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BEFORE THE CORPORATION COMMISSION  
OF THE STATE OF OKLAHOMA

**FILED**  
FEB 21 2013

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CORPORATION COMMISSION  
OF OKLAHOMA

|                                  |                                 |   |                     |
|----------------------------------|---------------------------------|---|---------------------|
| <b><u>APPLICANT:</u></b>         | <b>CRYSTAL MOUNTAIN, LLC</b>    | ) |                     |
|                                  |                                 | ) |                     |
| <b><u>RELIEF SOUGHT:</u></b>     | <b>DETERMINATION THAT THE</b>   | ) | <b>CAUSE PD NO.</b> |
|                                  | <b>USE OF APPLICANT'S</b>       | ) | <b>201200098</b>    |
|                                  | <b>DETERMINATION THAT THE</b>   | ) |                     |
|                                  | <b>USE OF APPLICANT'S ODIS®</b> | ) |                     |
|                                  | <b>PROCESS ON WASTE</b>         | ) |                     |
|                                  | <b>MATERIAL AND</b>             | ) |                     |
|                                  | <b>DELETERIOUS SUBSTANCES</b>   | ) |                     |
|                                  | <b>RESULTS IN A BENEFICIAL</b>  | ) |                     |
|                                  | <b>PRODUCT THAT SHOULD NO</b>   | ) |                     |
|                                  | <b>LONGER BE CLASSIFIED AS</b>  | ) |                     |
|                                  | <b>WASTE OR A DELETERIOUS</b>   | ) |                     |
|                                  | <b>SUBSTANCE PURSUANT TO</b>    | ) |                     |
|                                  | <b>COMMISSION RULES AND</b>     | ) |                     |
|                                  | <b>GRANTING STATEWIDE</b>       | ) |                     |
|                                  | <b>AUTHORITY FOR ITS USE</b>    | ) |                     |
|                                  |                                 | ) |                     |
| <b><u>LEGAL DESCRIPTION:</u></b> | <b>THE STATE OF OKLAHOMA</b>    | ) |                     |

**REPORT OF THE OIL AND GAS APPELLATE REFEREE ON  
AN ORAL APPEAL OF A MOTION TO DISMISS**

This Motion came on for hearing before **Susan R. Osburn**, Administrative Law Judge for the Oklahoma Corporation Commission, at 9 a.m. on the 6<sup>th</sup> day of November, 2012, in the Commission's Courtroom, Jim Thorpe Building, Oklahoma City, Oklahoma, pursuant to notice given as required by law and the rules of the Commission for purpose of taking testimony and reporting to the Commission.

**APPEARANCES:** **Cheri M. Wheeler**, attorney, appeared for applicant, Crystal Mountain, LLC ("Crystal"); **Richard J. Gore**, attorney, appeared for protestants (collectively "Gage") listed on Amended Exhibit "A" (Joseph Anton and Shelly Schroeder, Kyle Best, Dennis and Karen Bittman, John Brosh, Marlene Christophersen, Roger Crouse, Gary and Mary Crow, Gary Don Crow, John and Susie Cully, Christie Dipple, Terry and Sherry Fagala, Terry Fagala, Robert Fessler, Billie File, Clay File, City of Gage, Dusty Girton, Nathan Grantham, Sylva Grantham, Arnold Hagen, George Herber, Les Herber, Wes Herber, Max Hess, William James, Donald Ray and Judy Jenkins, Denny

Jenkins, Jerald C. Kuhlman, Cathy Long, Olivia Mackey, Wayne and Judy Mackey, William F. McLain, Jr., John Mitchell, Larry and Marilyn Nickeson, Chris Pinkston and Stacy Parnell, J.D. Peer, Phyllis Peer, Karen M. Perkins, Kelly and Karen Perkins, James Poindexter, Janet Schroeder, Kent and Bonita Sloan, Jason and Crystal Sprague, L. Frankie Stevens, Bill Taylor, Curtis and Kay Torrance, and Kenneth Thompson); **Eric R. King**, attorney, appeared on behalf of Scott Environmental Services, Inc. ("Scott"); **Keith Thomas**, Assistant General Counsel for the Conservation Division, filed notice of appearance for the Underground Injection Control ("UIC")/Pollution Abatement departments of the Oklahoma Corporation Commission; and **Jim Hamilton**, Assistant General Counsel for the Conservation Division, filed notice of appearance.

The Administrative Law Judge ("ALJ") issued her Oral Ruling on the Motion to which Oral Exceptions were timely lodged and proper notice given of the setting of the Exceptions.

The Appellate argument concerning the Oral Exceptions was referred to **Patricia D. MacGuigan**, Oil and Gas Appellate Referee ("Referee"), on the 7<sup>th</sup> day of December, 2012. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

### **STATEMENT OF THE CASE**

**CRYSTAL TAKES EXCEPTION** to the ALJ's recommendation that the Motion to Dismiss be granted.

Crystal filed its application in the present cause on May 16, 2012 seeking relief in the form of statewide approval for the use of its ODIS® process for the treatment of waste materials and deleterious substances produced in the course of drilling operations, and a determination from the Commission that application of its process results in a product that should no longer be defined as waste material or deleterious substance under the Commission rules, if certain target limits proposed within Crystal's application are met. Crystal further proposes that the Commission approve its ODIS® process on an interim basis so that the Commission may maintain jurisdiction and periodically review the implementation of the process to insure its adherence to the proposed guidelines. Prior to filing its application Crystal participated in several technical conferences with the Commission's Pollution Abatement department and Legal division staff to develop methods and parameters for the testing of waste materials and deleterious substances at various stages of the ODIS® process.

On September 16, 2010 twenty (20) months earlier than the Crystal application was filed, Scott filed its application in Cause PD 201000109, seeking nearly identical relief from the Commission for Scott's Firmus® process. Like Crystal,

Scott sought statewide approval for its process, initiated and participated in a multitude of conferences with the Pollution Abatement department and Legal division to establish stringent parameters and target limits, and submitted its process to the continuing oversight of the Commission on an interim basis. On November 2, 2010 Interim Order No. 580014 issued in Cause PD 201000109, and on December 20, 2011, the Commission issued Order No. 592234, granting final approval to Scott on its application. As a result, Crystal cited Cause PD 201000109 as a precedent establishing the propriety of the relief it seeks, and a procedural method by which it seeks this relief, in the instant cause.

Gage filed their Motion to Dismiss on October 5, 2012. They urged the Commission to dismiss Crystal's application on the grounds that the prospective effect of a Commission order granting the requested relief is too broad. They argued that because Crystal seeks statewide approval for its process the notice provided for its application (publication in newspaper of general circulation in Oklahoma and Tulsa Counties) was insufficient. Further, Gage argues that, because the Commission rules do not provide specific criteria for the proposed process, and do not appear to prescribe procedures for relief on a statewide basis, adjudication is inappropriate, and Crystal should invoke the Commission's rulemaking procedures to accomplish its purpose. Gage insists that the Scott case, PD 201000109, does not compel the Commission to permit Crystal to proceed by adjudication because, since the issuance of the final order in the Scott case, the Oklahoma Court of Civil Appeals decided *Hoover v. Boon Operating Inc.*, 274 P.3d 815 (Okla. App. 2012). Gage asserts that this case conclusively prohibits Oklahoma agencies from proceeding by adjudication on any issue where specific, substantive rules do not exist.

### **REPORT OF THE ADMINISTRATIVE LAW JUDGE**

**ALJ Susan R. Osburn** reported that after taking into consideration all the arguments, exhibits and case law presented in this Motion to Dismiss hearing, she recommended granting Gage's Motion to Dismiss.

With respect to notice given in the present case the ALJ found that it was insufficient for an adjudicatory hearing for relief as against the entire state. If the cause was allowed to go forward it was the opinion of the ALJ that any order issuing from this cause would be limited to areas in the counties where the publishing occurred. Publication in a newspaper of general circulation in Oklahoma and Tulsa Counties is insufficient.

The ALJ found that Crystal is seeking a full evidentiary hearing to address any issues in controversy which Gage may have or which the Pollution Abatement

department of the Commission may have and thereafter to obtain an interim order.

In this case since there are no specific rules regarding the process in question, for authority Crystal has cobbled together a series of Commission rules for definition along with 52 O.S. Section 87.1, and in argument they have also pointed out a precedent in granting this type of relief in the Scott environmental case, PD 201000109. While that case might have been sufficient prior to the Court of Civil Appeals *Hoover v. Boon Operating, Inc.* case, 374 P.3d 815 (Ok.Civ.App. 2012), it is no longer sufficient. The *Hoover* case stands for the proposition that the Commission must have specific rules under which an applicant can function. Here there are no specific rules.

While meeting with the Pollution Abatement department and with the Commission Legal staff to determine what might be acceptable testing, target limits, reporting requirements, and leachate issues is commendable, Gage has a valid point in that numerous other state agencies and industry parties and concerned citizens do not have an opportunity for input here on those issues as they would have under the rulemaking process. Certainly the Scott environmental case, PD 201000109, as well as the work done by Crystal here in cooperation with Legal staff and Pollution Abatement would serve as a good basis for determining specific rules for using these type processes throughout the state. Additionally given that work and the Scott case, there should not be the lengthy delay in establishing rules that Crystal has argued would cause a chill on development and use of the ODIS® process.

## POSITIONS OF THE PARTIES

### CRYSTAL

1) **Cheri Wheeler**, attorney, appearing on behalf of Crystal, stated Crystal has been involved in the oil and gas waste disposal and processing business for a number of years. Crystal operates a commercial recycling facility and seeks to get statewide approval to use their process to recycle wastewater into a beneficial product. Crystal intended to do that by implementing testing targets agreed upon by the Pollution Abatement department.

2) A similar process was approved by the Commission for Scott (Cause PD 201000109) to turn waste into a beneficial product.

3) The ALJ's dismissal of the case was based upon the absence of specifically governing rules. Crystal argues that this is a significant departure from the basic principal of administrative law that the administrative agency can choose whether to proceed by general rule or individual ad hoc litigation. The Commission is vested with the jurisdiction and duty to issue orders governing and relating to the handling and disposition of saltwater, mineral brines, waste oil, and other deleterious substances produced from or obtained in connection with oil and gas operations. Crystal believes that the ALJ's decision keeps the Commission from performing their statutory duty.

4) The oil and gas industry is using technology to recycle wastewater that is advancing very quickly. To wait for new rules on the topic would be unnecessary based on the *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *El Paso Natural Gas Co. v. Oklahoma Tax Com'n.*, 929 P.2d 1002 (Ok.Civ.App. 1996); and *N.L.R.B. v. Bell Aerospace Co. Div. Of Textron, Inc.*, 416 U.S. 267 (1974) cases.

5) Crystal believes the Scott cause provided the precedent to approve their ODIS® process. The Commission was asked to grant statewide authority for a process which processes oil field waste into a product which is no longer deleterious. Even after the Commission approved the thermos process in that case, the Commission still retains the jurisdiction to continue to monitor the process and make sure pollution is prevented. The ALJ did not follow stare decisis in her report.

6) The ALJ ruled the precedent set in *Chenery* case was no longer needed because of *Hoover v. Boone Operating, Inc.*, 274 P.3d 815 (Ok.Civ.App. 2012). The *Hoover* case sets an exception to the agency's discretion to make pronouncements of future applicability when deciding an adjudicatory matter. The exception pertains to rules implemented when the commission is seeking to apply new liability and new financial responsibility. Crystal does not believe this to be an analogous situation. The Commission has the discretion whether to go through adjudication or through rulemaking.

7) Crystal takes exception to the due process argument that the respondents should have had better notice. The publication notice in Oklahoma and Tulsa counties was what the Commission suggested. Beyond this, the facilities have not been determined yet. They will be where the well sites are and Crystal will contract with the affected individuals.

8) If this case is subjected to rulemaking it might put into rules things that may change. Thus, the interim order is the best way to approach this case because it gives a year to work out the problems and issues before giving a final order.

9) Crystal respectfully requests that the ruling of the ALJ be overturned and that Crystal be allowed to proceed in an adjudicatory matter with its case and not be subjected to rulemaking.

### GAGE

1) **Richard Gore**, attorney appeared on behalf of Gage, and explains that the Supreme Court authority of the *Hoover* case is the controlling law. The Commission did not have authority to act because the agency had not enacted rules for the determination of who is an "other responsible person" and the criteria for assigning to the other responsible person primary, joint, or secondary reliability and responsibility.

2) Gage argues that the *Hoover* case is simple and clear in explaining that if the Commission has not enacted rules then the Commission cannot act. The only exception to that is if the statute is sufficiently detailed and clear as to the authority that it grants to the Commission, then the Commission can act under the statute without a rule. However, Crystal makes no argument that any rules already govern their request.

3) The ALJ heard the arguments and found that there are no specific rules to give the Commission authority to act. Crystal cobbled together a series of rules, but none of them authorize the Commission to do what Crystal is requesting. The ALJ also adopts the *Hoover* case as the law in Oklahoma.

4) Gage clarifies that the Scott Order No. 592244 in PD 201000109 came before the *Hoover* case, so the law was not as clear as it is today on this subject.

5) Granting statewide authority to recycle drilling mud with oil in it is a big pollution issue and there are many parties that would be interested in this topic that cannot be involved unless it were a rulemaking case.

6) The parameters used in the thermos process from the Scott cause are more stringent than the parameters in this case. Also, the thermos process parameters were approved previously in Texas.

7) Alternatively, Gage argues that there are specific hydrocarbon recycling rules OCC-OAC 165:10-8-1 and 10-9-4 and in Form 1020A, but that Crystal does not want to comply with those rules.

8) Gage requests the Commission uphold the ALJ's decision because it is the correct and current Oklahoma law.

**UIC**

1) **Keith Thomas**, Assistant General Counsel, appearing on behalf of the UIC department, clarifies that Crystal is not the operator, but will be treating the oil field waste.

2) The Pollution Abatement department supports Crystal's application as the Commission has jurisdiction over both the generator of the waste and the person treating the waste. UIC does not believe that the *Hoover* case is on point in this case because it is about assigning liability to somebody over which the Commission did not have jurisdiction and that is not the case here.

3) The operator is responsible from the cradle to the grave for their waste, so the operator will always be liable for the waste. The statutes that declared the Commission to prohibit pollution give the Pollution Abatement department control over those parties.

4) The Pollution Abatement department feels that the Commission does have the jurisdiction to issue an order in this case and that a rulemaking is not necessary.

**RESPONSE OF CRYSTAL**

1) Crystal clarifies that the rules Gage brings up, OCC-OAC 165:10-8-1 et al, about hydrocarbon recycling/reclaiming facilities are for reclaimers and do not apply to either the Scott cause or Crystal cause at bar.

2) The *Hoover* case is not a blanket over every action the Commission would like to make. It is specific only to the imposition of liability and responsibility. The cases of *Hoover*, *Chenery*, *El Paso*, and *Bell Aerospace* can all exist together. Crystal does not suggest the Commission overrule the *Hoover* case, as it cannot do that, but instead recognize it is specific to its facts and not applicable in this case.

## CONCLUSIONS

**The Referee finds the Oral Report of the Administrative Law Judge to grant the Motion to Dismiss should be affirmed.**

1) The Referee finds that the ALJ's recommendation to grant Gage's Motion to Dismiss is supported by applicable law. The Oklahoma Corporation Commission ("Commission") has been granted legislative, administrative and quasi-judicial powers, but it is a tribunal of limited jurisdiction, having powers only to the extent conferred upon it by the Oklahoma Constitution and statutes of the State of Oklahoma. *Merritt v. Corporation Commission*, 438 P.2d 495 (Okl. 1968); *Meinders v. Johnson*, 134 P.3d 858 (Okl.Civ.App. 2006). These constitutional and statutory provisions grant the Commission the power to establish its own rules and regulations governing the oil and gas industry and the power and authority of a court of record to enforce its lawful orders. Okl. Constitution. Art. IX Section 19; *Halpin v. Corporation Commission*, 575 P.2d 109 (Okl. 1977). The legislature passed the Oklahoma Environmental Quality Act in 1993, 27A Section 1-1-101, et seq. (the "Act") to provide for the administration of environmental functions of the various Oklahoma environmental agencies. 27A O.S. Section 1-1-102. The legislature defined the jurisdictional areas of environmental responsibilities for the agencies and set forth the Commission's responsibilities. 27A O.S. Section 1-3-101.E.1.i. as follows:

1. The Corporation Commission is hereby vested with exclusive jurisdiction, power and authority, and it shall be its duty to promulgate and enforce rules, and issue and enforce orders governing and regulating:

\* \* \*

i. the handling, transportation, storage and disposition of salt water, mineral brines, waste oil and other deleterious substances produced from or obtained or used in connection with the drilling, development, producing and operating of oil and gas wells, at:

(1) Any facility or activity specifically listed in paragraphs 1 and 2 of this subsection as being subject to the jurisdiction of the Commission, and

(2) Other oil and gas extraction facilities and activities,...

2) The above listed provisions give the Commission exclusive environmental jurisdiction in the area of "oil and gas" including the disposition of deleterious substances incidental to petroleum production. *Messer-Bowers Company, Inc. v. State ex rel Oklahoma Water Board*, 8 P.3d 877, 882 (Okl. 2000); see also, *Bowen v. Amoco Pipeline Company*, 254 F.3d 925, 937-938 (10<sup>th</sup> Circuit 2001).

3) The Supreme Court in *Waste Connections, Inc. v. Oklahoma Department of Environmental Quality*, 61 P.3d 219, 224 (Okl. 2002) stated:

An agency's authority to make rules is clearly distinctable from that of adjudication. *Rulemaking* includes the power to adopt rules and regulations of general applications—both substantive and procedural—which are legislative in nature, operate prospectively and have general application. *Orders* of an administrative body are adjudicative in character. They apply to named persons or specific situations and have immediate rather than future operation. *Harry R. Carlile Trust v. Cotton Petroleum Corp.*, 1986 OK 16, 732 P.2d 438, 441-42.

4) Whether to proceed by rulemaking or by individual litigation relies primarily within an agency's discretion. The United States Supreme Court case of *SEC v. Chenery Corporation*, 332 U.S. 194, 67 S.Ct. 1575 (U.S. 1947) stated that agencies (the SEC in that case) unlike a court, have the ability to make new law prospectively, through the exercise of their rulemaking powers and, therefore, have less reason to rely on ad hoc adjudication to formulate new standards of conduct within the framework of their legislative duties under an Act. *Id.* at 202, 1580. The Supreme Court argued for flexibility in the system and stated "And the choice make between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.*

5) In *Marathon Oil Company v. EPA*, 564 F.2d 1253 (9<sup>th</sup> Circuit 1977), the Federal Court stated that the determination of whether to proceed by adjudication or rulemaking depends less on resolution of factual disputes and more on the drawing of policy. Rulemaking decisions must be guided by more informal procedures. Rulemaking is essentially legislative in nature, not only because it operates in the future, but also because it is primarily concerned with policy considerations. Typically the issues relate not to the evidentiary facts, as to which the veracity and demeanor of the witnesses would often be

important, but rather to policy making conclusions to be drawn from the facts. Id at 1261, 1262.

6) Whether to proceed by rulemaking or by individual litigation lies primarily within an agency's discretion. *El Paso Natural Gas Company v. Oklahoma Tax Commission*, 929 P.2d 1002 (Okla.Civ.App. 1996). The Court found that an agency has a choice to proceed by general rulemaking or by individual ad hoc litigation and that the choice lies within the informed discretion of the agency.

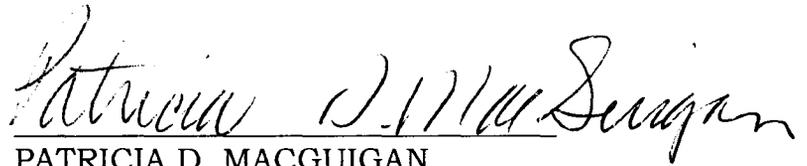
7) The Oklahoma Legislature mandated through the Oklahoma Environmental Quality Act, 27A Section O.S. Section 1-1-101 et seq. that the "Commission is hereby vested with exclusive jurisdiction, power and authority and it shall be its duty to promulgate and enforce rules..." See 27A O.S. Section 1-3-101E1. The Referee agrees that the applicant is seeking an adjudication in one court room, in front of limited parties to secure a statewide certification of its process. The Commission should not create such rules on an ad hoc basis through individual hearings. Just looking at the public record one can see different applicants, different decision makers/administrative law judges and different geographic areas. The Referee agrees that this is a complicated and fractious approach not designed to create rules to apply across the board for all parties. The Referee agrees that the better practice and better policy requires that these disjointed proceedings be consolidated and dismissed or stayed, pending a formal rulemaking (excluding with one exception, the Scott Environmental matter, PD 201000109, which is a final order and not subject to collateral attack).

8) The Referee further agrees that if a law is to be applied to parties in a particular case, there should be rules already in place before directives, sanctions or liabilities are imposed. See *Hoover v. Boone Operating Inc.*, 274 P.3d 815 (Okla.Civ.App. 2012). In the present case there is no valid measurement or rules to measure the standards Crystal seeks to use within the oilfield waste process. Rules must be made to protect the State, its citizens and the environment, as well as to guide the overseers and enforcement agents within the Commission. The Referee agrees with the ALJ that the contemplated action by Crystal is intended to have widespread application and prospective effect and, therefore, rulemaking is clearly the suitable mode of proceeding. The Referee agrees that the rulemaking process would enable other interested parties, state agencies and concerned citizens to have an opportunity for input on these issues presented under the rulemaking process. The Referee further agrees with the ALJ that the Scott Environmental case, PD 201000109, as well as the work done by Crystal in the present case in cooperation with the Commission legal staff and the Pollution Abatement department would serve as a good basis for determining specific rules for using these types of processes throughout the State. Given the work already

performed in the Scott case and the present case there should not be a lengthy delay in establishing rules.

9) The Referee agrees with the conclusion of the ALJ and finds no reason upon review to reverse the recommendation of the ALJ. Therefore, the Oral Report of the ALJ should be affirmed.

**RESPECTFULLY SUBMITTED THIS 21<sup>st</sup> day of February, 2013.**



PATRICIA D. MACGUIGAN  
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Douglas  
Commissioner Anthony  
Commissioner Murphy  
Jim Hamilton  
ALJ Susan R. Osburn  
Cheri M. Wheeler  
Richard J. Gore  
Eric R. King  
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