

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

FILED

AUG 10 2009

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE APPEAL)
OF CLABAUGH RANCH, INC.)
FROM WYPDES PERMIT NO. WY0049697) Docket No. 08-3802

**CLABAUGH RANCH INC'S RESPONSE TO LANCE OIL AND GAS COMPANY'S
MOTION TO RETURN INADVERTENTLY PRODUCED ATTORNEY-CLIENT
PRIVILEGED MATERIAL**

Clabaugh Ranch, Inc. opposes Lance's motion to return the document which Lance claims is subject to the attorney-client privilege and which Lance claims was inadvertently produced in response to request for production of documents served by Clabaugh Ranch, Inc.

The document in question is an e-mail from David Stephens, the environmental manager for Anadarko Petroleum, to Jason Driscoll, an employee of CBM Associates, Inc., dated August 2, 2007. The Bates stamped numbers on that e-mail are LANCE-02614 to LANCE-02620. A copy of this document is in a sealed envelope attached to the original of this response which is filed with the Environmental Quality Council so that this document is part of the record. Copies of the sealed document are not attached to the copies of this response which have been provided to the Council for distribution to members of the Council.

A reading of the document makes it apparent why Lance is so anxious to keep this document from the Environmental Quality Council members, but there is no legitimate basis for denying the Environmental Quality Council the important information contained in this document. Lance was required to turn over the disputed document because it was never protected by the attorney-client privilege in the first place and it was deliberately, not

inadvertently, produced.

1. Lance did not claim that this document, which was provided to Clabaugh Ranch, Inc., was subject to the attorney-client privilege when Lance produced the document. The document which Lance now claims is privileged was not included on the list of privileged documents that Lance refused to produce. A copy of Lance's response to Clabaugh Ranch, Inc.'s request for production is attached. One can readily see that the document which Lance now claims is privileged has Bates stamped numbers LANCE-02614 through LANCE-02620. Lance's privilege log shows that Lance did not designate that document with those Bates stamp numbers as being privileged, and Lance did not designate the e-mail from David Stephens to Jason Driscoll dated August 2, 2007 as being privileged.

2. The reason Lance did not designate that document as being subject to the attorney-client privilege is that whoever produced the documents and created the privilege log recognized that Lance had no good faith basis for trying to claim attorney client privilege for information contained in an e-mail from an employee of Anadarko to an employee of an outside company. Lance was required to turn over the requested document because it is not protected by the attorney-client privilege. The attorney-client privilege protects only communications between an attorney and his client and then only if those communications are not disclosed to a third party. *Wyo. Stat.* §1-12-101(a); *Dobbins v. State*, 483 P.2d 255, 260 (Wyo. 1971). This e-mail is a communication between an employee of Anadarko and an employee of CBM Associates, Inc. Neither party to the communication is an attorney.

3. Even if the attorney-client privilege could somehow be stretched to include

a communication between an Anadarko employee and an employee of CBM Associates, Inc., the disclosure of the information contained in the document to an employee of CBM Associates as well as Lance's production of the document to Clabaugh Ranch, Inc. in response to the request for production of documents destroys any privilege. This document was marked as deposition exhibit number 20 in the discovery depositions taken in this case. Once the disclosure was made to the independent contractor or to Clabaugh Ranch, Inc., any attorney-client privilege was lost. In *Figuly v. City of Douglas*, 853 F. Supp. 381, 388 (D. Wyo. 1994), the court said, "Even assuming that the document is an attorney-client communication under Wyoming law, the privilege is lost if the communication itself is disclosed to a third party, **whether the disclosure is inadvertent or intentional**. See *Dobbins v. State*, 483 P.2d 255 (Wyo. 1971) (defendant's statement to his counsel which were inadvertently overheard by a third party were not privileged communications)." (Emphasis added.) Therefore, this document is admissible evidence.

Conclusion

In summary, the document in question was not identified as being privileged in the Lance's privilege log. No attorney-client privilege could have been legitimately asserted because it is a communication between an Anadarko employee and a third party contractor, and the document was disclosed to persons who are not clients of the attorney. Therefore, Lance's motion should be denied. The information contained in this document, which is harmful to Lance's contention that the effluent limits set by this permit are proper, should be considered by the Council.

Dated this 7th day of August, 2009.

Yonkee & Toner, LLP

By: Tom C. Toner

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Certificate of Service

I hereby certify that on the 7th day of August, 2009, I caused the foregoing to be served on the other parties by depositing a copy of the same in the United States mail, postage prepaid, at Sheridan, Wyoming, and duly addressed to:

John S. Burbridge
Senior Assistant Attorney General
Attorney General's Office
123 Capitol Avenue
Cheyenne, WY 82002

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**Jim Ruby, Executive Secretary
Environmental Quality Council**

Counsel for Lance Oil and Gas Company, Inc.

**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING**

**IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC. FROM
WYPDES PERMIT NO. WY0049697**

Docket No. 08-3802

**RESPONSE OF LANCE OIL AND GAS COMPANY, INC. TO CLABAUGH
RANCH INC.'S REQUEST FOR PRODUCTION OF DOCUMENTS**

Lance Oil and Gas Company, Inc. ("Lance"), by and through its counsel, Patrick J. Crank of Speight, McCue and Crank, P.C., hereby responds to Clabaugh Ranch, Inc.'s ("Clabaugh") First Requests for Production of Documents as follows:

REQUEST FOR PRODUCTION

1. All documents reflecting any communications between the Wyoming Department of Environmental Quality and Lance referring or relating to WYPDES Permit No. WY0049697 or the application for WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-02372 to 02545; LANCE-03030 to 03327; and LANCE-05403 to 05946.

2. All documents reflecting any communications between the Wyoming Department of Environmental Quality and CBM Associates, Inc. referring or relating to WYPDES Permit No. WY0049697 or the application for WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-01446 to 01857; LANCE-02036 to 02120; LANCE-02372 to 02558; and LANCE-05079 to 05402.

3. All documents reflecting any communications between CBM Associates, Inc. and Lance referring or relating to WYPDES Permit No. WY0049697 or the application for WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-00247 to 01349; LANCE-02121 to 02545; LANCE-02559 to 02827; LANCE-02836 to 03029; and LANCE-03328 to 03384 and are subject to the attached Lance Oil and Gas Company, Inc.'s Documents Privilege Log: Clabaugh Ranch, Inc.'s Request for Production of Documents.

4. Any water management plan prepared for Lance relating to any water discharged or proposed to be discharge into the Wild Horse Creek drainage.

RESPONSE: See LANCE-06127 to 06888.

5. All documents reflecting the analysis of any soil samples taken in the Wild Horse Creek drainage.

RESPONSE: See LANCE-01350 to 01445 and LANCE-06729-06888.

6. All documents reflecting the analysis of the quality of any water flowing into Wild Horse Creek.

RESPONSE: See LANCE-05947 to 06126.

7. Any photographs or video recordings showing the property of Clabaugh Ranch, Inc.

RESPONSE: See LANCE-04967 to 05078. Also see documents produced in response to Request No. 1, 2, and 3.

8. Any photographs or video recordings showing any portion of the Wild Horse Creek drainage.

RESPONSE: See LANCE-04967 to 05078. Also see documents produced in response to Request No. 1, 2, and 3.

9. Any documents reflecting the types of forage, grasses or crops grown or raised in the Wild Horse Creek drainage.

RESPONSE: See documents produced in response to Request No. 1, 2, and 3.

10. Any documents reflecting any communications with any person that the formula on page 3 of WY0049697 renewal permit of SAR <7.10 X EC - 2.48 is incorrect and all documents reflecting any communications with any person stating that the correct formula is SAR <6.75 X EC - 3.7.

RESPONSE: Lance has no discoverable documents in its possession that would be responsive to this document request. Any documents containing any information regarding this subject are protected by Attorney/Client Privilege.

11. All documents showing that effluent limits of 2560 micromhos/cm for specific conductance and 15 for sodium adsorption ratio will protect plant life on the Clabaugh Ranch and on the Wild Horse Creek drainage.

RESPONSE: See LANCE-01858 to 02035. Also see documents produced in response to Request No. 1, 2, and 3.

12. Any documents reflecting an analysis of the quantity of salts that will be deposited on the ranch of Clabaugh Ranch, Inc. as a result of the discharges allowed under WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-02828 to 02835.

13. All discharge monitoring reports filed with the Department of Environmental Quality for WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-03494 to 04720. Also see documents produced in response to Requests No. 1, 2, and 3.

14. All permits issued by the Wyoming State Engineer for each of the wells listed in Table 2 of application for WYPDES Permit No. WY0049697 and each of the reservoirs described in the application for WYPDES Permit No. WY0049697, and all communications with the Wyoming State Engineer's office relating to those permits.

RESPONSE: See LANCE-00001 to 00246.

15. All documents, including but without limitation, laboratory analytical reports, showing the quality of any water produced by any coalbed methane well listed in Table 2 of application for WYPDES Permit No. WY0049697.

RESPONSE: See LANCE-04721 to 04966. Also see documents produced in response to Requests No. 1, 2, and 3.

16. For each expert witness that you intend to call at the hearing in this case, produce all documents showing the amount paid to any expert witness or to the company that employs that expert witness.

RESPONSE: Lance has not yet determined what expert testimony may be offered during the course of the hearing in this matter. At this time, Lance cannot therefore produce any documents responsive to this request.

17. A copy of any report prepared by any witness that you intend to call as an expert witness at the hearing in this case and that relates to the issues in this case.

RESPONSE: Lance has not yet determined what expert testimony may be offered during the course of the hearing in this matter. At this time, Lance cannot therefore produce any documents responsive to this request.

18. All documents reflecting any study or analysis done of the effects of coalbed methane water on soil and water in the Wild Horse Creek drainage.

RESPONSE: See documents produced in response to Request No. 1, 2, and 3.

19. All documents reflecting any study or analysis done of the channel of Wild Horse Creek drainage, erosion along the Wild Horse Creek drainage, and capacity of the Wild Horse Creek drainage.

RESPONSE: See LANCE-06092 to 06120.

20. All documents reflecting any communications between employees of Lance or between employees of Lance and third parties that refer to the Clabaugh Ranch or to the flooding of the Clabaugh Ranch by coalbed methane discharge water.

RESPONSE: See documents produced in response to Request No. 3.

21. All documents reflecting any communications between the employees of the Wyoming Department of Environmental Quality that refer to the Clabaugh Ranch or to the flooding of the Clabaugh Ranch by coalbed methane discharge water.

RESPONSE: See documents produced in response to Request No. 3.

22. All documents that Jason Thomas referred to or relied upon to support the statement he made in his deposition taken on June 06, 2006 in Environmental Quality Council docket no. 05-3803, that the DEQ knew that there was a discharge occurring in Wild Horse Creek of approximately 1 c.f.s. and that discharge was traveling, as best the DEQ could tell, greater than (sic) 20 miles, particularly in wintertime.

RESPONSE: Lance possesses no documents that would be responsive to this request.

23. All documents reflecting the distance any discharge into Wild Horse Creek will travel and the infiltration and evaporation rate of water discharged into Wild Horse Creek.

RESPONSE: See documents produced in response to Request No. 1, 2, and 3.

24. All permits authorizing Lance to discharge water into Wild Horse Creek or any tributary of Wild Horse Creek and all applications for such permits and all correspondence between the Wyoming Department of Environmental Quality and Lance that refer to or relate to those applications.

RESPONSE: See LANCE-03385 to 03493. Also see documents produced in response to Requests No. 1, 2, and 3.

25. All documents reflecting the number of permits that permit the discharge of coalbed methane water into the Wild Horse Creek drainage, the quantity of water that is permitted to be discharged into the Wild Horse Creek drainage under those permits, the names of companies holding those permits, and any studies of analyses of the cumulative effects of those discharges on erosion, water quality or soils in the Wild Horse drainage.

RESPONSE: See documents produced in response to Requests No. 1, 2, and 3.

26. All maps showing the location of the outfalls under WYPDES Permit No. WY0049697 and the location of all wells that discharge under the permit.

RESPONSE: See documents produced in response to Request No. 1, 2, and 3.

27. All maps that depict the land owned by Clabaugh Ranch, Inc.

RESPONSE: See documents produced in response to Request No. 1, 2, and 3.

28. All documents referred to, used, or relied upon by the Wyoming Department of Environmental Quality to establish the EC and SAR effluent limits for WYPDES Permit No. WY0049697.

RESPONSE: Lance has no ability to determine what documents Wyoming Department of Environmental Quality "referred to, used, or relied upon" to establish EC and SAR effluent limits for WYPDES Permit No. WY0049697. The request to produce is accordingly vague, ambiguous, and Lance cannot produce any of the requested documents. Lance accordingly objects to this Request for Production.

29. All documents showing the results of any water quality testing at any irrigation compliance point on Wild Horse Creek.

RESPONSE: See documents produced in response to Request No. 15.

Dated this 15th day of October, 2008.

SPEIGHT, McCUE & CRANK, P.C.

By: 

Patrick J. Crank, #5-2305

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Cheyenne, WY 82003

(307) 634-2994

Fax: (307) 635-7155

ATTORNEY FOR LANCE OIL AND GAS
COMPANY, INC.

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of October, 2008, a true and correct copy of the foregoing was served upon counsel as follows:

Director, Department of Environmental	[X]	U.S. Mail
Quality	[]	Federal Express
122 West 25 th Street	[]	Fax
Herschler Building, Room 174	[]	Hand Delivered
Cheyenne, WY 82002		

John Burbridge	[X]	U.S. Mail
Wyoming Attorney General's Office	[]	Federal Express
123 Capitol Building	[]	Fax
Cheyenne, WY 82002	[]	Hand Delivered

Tom C. Toner	[X]	U.S. Mail
Yonkee & Toner, LLP	[]	Federal Express
P.O. Box 6288	[]	Fax
Sheridan, WY 82801	[]	Hand Delivered

Christin Haller

Lance Oil and Gas Company, Inc.'s Documents Privilege Log:
Clabaugh Ranch, Inc.'s Request for Production of Documents

No.	Bates	Document Type	General Subject Matter	Date	Author	Recipient	Copied To	Privilege Type*	Basis for Privilege Description
1	LANCE-01182 to 01185	Email string	Legal review of draft WYPDES permit	02/04/2008	Jason Driscoll	Tim Kalus	Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff**	A/C	Attorney Client Communication
2	LANCE-02559 to 02566	Email string	Legal review of permit renewal	08/13/2007	Tim Kalus	Jason Driscoll	Mark Rupert; Richard Waters; Dave Stephens; Matt J. Micheli; Mike Coder	A/C	Attorney Client Communication
3	LANCE-02621 to 02622	Email string	Communication regarding recent correspondence from Clabaugh/Toner	08/13/2007	Tim Kalus	Jason Driscoll	Richard Waters; Dave Stephens; "Mruppert@hollandandhart.com"; Mike Coder	A/C	Attorney Client Communication
4	LANCE-02623	Email string	Communication regarding permit modifications	05/23/2007	Dave Stephens	Jason Driscoll	Mark Rupert; Richard Waters; Dave Stephens; Brooke Bell; "MRuppert@hollandandhart.com"; "mmicheli@hollandandhart.com"	A/C	Attorney Client Communication

* By the designation "A/C", Lance Oil & Gas Company, Inc. asserts that the document is protected by the attorney-client; by the designation "W/P", Lance Oil & Gas Company, Inc asserts that the document is protected by the work product doctrine.

** The portions of the email string that contain attorney client privileged communications are contained within other emails in the email string. The attorney client information contained in the email string has not been waived by disclosure to an outside third party.

No.	Bates	Document Type	General Subject Matter	Date	Author	Recipient	Copied To	Privilege Type*	Basis for Privilege Description
5	LANCE-02625	Email string	Communication concerning responses to Clabaugh/Toner	08/13/2007	Tim Kalus	Jason Driscoll	Richard Waters; Matt J. Micheli; Mark Ruppert; Dave Stephens; Matt Coder	A/C	Attorney Client Communication
6	LANCE-02630 to 02632	Email string	Legal review of draft WYPDES permit	02/01/2008	Tim Kalus	Jason Driscoll	Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff	A/C	Attorney Client Communication
7	LANCE-02661 to 02663	Email string	Legal review of draft WYPDES permit	02/04/2008	Tim Kalus	Jason Driscoll	Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff	A/C	Attorney Client Communication

* By the designation "A/C", Lance Oil & Gas Company, Inc. asserts that the document is protected by the attorney-client; by the designation "W/P", Lance Oil & Gas Company, Inc asserts that the document is protected by the work product doctrine.

** The portions of the email string that contain attorney client privileged communications are contained within other emails in the email string. The attorney client information contained in the email string has not been waived by disclosure to an outside third party.