

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



**IN THE MATTER OF Enterprise Products Operating LLC
A Texas limited liability company.**

**THE OIL CONSERVATION DIVISION'S RESPONSE TO ENTERPRISE PRODUCTS
OPERATING LLC'S MOTION TO CONDUCT ADDITIONAL DISCOVERY**

COMES NOW Petitioner, the Oil Conservation Division ("OCD"), and, pursuant to 20.1.3.15.D NMAC, hereby responds to Respondent Enterprise Products Operating LLC's Opposed Motion to Conduct Additional Discovery (the "Motion"). The OCD respectfully requests the Hearing Examiner to deny Enterprise Products Operating LLC's ("Enterprise") highly unusual and disfavored Motion, as granting the Motion 1) is unwarranted as the Motion lacks specificity and bases; 2) will cause undue harassment; and 3) is premature.

Enterprise's Motion Lacks Specificity and is Unwarranted

The lack of specificity for Enterprise's reasons, the persons, circumstances, and proposed timing regarding its desired depositions should alone serve as reasons to deny the Motion. *See* 20.1.3.19.I(1) NMAC. Enterprise names certain persons it may depose along with "other individuals identified during discovery, which is still ongoing." Motion at 2. Enterprise ought first complete discovery permitted per WQCC rules, then attempt to identify the persons it deems essential, if any, it must depose, and identify the circumstances and limited issues it will require in a deposition. OCD is aware that Enterprise has, through Enterprise's own private investigator, already spoken to many of the same persons it wishes to now depose. Perhaps reviewing Enterprise's own investigation (OCD has not seen the investigation and can only speculate what some of the people Enterprise already investigated may now say in a deposition) may prove helpful in narrowing Enterprise's Motion. Regardless, however, it appears contrary to the

specific intent of WQCC rules to prematurely seek additional discovery of matters and persons of which Enterprise has both superior knowledge and has not sought to narrow the nature of any additional discovery.

For example, both the Administrative Compliance Order (“ACO”) and the Motion both acknowledge that OCD claims a penalty in this case that was calculated “after consulting NMED’s Ground Water Quality Bureau’s Civil Penalty Assessment Policy.” ACO ¶¶ 122-123; Motion at 3. However, notwithstanding the record in this matter, Enterprise relies on an article in the *Albuquerque Journal* and appears to disregard the law regarding the use of penalties as a means to apparently justify depositions in this matter. *See* Motion at 5; NMSA 1978, § 74-6-10 (1993). Civil penalties are permitted per NMSA 1978, Sections 74-6-10.1(A) and 74-6-10(C)(1) (1993). Deposing anyone on the penalty, especially a new OCD attorney as Enterprise desires to do and is discussed herein, is inappropriate.

Enterprise needs to complete discovery permitted by WQCC rules and then, if absolutely necessary, file a motion to conduct additional discovery. Without completing permitted discovery, Enterprise cannot possibly know if “[r]equests for admission...are insufficient.” *See* Motion at 5. If Enterprise completes discovery routinely allowed per WQCC rules and still feels it needs to conduct additional discovery, Enterprise can request such special latitude with the great specificity required, as it will have had the opportunity to complete routine discovery and narrow its request.

Granting Enterprise’s Motion Will Cause Undue Harassment

Enterprise seeks to depose an extensive known list of persons (along with persons to be determined through additional discovery), including possibly an OCD attorney not even a member of the State Bar for two years—Keith Herrmann. The deposition of Mr. Herrmann

appears to be nothing more than a litigation tool of harassment and intimidation, as any responses Mr. Herrmann would potentially be able to provide to a deposition question would be protected by either attorney client privilege or work product. Ironically, despite the presence of the Energy, Minerals and Natural Resources Department's General Counsel at all but one meeting with Enterprise, and another senior attorney at the one meeting the General Counsel did not attend, Enterprise only seeks to depose Mr. Herrmann; the rationale is highly suspect.

Enterprise's Motion is Premature

Enterprise has not fully exhausted the discovery tools available to it under WQCC rules and ought to first utilize the preferred discovery tools prior to requesting highly unusual and disfavored discovery. As Enterprise states in its Motion, "Enterprise intends to take full advantage of the discovery tools expressly permitted by the WQCC Rules...and will serve requests for admission on the OCD." Motion at 3-4. To date, OCD has not received Enterprise's requests for admission. OCD believes that, should Enterprise serve OCD with such requests for admission as provided for under WQCC rules, many of the alleged 'unknowns' or questions in Enterprise's Motion it seeks to 'answer' through expensive and timely discovery processes may otherwise be answered. By not using the discovery tools otherwise available to it under WQCC rules and prematurely seeking additional discovery, Enterprise is not fully using the processes contemplated by the WQCC and ought to do so before requesting discovery that is "not favored" and "discouraged" per WQCC rules. *See* 20.1.3.19 I (1) NMAC.

By example, Enterprise states in its Motion, "Counsel for OCD has indicated that OCD has interviewed a number of individual truckers about these assertions, and Enterprise expects the identities of these individuals to be revealed in response to requests for production." Motion at 3. While Enterprise's Motion was filed after OCD provided responses to its requests for

production and, without addressing the merits of Enterprise's allegation, any persons Enterprise wishes to depose, or persons Enterprise *thinks* its needs to depose, or actions Enterprise *thinks* OCD took and wants to examine should first be determined through routine WQCC discovery prior to requiring unnecessary depositions and requiring all parties—especially the OCD which has less resources than Enterprise—to waste time and resources.

Should the Hearing Officer, after considering all arguments set forth herein, still grant Enterprise's Motion, the OCD requests, in the alternative, that OCD be allowed to conduct depositions and serve interrogatories on Enterprise. As noted, as discovery permitted under the WQCC is ongoing, the identification of persons OCD wishes to depose is premature, as OCD does not anticipate receiving responses to its requests for production of documents until September 28, 2015 (as OCD granted Enterprise a one-month extension to respond to its production request). The OCD would ask that, after discovery permitted under WQCC rules concludes, both parties submit a comprehensive list of parties they wish to depose and appropriate limitations and conditions be set following a hearing.

If the Hearing Officer does not concur with OCD's first alternative suggestion, the OCD then suggests the Hearing Officer appropriately limit the depositions and interrogatories in any order he issues in order to make certain only discoverable and relevant information is obtained in discovery. *See generally Lara v. City of Albuquerque*, 1999-NMCA-012, 126 N.M. 455, 971 P.2d 846. Moreover, the OCD requests that the Hearing Officer allow OCD to submit a list of persons it wishes to depose 21 days following receipt of the production of documents from Enterprise and the Hearing Officer consider the listed persons in said order. In addition, all depositions should take place in Santa Fe or Lea County—the locations of the discharges.

If the Hearing Officer does not concur with either OCD's first or second alternative suggestion, the OCD then suggests that the OCD have discretion to depose persons it feels necessary to be on equal footing as Enterprise. Enterprise's request for depositions and interrogatories is more customary in a district court proceeding than in a WQCC proceeding. As OCD has not received discovery responses from Enterprise, it is impossible for OCD to identify a comprehensive list of persons it would seek to depose at this time. However, as OCD has limited resources, OCD would most certainly only depose those persons it feels necessary in order for OCD to be on a somewhat equal playing field as Enterprise. In addition, OCD would serve interrogatories regarding Enterprise's defenses, contacts with persons and entities performing work on Enterprise projects, internal knowledge of the dumping, Enterprise's own investigation of the dumping, reasons for delaying the reporting to OCD, and other matters which may be determined upon receipt of discovery responses permitted by WQCC rules. Again, OCD would ask that all depositions take place in Santa Fe or Lea County—the locations of the discharges; however, as counsel for Enterprise requested depositions take place in Santa Fe, OCD would be agreeable to Santa Fe as the location.

Finally, the continued references to the New Mexico Rules Annotated (NMRA) are inappropriate and neither instructive nor authoritative in a WQCC proceeding, as the NMRA is the official compilation of New Mexico state court rules and not WQCC rules. *See* 23-112 NMRA. OCD would ask that appropriate limitations and guidelines for a WQCC proceeding be set forth in an order, including appropriate time limits on any depositions, among other limitations. Similarly, OCD would ask that limitations be set on any interrogatories served. While Enterprise states it "will serve interrogatories pursuant to the rules governing discovery in WQCC proceedings", no such rules exist governing the highly unusual service of interrogatories;

OCD does not want an excessive number, such as fifty as permitted under 1-033 NMRA, to be used as guidance.

Wherefore, the OCD respectfully requests the Hearing Officer to deny Enterprise's Motion. The OCD ask the Hearing Officer to encourage Enterprise to review the countless documents already provided to Enterprise and to ask Enterprise to first take advantage of discovery tools provided for under WQCC rules before seeking to use extraordinary discovery tools. Enterprise has not met the requisite threshold to utilize these highly discourage discovery tools; only after Enterprise has exhausted discovery tools available to them under WQCC rules and shown a narrowly tailored reason for an exception should the Hearing Officer entertain a motion.

Respectfully submitted this 31st day of August, 2015.

OIL CONSERVATION DIVISION

By: 

Allison R. Marks, Assistant General Counsel
Energy, Minerals and Natural Resources/Oil Conservation Division
1220 S. St. Francis Drive
Santa Fe, NM 87505
Tel. 505.476.3206

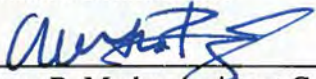
Certificate of Service

I hereby certify that a true and correct copy of the The Oil Conservation Division's Response to Enterprise Products Operating LLC'S Motion to Conduct Additional Discovery was sent via electronic mail and U.S. Mail (hand delivered to Ms. Castaneda) on this 31st day of August, 2015 to:

William Scott
Sarah Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 4th St. NW, Ste. 1000
Albuquerque, New Mexico 87103-2168
bscott@modrall.com
sarah.stevenson@modrall.com

Pam Castaneda
Administrator
New Mexico Water Quality Control Commission
1190 S. St. Francis Drive, S-2102
Santa Fe, New Mexico 87502
Pam.Castaneda@state.nm.us

Wade Jackson
General Counsel
NM Economic Development Department
1100 S. St. Francis Drive
Santa Fe, New Mexico 87505
Wade.Jackson@state.nm.us

By: 
Allison R. Marks, Assistant General Counsel
Energy, Minerals and Natural Resources Department
Oil Conservation Division