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# Environmental Consultant Documents: Federal District Court Addresses Potential Application of Attorney- Client Privilege/Work Product Doctrine

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The United States District Court (Western District of Oklahoma) addressed in a January 11th Order the potential application of the attorney-client privilege and work product doctrine to certain documents generated by environmental consultants. See *Albin Family Revocable Living Trust, et al. v. Halliburton Energy Services, Inc.*, 2018 WL 387805.

Albin Family Revocable Living Trust, et al. (“Plaintiffs”) requested that the Court enter an Order finding that Halliburton Energy Services, Inc. (“Defendant”):

- Erred and misapplied the attorney-client privilege and work product doctrine for all documents on its initial Rule 26 privilege log (“First Log”)
- Produce all such documents on the First Log with the exception of those documents for which attorney-client privilege is asserted and the only authors and recipients identified are Halliburton employees and a Halliburton in-house or retained counsel

The Court states that Plaintiffs asserted that Defendant asserted attorney-client or work product protection for 1,022 documents of which less than 20 involved communications solely between Defendant and its counsel. It also notes that Defendant asserts:

. . . either attorney-client or work product protection for hundreds of documents that its independent contractor, SAIC Energy, Environmental & Infrastructure, LLC, formerly known as the Benham Companies, LLC (collectively “SAIC”), drafted and received internally.

Plaintiffs contend:

- Defendant incorrectly utilized Rule 26 to protect documents that SAIC drafted or possessed and that such documents pertain to Defendant’s efforts to address its contamination of the local aquifer (i.e., work done in the ordinary course of business)
- Defendant’s regulatory compliance with Oklahoma law and its subsequent compliance with its Consent Order agreement with the Oklahoma Department of Environmental Quality (“ODEQ”) are regulatory, business requirements unrelated to litigation

An additional Plaintiff’s contention is that the documents do not reflect Defendant’s counsel’s legal strategies.

Defendant responded that the challenged documents are protected by:

- The work product doctrine
- The attorney-client privilege

The argument includes a statement that:

. . . after it discovered the potential for offsite perchlorate contamination, the site investigation became the responsibility of Defendant’s counsel, who advised Defendant in connection with adversarial regulatory proceedings with the ODEQ and in anticipation of third-party litigation. Defendant asserts that the documents at issue in the First Log were prepared by or sent to SAIC, an environmental consulting firm that was assisting counsel in advising Defendant how to deal with ODEQ in these proceedings, and that decisions about how Defendant should proceed in its dealings with ODEQ have been made with the guidance and advice of Defendant’s in-house and outside counsel since May 2011.

As a result, Defendant contended that the documents generated by the environmental consultants (including SAIC) relating to work performed at the direction of counsel in connection with the defense of the ODEQ regulatory proceeding under the Consent Order are “clearly work product and privileged.”

The Court’s Order addresses both claims of work product protection and attorney-client privilege. It outlines the standards for both rules/doctrines.

The Court finds that Defendant did not establish that the documents at issue (SAIC documents) were prepared in anticipation of litigation. Therefore, they are found to not be protected by the work-product protection.

The Court’s findings include a determination that Defendant did not establish that the ODEQ proceedings for which the documents were prepared were of an adversarial nature. The ODEQ proceedings are noted to include:

. . . defendant submitting a self-disclosure letter, the negotiation and execution of a Consent Order between ODEQ and Defendant to investigate and remediate potential environmental impacts from the site, and Defendant’s investigation and remediation of the site under the terms of the Consent Order.

The Court determines that the proceedings “have none of the hallmarks of adversarial proceedings but more in the nature of *ex parte* proceedings” and finds the argument that because ODEQ has the ability to impose monetary sanctions and to enforce the Consent Order in a state District Court is too broad.

As to the attorney-client privilege, the Court recognizes that it can apply to communications between an environmental consultant and an attorney when the communication is made to assist the attorney in giving legal advice to the client. See *Ford Motor Co. v. Mich. Consol. Gas Co.*, 2012 WL 5435184 (September 27, 2013). However, the Court makes a finding that the attorney-client privilege would apply to any communications between Defendant’s counsel (whether in-house counsel or outside counsel) and SAIC, their environmental consultant, if the communication is made to assist counsel in giving legal advice to Defendant and the confidential nature of the communication has been maintained. It finds that sufficient evidence (from affidavits of its counsel) indicates that counsel retained SAIC to consult with and assist in order to render advice to Defendant.

[A copy of the Order can be found here.](#)