

STATE OF NEW MEXICO  
ENERGY MINERALS AND NATURAL RESOURCES DEPARTMENT  
OIL CONSERVATION COMMISSION

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CASE NO. 15617

APPLICATION OF CK DISPOSAL, LLC  
FOR A PERMIT TO OPERATE A COMMERCIAL  
SURFACE WASTE MANAGEMENT FACILITY,  
LEA COUNTY, NEW MEXICO

**LOUISIANA ENERGY SERVICES, LLC'S RESPONSE TO  
CK DISPOSAL, LLC'S MOTION TO QUASH SUBPOENA OF  
ELIZABETH BISBEY-KUEHN**

CK Disposal, LLC's ("CK's"), Motion to Quash Subpoena of Elizabeth Bisbey-Kuehn ("Motion") is baseless and should be denied. CK contends that Ms. Bisbey-Kuehn's testimony is irrelevant and burdensome. To the contrary, her testimony will be directly relevant to facts that CK must prove to meet its burden of proof. LES is entitled under the OCD's rules to solicit and present the testimony.

A. **CK's Motion Would Be Premature At Best.**

At this point, CK has no idea what testimony LES will elicit from Ms. Bisbey-Kuehn. No pre-filed testimony has been ordered by the Oil Conservation Commission ("OCC"). No other disclosure of non-expert testimony is required, see 19.15.4.13.B.1 NMAC (pre-hearing statement requirements), and none has been provided by any of the parties. CK is simply speculating about Ms. Bisbey-Kuehn's testimony.

The obvious initial consideration in determining whether testimony should be excluded on grounds of relevance is what testimony the witness will give. Only then can a determination of relevance be made. *See* NMRA 11-401 (evidence is relevant if it has any tendency to make a

fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action); *see also* 19.15.4.17.A NMAC (OCC may use rules of evidence as guidance in conducting adjudicatory hearings). Thus, CK cannot possibly argue relevance until it knows what Ms. Bisbey-Kuehn will testify about. Similarly the OCC cannot possibly evaluate relevance (much less weigh that relevance against countervailing considerations of prejudice, confusion or delay, *see* NMRA Rule 11-403) until it hears the direct examination.

**B. Ms. Bisbey-Kuehn's Testimony Will Be Relevant. CK's Claims of Bias and Undue Burden Are Frivolous.**

CK claims that the witness "has no connection to the subject application, or to the agency's review of that application," (Mot. at 1), but even if true that would be beside the point. Before the OCD can approve CK's application and grant a permit for its proposed oil field waste disposal facility, the OCC must find that the facility "can be constructed and operated in compliance with applicable statutes and rules and without endangering fresh water, public health, safety or the environment." 19.15.36.12.A.1 NMAC (emphasis added). Ms. Bisbey-Kuehn is the Minor Source Manager for the New Mexico Environment Department's ("NMED's") Air Quality Bureau. She wrote CK on December 13, 2016 regarding its compliance with NMED's air quality permitting requirements. *See* Letter from Elizabeth Bisbey-Kuehn, Minor Source Manager, Air Quality Bureau, NMED, to Bryce Karger, CK Disposal, LLC (Dec. 13, 2016), attached hereto as Exhibit 1. In her testimony, she generally will address that topic, which by OCD regulation places her testimony squarely within the issues of this proceeding. It is immaterial that she was not part of the OCD's review of the application, except insofar as it might suggest a deficiency in the review process. Her testimony relates directly to determinations – whether CK can comply with all applicable statutes and rules – the OCD must make before it can issue a permit. Because CK's premise is false – the testimony *is* connected to

the application and its review – CK’s conclusion that Ms. Bisbey-Kuehn’s testimony is irrelevant and immaterial is invalid.

CK claims that the subpoena should be quashed because it is burdensome to the witness. (Mot. at 3.) CK does not have standing to object to a third party witness subpoena on grounds of burden to the witness. (The witness herself does not complain of burden.) Moreover, there is no undue burden: Ms. Bisbey-Kuehn can walk from her office to the hearing venue, and she will be compensated for per diem as required by court rules. *See* NMRA Rule 1-045.

C. **LES Is Entitled to Use the OCC’s Subpoena Authority and to a Full Opportunity to Present Its Case.**

The OCC subpoena authority is set forth in OCD regulations and LES is entitled to use it. 19.15.4.16.A NMAC states: “The director or the director’s authorized representative shall issue a subpoena for attendance at a hearing upon a party’s written request.” Furthermore, “[s]ubject to other provisions of 19.15.4.16 NMAC, the commission ... shall afford full opportunity to the parties at an adjudicatory hearing before the commission ... to present evidence and to cross-examine witnesses.” 19.15.4.17.A NMAC. (The “other provisions” of 19.15.4.16 NMAC relate to subpoenas, pre-hearing conferences and hearings on motions and thus, given compliance by LES, do not diminish LES’ right to a full opportunity to utilize the OCC’s subpoena power to present its case.)

CK claims that the subpoena should be quashed because it is unduly burdensome to CK and the hearing would be more “efficient” without Ms. Bisbey-Kuehn’s testimony. (*See* Mot. at 2-3.) CK presumably will not like any of the evidence that LES will present at next week’s hearing and views all of it as burdensome, but that consideration has never been recognized as a basis for barring, whether in a judicial or an administrative adjudicatory hearing, an opposing party’s from presenting its case. CK certainly does not offer any legal authority for its efficiency

argument. LES is entitled to a full opportunity to present its case. CK's motion to bar Ms. Bisbey-Kuehn from testifying should be denied.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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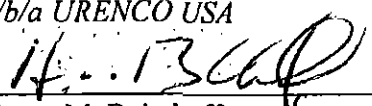
**CERTIFICATE OF SERVICE:**

We hereby certify that a copy of the foregoing pleading was e-mailed on February 2, 2017, to the following:

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December 13, 2016

**CERTIFIED MAIL NO. 7005 1820 0001 5773 6163**

Bryce Karger  
CK Disposal, LLC  
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Lubbock, Texas 79424

Re: Potential Applicability of Air Quality Permit or Notice of Intent (NOI) Requirements to the Proposed  
C.K. Disposal E&P Landfill and Processing Facility

Dear Mr. Karger:

In November 2016, the New Mexico Environment Department (NMED) Air Quality Bureau (Bureau) was contacted by members of the public regarding whether the proposed referenced facility was subject to air quality requirements and, if so, whether it had submitted an air quality permit or NOI application to the Bureau. The Department has researched the above facility and determined NMED has not received any air quality permit or NOI application regarding this facility to date. The NMED regulates the emissions from oil and gas related facilities if the uncontrolled potential emission rate exceeds certain regulatory thresholds under the construction permitting and NOI regulation, 20.2.72 and 20.2.73 NMAC.

Based on the Department's understanding of the proposed facility process, the potential emission rate from the facility may exceed permitting thresholds under 20.2.72 NMAC or NOI thresholds under 20.2.73 NMAC. However, since the Department has not received air emission estimates and other technical information from the company necessary to make a conclusive determination, the Department cannot determine whether or not this facility would trigger any requirements under these regulations. Based on the above, the Department urges the applicant to request a formal determination regarding permit or NOI applicability from the Air Quality Bureau prior to constructing this source, as it is possible an air quality permit or, at a minimum, a NOI will be required prior to construction.

If you have any questions, please feel free to call me directly at 505-466-4338.

Elizabeth Bisbey-Kuehn  
Minor Source Manager  
Air Quality Bureau  
New Mexico Environment Department

EXHIBIT 1