enercon reasserts that the Commission cannot make a factual finding of monetary responsibility without properly notifying the parties to be adversely affected by that finding.

13) Enercon asserts, despite the statements of the PSTD, the fact that the Commission has enforcement authority does not eliminate the necessity of proper notice in this matter.

14) Enercon asserts that it was the only party, other than the surface and structure owners, to receive notice of the Application.

15) Enercon asserts that a party cannot be designated an agent for the purpose of holding the purported principal responsible.

16) Enercon contends that the ALJ overstepped his bounds in making his recommendation, unless he was going to bring the appropriate parties into the action, in order that the terms of an order to ultimately be enforced against those parties could be addressed.

RESPONSE OF BENTLEY & BRIDGES

1) Bentley & Bridges contend that the PSTD omitted in its representation of agency policy the portion of 17 O.S. Section 315 that states the purpose of the fund is the implementation of the provisions of the OSTR Act.

2) Bentley & Bridges assert that 17 O.S. Section 310(E)(3) is part of the OSTR Act; and, moreover, that the section does not address salaries or operating costs.

3) Bentley & Bridges contend that the statute provides that funds are to be used for the purposes of implementing the OSTR Act, which includes 17 O.S. 310(E)(3).

4) Bentley & Bridges assert that there is not yet an order upon which to seek enforcement.

5) Bentley & Bridges contend that the Commission does not have unfettered access to property as asserted by the PSTD.

6) Bentley & Bridges assert that there is no other evidence, beyond the testimony of the property owners, of the reasonable compensation for access. Bentley & Bridges assert that the property of Bentley & Bridges is not distinguishable from the Baptist Church property. Bentley & Bridges contend that the Baptist Church retains access to its property and that Bentley & Bridges is similarly unable to interfere with Enercon's use of property.

7) Bentley & Bridges assert that the only addressed issue on re-opening was compensation for access, and that consideration of the remediation plan was prohibited in the re-opening hearing.

8) Bentley & Bridges contend that compensation for remediation may come via 17 O.S. Section 356, as asserted by Enercon. Bentley & Bridges reassert that 17 O.S. Section 315 is applicable in this matter.

RESPONSE OF PSTD

1) PSTD requests that any relief sought that is outside the Application be denied.

CONCLUSIONS

The Referee finds the Report of the Administrative Law Judge Upon Reopening of Cause by Motion should be affirmed with one finding being reversed/modified.

I.

REASONABLE COMPENSATION

1) The Referee finds that the ALJ's determination that payment of \$10 per well per year as reasonable compensation for the use of the property is supported by the weight of the evidence, in accordance with law, free of reversible error and should be affirmed. 17 O.S. Sections 301 through 318 known as "Oklahoma Storage Tank Regulation Act" and OCC-OAC 165:25-1-1 et seq, known as the "Oklahoma Corporation Commission Underground Storage Tank Rules", concern this case.

2) The General Rules of the Commission have the force and effect of law and must be followed. *Brumark Corporation v. Corporation Commission*, 864 P.2d 1287 (Okl.App. 1993); *Ashland Oil Inc. v. Corporation Commission*, 595 P.2d 423 (Okl. 1979).

- 3) OCC-OAC 165:25-1-1 titled "Purpose" states:
The purpose of this Chapter is to provide a comprehensive regulatory program for the safe operation of underground storage tank systems in Oklahoma and to prevent and contain pollution caused by leaking underground storage tank systems and to reduce the hazards of fire and explosion...
- 4) 17 O.S. Section 310(E)(3) provides:
3. The Commission shall determine the reasonable compensation, if any, to be paid to the owner of the property which is to be accessed for the use of the property to investigate, remediate or perform corrected action as a result of a release.
- 5) Deference must be given to the interpretation of the rules by the Commission staff. When faced with a problem of statutory construction, this deference is given to the interpretation given a statute or rule by the officers or agency charged with its administration. *Unemployment Commission v. Aragon*, 329 U.S. 143, 153. See also, e.g., *Gray v. Powell*, 314 U.S. 402; *Universal Battery Company v. United States*, 281 U.S. 580, 583. Thus, the PSTD position in the present case must be favored.
- 6) Lastly the ALJ based his ruling concerning reasonable compensation on evidence that would convince a reasonable man that the granting of said compensation was proper. *El Paso Natural Gas Company v. Corporation Commission of Oklahoma*, 640 P.2d 1336 (Okl. 1981); *Kuykendall v. Corporation Commission*, 634 P.2d 711 (Okl. 1981); and *Land Owners Oil, Gas and Royalty Owners v. Corporation Commission*, 415 P.2d 942 (Okl. 1966). The testimony reflected that the property of Bentley & Bridges is not similar to the Baptist Church tract being used by PSTD/Enercon, because the use of the Baptist Church property has been forfeited for the term of its use by the PSTD/Enercon. Bentley retains use of his property for the operation of his funeral home and Bridges retains the residential use of his property.

II.

RESPONSIBLE PARTIES

- 1) The ALJ found on page 10 of his Report:
...Title 17 O.S. § 310 gives the Commission the authority to determine reasonable compensation to be paid to the owner of property that is accessed. This statute is silent as to who will pay this compensation. Title 17 O.S. §§ 353, 356 and 365 which govern the Oklahoma Petroleum Storage Tank Release Indemnity

Program and Oklahoma Leaking Underground Storage Tank Fund are also silent as to payment for usage of property. The ALJ can find no statutory authority granting the Commission the power to require the usage payment to be paid from either the Petroleum Storage Tank Release Fund or the Leaking Underground Storage Tank Fund. The burden for paying compensation should fall to the responsible persons who caused the release.

PSTD is given the opportunity under 17 O.S. Section 310 to file an application for access. There is no mention in 17 O.S. Section 310 of a party responsible for payment. PSTD contends that it filed the application in this matter on behalf of Enercon or the responsible party/tank owner for the purpose of getting a responsible party/owner, Enercon or the Corporation Commission to get access onto the Bentley & Bridges property.

2) The Referee agrees with the ALJ that it is logical as asserted by the PSTD that the responsible parties are to pay for property access. The evidence reflected that no monies have been paid out of 17 O.S. Section 315 for access to property. Thus, the Referee agrees with the ALJ that the \$10 per year per well fee should be paid by the persons responsible for the release. Those responsible parties in the present case are the responsible/impacted parties in Fletcher, Oklahoma: W.A. Smith or Chris Smith of the Former Smith-Fina; David Malone and Eddie Malone of the Former Malone Ford; and Dick Herron for the City of Fletcher, which acquired the Former Champlin station after that station closed. Thus, the appropriate parties to pay the access fee are the persons responsible for the release.

III.

NOTICE

1) Enercon asserts that the responsible parties cannot have the burden of payment of the access fee as their due process rights would be violated. Enercon asserts that the responsible parties were not named as respondents in this application or given notice thereof. Enercon asserts that as a result, those parties were not given an opportunity to defend against the ALJ's Findings as to reasonable compensation or their liability for payment. PSTD asserts that though the responsible parties were not named, they defer to the Corporation Commission under 17 O.S. Section 310 by not filing an access application themselves. PSTD contends that the responsible parties' representative, the environmental consultant, Enercon, was present at the hearing and fully participated.

2) The Oklahoma Supreme Court case of *Union Texas Petroleum, a Division of Allied Chemical Corporation v. Corporation Commission of State of Oklahoma*, 651 P.2d 652 (Okl. 1981) stated:

Appellant Union Oil Company of California states it was never served by mail. The affidavits of mailing confirm that allegation. Appellant Tenneco Oil Company states service upon it was improper in that "the notice sent to Tenneco was improperly addressed." There is no allegation in the briefs, or lengthy record of this appeal, which indicates there is any prejudice resulting from the improper address on Tenneco's notice. The record indicates service by mailing was made. If the incorrect address resulted in failure to give notice that fact should have been raised. The Appellant, Tenneco, has not alleged in the proceedings before the Commission that the improper address resulted in failure to impart notice. A mere defect in form of style or nomenclature will not invalidate service of process unless it actually resulted in failure to give notice, as can be discerned from the excerpts from *Mullane* which demonstrate the inquiry is centered on what steps are necessary to impart actual notice, and not formalistic ritual of service of process.

3) The U.S. Supreme Court in *Mullane v. Central Hanover Tr. Company*, 339 U.S. 306 (1950) provided:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Myer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398.

The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Farris*, 214 U.S. 71.

* * *

That when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

4) In the present case the Referee agrees with PSTD's position that though the responsible persons were not named parties, the responsible parties defer

to the Corporation Commission under 17 O.S. Section 310 by not filing an access application themselves. Also the responsible parties' representative, the environmental consultant, Enercon, was present at the hearing and fully participated. The Referee believes that the full participation of Enercon, the representative of the responsible parties, was sufficient to provide required information and notice, and the responsible parties were thus afforded the opportunity to present their position and/or objections.

IV.

ISSUE OF NO WELLS BEING DRILLED "WITHIN 30 FEET OF FUNCTIONAL DOORS OR WINDOWS OF ANY INHABITED RESIDENCE"

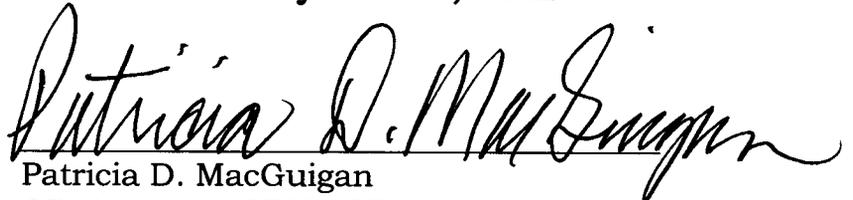
- 1) Both PSTD and Enercon request that portion of the ALJ's recommendation prohibiting drilling "within 30 feet of functional doors or windows of any inhabited residence" be stricken. PSTD contends that this prohibition creates a hardship because to effect a clean-up and remediation, it is necessary to be as close to the building as possible. PSTD was not adverse to the proposed plan by Enercon. Enercon asserts that there was no evidence taken in the two hearings which addressed this issue and no party objected to the configuration of wells regarding this issue. The plan for corrective action is aimed at remediation of the subsurface existing beneath such structures and Enercon must warrant the effectiveness of its efforts to remediate the area of the release. The Referee agrees with the assertions of both Enercon and PSTD and would reverse the ALJ's recommendation which seeks to modify the plan for corrective action as previously approved by the PSTD. See *El Paso Natural Gas Company v. Corporation Commission of Oklahoma*, supra at 1338 which mandates the utilization of "the substantial evidence" test for reviewing decisions of the Oklahoma Corporation Commission which does not require the evidence be weighed, only that there be evidence taken to support such order.
- 2) The Referee would affirm all other aspects of the ALJ's Report concerning his recommendations in full/complete paragraph #3 on page 10 pertaining to access, etc.

V.

CONCLUSION

1) For the foregoing reasons the Referee finds the Report of the ALJ should be affirmed, except as reversed and modified concerning the ALJ's recommendation that no wells be drilled "within 30 feet of functional doors or windows of any inhabited residence".

RESPECTFULLY SUBMITTED THIS 21st day of June, 2012.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Murphy
Commissioner Anthony
Commissioner Douglas
Jim Hamilton
ALJ Michael Porter
Jeffrey P. Southwick
Natasha M. Scott
John E. Lee, III
Richard A. Grimes
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