

**DECISION SHEET
OF THE OIL & GAS APPELLATE REFEREE**

FILED
AUG 20 2014

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OF OKLAHOMA

<u>APPLICANT:</u>	COBALT ENVIRONMENTAL SOLUTIONS, LLC)	
)	
<u>RELIEF SOUGHT:</u>	COMMERCIAL DISPOSAL WELL (FORM 1015))	CAUSE PD NO. 201400129
)	
<u>LEGAL DESCRIPTION:</u>	COBALT MARIETTA SWD #1, NE/4 NW/4 NW/4 SECTION 24, T7S, R1W, LOVE COUNTY, OKLAHOMA)	
)	

**ORAL APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S
RULING ON A MOTION FOR DEPOSITIONS AND SUBPOENAS
DUCES TECUM**

This Motion came on for hearing before **Michael Porter**, Administrative Law Judge ("ALJ"), for the Oklahoma Corporation Commission, at 9 a.m. on the 15th day of August, 2014, pursuant to notice given as required by law and the rules of the Commission for the purpose of taking testimony and reporting to the Commission.

APPEARANCES: **Russell James Walker**, attorney, appeared for the applicant, Cobalt Environmental Solutions, LLC ("Cobalt"); **Darryl F. Roberts**, attorney, appeared for Falconhead Property Owners Association, Inc. ("Falconhead"); **Keith Thomas**, Assistant General Counsel, for the Oil and Gas Conservation Division, Underground Injection Control department ("UIC"); and **Jim Hamilton**, Deputy General Counsel for Deliberations, filed notice of appearance.

The Oral Arguments on the Oral Appeal were referred to Patricia D. MacGuigan, Oil and Gas Appellate Referee ("Referee"), on the 15th day of August, 2014. After considering the arguments of counsel and the record contained within this Cause, the Referee finds as follows:

REPORT OF THE ADMINISTRATIVE LAW JUDGE

1) **ALJ Michael Porter** reported that after review of the arguments presented by the parties, it was the recommendation of the ALJ that the Motion for Depositions and Subpoenas Duces Tecum be denied. He based his decision upon Commission rule OCC-OAC 165:5-1-3 which defines a protestant, and indicates that a protestant is "a person who, upon grounds of private or public interest, resists and application or any relief sought thereby. A protest is governed by the rules applicable to a response." The ALJ then examined OCC-OAC 165:5-11-3 which is entitled Commission subpoena and under subparagraph (a) states: "The Commission, upon motion of a person or upon motion of the Commission, may order the Secretary to issue subpoena in the name of the Commission in any pending cause requiring attendance of a witness from any place in the State to the place of hearing." Subparagraph (b) "Subpoena Duces Tecum." states "A subpoena may require the witness to produce at the hearing books, records, accounts, papers and other documents and tangible objects, which shall be described with reasonable particularity in the subpoena." Subparagraph (c) entitled "Service of Subpoena" provides "A subpoena shall be served on a witness not less than five (5) days prior to hearing."

2) It is the ALJ's view that a protestant is not necessarily a witness therefore these 14 parties that were named in the Motion are protestants and signed a certain document that has now been filed with the Commission. Those names are contained on the list of names provided in the document as protestants which does not make them a witness in the ALJ's view. They do not need to be subpoenaed if they're not witnesses that are going to testify and submit scientific documents. What little testimony we had was no one knew if these protestants had any documents or not and these people are not scientifically trained. The whole point of this was to find out what their protest was about. The ALJ's opinion was that forcing protestants to give depositions was extreme since these parties were merely protestants.

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1) The Referee finds the ALJ should be reversed.

2) In District Court discovery is provided to learn what the concerns of the defendant or the plaintiff are. In the present situation Cobalt is seeking a determination of what Falconhead's concerns are. Six of the protestants live relatively near the property where the disposal well is proposed to be constructed and then there is a neighborhood called Falconhead which is

about two miles away from the proposed well and a number of people from the Falconhead neighborhood filed protests. Cobalt is trying to find out what Falconhead's concerns are so they can be addressed at trial. Cobalt chose at random eight people who lived in the Falconhead neighborhood to ascertain their concerns.

3) What the word "witness" means in the rules referenced by the ALJ is the "witness" at the deposition it doesn't mean a witness who is going to show up at trial and testify necessarily. It would be practically impossible at the Commission to take a deposition of an actual witness at the protested hearing, as the parties have to file their witness list nine days before trial and it would be nearly impossible to take a deposition that soon before the trial began, especially when a Motion for Deposition would have to be filed and heard nine days before trial. The word witness in these rules is referring to the person who is giving the deposition, the witness at the deposition. It is not necessarily a witness that is going to testify at trial. Cobalt needs to know what the concerns of the protestants are prior to trial in order to address those needs and concerns at trial.

4) The Referee believes that the ALJ's determination to recommend denial of the Motion for Depositions and Subpoenas Duces Tecum filed by Cobalt should be reversed as being contrary to law, the Commission rules and the hearing procedure set by the Commission rules of practice. Cobalt has a right to pursue discovery in depositions under the Commission rules, if its actions comply with those rules.

5) The Commission procedures for discovery matters follow the Oklahoma Code of Civil Procedure, 12 O.S. Section 3226, wherein the General Provisions Governing Discovery, provide in relevant part:

A. DISCOVERY METHODS; INITIAL DISCLOSURES.

1. DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Except as provided in this section or unless the court orders otherwise under this section, the frequency of use of these methods is not limited.

B. DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance

with the Oklahoma Discovery Code, the scope of discovery is as follows:

1. IN GENERAL.

a. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any documents, electronically stored information or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

6) The Supreme Court in *Boswell v. Schultz*, 175 P.3d, 390 (Okl. 2007) stated:

The purpose of modern discovery practice and procedure is to promote the discovery of the true facts and circumstances of the controversy, rather than to aid in their concealment.

7) The Oklahoma Court of Civil Appeals determined in *State ex rel, Protective Health Services v. Billings Fairchild Center, Inc.*, 158 P.3d 484 (Okl.Civ.App. 2007):

Civil trials no longer are to be conducted in the dark. Discovery, consistent with recognized privileges, provides for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Rozier v. Ford Motor Company*, 573 F.2d 1332, 1346 (5th Cir. 1978). "The aim of these liberal discovery rules is to 'make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.' "...

8) The Oklahoma Supreme Court has also stated in *Unit Rig and Equipment Company v. East*, 514 P.2d 396 (Okl. 1973):

Our discovery procedures are broad and, with certain limitations (see *Giles v. Doggett*, Okl. 500 P.2d 574, 516, and cases there cited), it is not necessary that questions be limited to those which would be admissible in court. *State ex rel. Westerheide et al. v. Shilling, Judge*, 190 Okl. 305, 123 P.2d 674. Evidence which might lead to the disclosure of admissible evidence is discoverable. *Carmen v. Fishel*, Okl., 418 P.2d 963.

9) The Motion for Depositions and Subpoenas Duces Tecum filed by Cobalt in the present case is in conformance with the Commission's discovery rules and the Commission has taken a position to apply its discovery rules liberally. Therefore, the Referee recommends reversing the ALJ's findings and recommendations in his Oral Report and the Motion for Depositions and Subpoenas Duces Tecum should be granted.

RESPECTFULLY SUBMITTED THIS 20th day of August, 2014.


Patricia D. MacGuigan
OIL & GAS APPELLATE REFEREE

PM:ac

xc: Commissioner Anthony
Commissioner Douglas
Commissioner Murphy
Jim Hamilton
Russell J. Walker
Darryl F. Roberts
Keith Thomas
Michael L. Decker, OAP Director
ALJ Michael Porter
Oil-Law Records