

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the General Investigation to) Docket No: 18-CONS-3224-CINV
Examine the Legal Issues Pertaining to the Notice)
Requirements for Applications, Filed Between) CONSERVATION DIVISION
October 2008 and the Present, Seeking)
Underground Injection of Salt Water Pursuant to) License No: N/A
K.A.R. 82-3-402.)

FINAL ORDER

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

Background:

1. On November 21, 2017, the Commission issued an *Order Opening General Investigation*. The Order noted that “[o]n October 24, 2008, K.A.R. 82-3-135a was amended to extend the protest period for underground injection well applications from 15 to 30 days, as required by 40 C.F.R. § 124.10(b).”¹ The Order also stated that a Kansas citizen, Cindy Hoedel, had brought to the Commission’s attention, via email, “a number of underground injection well applications where the applicants’ publication notice provided a 15-day period in which to protest the application.”² In response to Ms. Hoedel’s emails, the Commission initiated this general investigation.³

2. The Commission’s stated purposes for opening this general investigation were: “(1) to determine the accuracy of the facts alleged regarding publication notice of underground injection

¹ *Order Opening General Investigation*, ¶ 1 (Nov. 21, 2017).

² *Order Opening General Investigation*, ¶ 2.

³ *Order Opening General Investigation*, ¶ 5.

well applications; and (2) if the allegations prove to be accurate, to address the legal questions pertaining to publication notice of underground injection well applications and determine the appropriate course of action.”⁴ The Commission further stated: “The sole purpose of this docket is to create a record on the legal questions pertaining to publication notice for the underground injection well applications described above. The Commission is bound by state law, and thus, seeks input on the understanding of that law as it relates to this issue.”⁵ The Commission directed Conservation Staff (Staff) to file a Report and Recommendation providing certain information on previously filed underground injection well applications (subject applications).⁶

3. The Commission provided a procedure for affected operators to “file legal briefs recommending to the Commission an appropriate course of action for handling approved underground injection well applications, going back to October 2008, whose publication notices communicated an allotment of 15 days to object to or protest the application.”⁷ The Commission provided the same procedure for interested parties who were granted intervention in this proceeding.⁸ The Commission also encouraged members of the general public to submit public comments concerning this investigation.⁹ Upon close of the briefing period, Staff was given an opportunity to file its own brief recommending specific Commission action.¹⁰

4. On February 19, 2018, Staff filed its Report and Recommendation (R&R), “provid[ing] a brief history of injection application permitting and attach[ing] the data requested by the Commission.”¹¹ Staff’s R&R is incorporated herein by reference and adopted as part of this Order.

⁴ *Order Opening General Investigation*, ¶ 6.

⁵ *Order Opening General Investigation*, ¶ 16.

⁶ *Order Opening General Investigation*, ¶¶ 7-8.

⁷ *Order Opening General Investigation*, ¶ 9.

⁸ *Order Opening General Investigation*, ¶ 11.

⁹ *Order Opening General Investigation*, ¶ 13.

¹⁰ *Order Opening General Investigation*, ¶ 14.

¹¹ Notice of Filing of Staff’s Report and Recommendation, ¶ 3 (Feb. 19, 2018) (R&R).

5. On March 7, 2018, Staff filed a Notice and Explanation of Service, wherein Staff noted that “subsequent to the issuance of some of the injection permits, certain leases and wells have changed names, have been plugged, and/or have changed operatorship.”¹² Staff attached an Exhibit B to its Notice and Explanation of Service, which it asserted is “identical to Staff’s Exhibit A submitted February 19, 2018, with two distinctions: (1) highlighted in gray is any permit in which Staff has noted a change in operatorship or other pertinent data; and (2) removal of any application in which a permit was not issued.”¹³ Staff stated its intentions with regard to service of its R&R and its Notice and Explanation of Service,¹⁴ and “renew[ed] its February 19, 2018, suggestion that the Commission-ordered deadlines for entries of appearance, petitions for intervention, and submission of briefs be tolled to commence with the filing of” Staff’s Notice and Explanation of Service.¹⁵

6. Between March 8, 2018 and April 23, 2018, various entries of appearance, petitions for intervention, and legal briefs were filed. On April 3, 2018, intervention was granted to Eastern Kansas Oil & Gas Association (EKOGA), Stroke of Luck Energy & Exploration, LLC (SOLEE), and CMX, Inc. (CMX).¹⁶ On April 26, 2018, intervention was granted to the Kansas Independent Oil & Gas Association.¹⁷ On June 14, 2018, intervention was granted to Sierra Club, Douglas County, Kansas, Kathy Dowell, Tracy Brock, Larry Howard, Amy Adamson and Sarah Uher (Sierra Club or Petitioners).¹⁸

7. On March 27, 2018, the Commission issued an *Order Clarifying Deadlines*, setting April 23, 2018, as the deadline for affected operators to enter appearances and file responsive legal

¹² Notice and Explanation of Service, ¶ 4 (Mar. 7, 2018).

¹³ Notice and Explanation of Service, ¶ 4.

¹⁴ Notice and Explanation of Service, ¶¶ 5-6.

¹⁵ Notice and Explanation of Service, ¶ 7.

¹⁶ *Order Granting Intervention to EKOGA, Stroke of Luck Energy & Exploration, LLC, and CMX, Inc.*, Ordering Clause A (Apr. 3, 2018).

¹⁷ *Order Granting Intervention to KIOGA*, Ordering Clause A (Apr. 26, 2018).

¹⁸ *Order on Sierra Club, et al’s Petition to Intervene and on Motion to File Out of Time, Instanter*, Ordering Clause A (June 14, 2018).

briefs, for interested parties who were granted intervention to file responsive legal briefs, and for the general public to submit public comments.¹⁹

8. All responsive legal briefs, except for Staff's brief, were filed by April 23, 2018. The public comments, including comments by Ms. Hoedel,²⁰ were filed by the Director of the Commission's Division of Public Affairs and Consumer Protection, Linda Berry, on April 26, 2018.

9. On June 22, 2018, Staff filed its Brief and Recommendation.

10. On August 29, 2018, Sierra Club filed a Motion for Official Notice of Published Notices, asking the Commission to take official notice of two publication notices by CK Oil "mistakenly indicat[ing] that protests must be filed within fifteen days of the published notice rather than thirty days as prescribed by K.A.R. 82-3-135a(e)."²¹

Discussion:

11. Staff's February 19, 2018, R&R noted the following historical background to the Commission's Underground Injection Control (UIC) Program:

On February 8, 1984 the Kansas Corporation Commission (KCC or Commission) was delegated the Underground Injection Control (UIC) Program from the Environmental Protection Agency to implement the Class II well program within Kansas under Section 1425 of the Safe Drinking Water Act of 1974. From February 1984 until April 2002, the Commission issued injection authority through orders or dockets. In April 2002, the Commission approved regulations delegating the authority to issue injection permits to staff. In July 2002, the Commission issued a Declaratory Order stating "[t]he amendments to the injection well regulations were intended to allow the Conservation Division to take all actions with regard to injection wells without a Commission Order, except for contested matters." Since 2002, the routine processing of injection applications has been the responsibility of staff. Only contested matters are assigned a docket number and scheduled for an evidentiary hearing before the Commission. This results in only a small number of injection permits being issued by the Commission through an evidentiary hearing.²²

¹⁹ *Order Clarifying Deadlines*, Ordering Clause A (Mar. 27, 2018).

²⁰ Public Comment of Cindy Hoedel + 21 Kansas State Representative and Senators + 79 Kansas Citizens, ¶ 3 (Apr. 23, 2018), p. 44 of 70 within "Public Comments Filed by Linda Berry of Public Affairs and Consumer Protection," filed on April 26, 2018.

²¹ Motion for Official Notice of Published Notices (Aug. 29, 2018).

²² R&R, p. 1 (internal footnote omitted).

12. Staff further noted that K.A.R. 82-3-135a(e), the regulation at issue in this investigation, “was amended effective October 24, 2008, to change the protest period for applications filed under K.A.R. 82-3-400 through 82-3-412 and K.A.R. 82-3-600 through 82-3-607, from 15 days to 30 days.”²³

13. Staff continued:

Pursuant to the Order Opening General Investigation (Order) in this docket, staff has researched the more than 4,300 new injection permits and amendments filed since October of 2008. To comply with Paragraph 8(a) of the Order, staff has provided the listing attached [to the R&R] as Exhibit A. Exhibit A is separated into portions. The first contains all of the authorized injection permits filed since October of 2008 whose Notice of Applications were published with a 15-day protest period. This listing contains 1,007 applications for injection authority at 2,111 wells. To comply with Paragraph 8(b) of the Order, staff has provided the relevant docket number if the Commission approved the permit as a result of an evidentiary hearing. The second portion of the list is those applications which were dismissed, withdrawn, or denied.²⁴

14. After a careful review of Staff’s Exhibit A and Exhibit B, as well as Ms. Hoedel’s public comments stating that “Staff’s report contains 24 instances in which KCC issued a permit less than 30 days from publication of the application notice,”²⁵ the Commission cannot state the precise number of permits that were issued on less than 30 days’ publication notice. The record demonstrates that somewhere between 24 and 29 of the 1,007 applications on Staff’s list were approved in less than 30 days from the date of the publication notice of the application.²⁶ Staff recommended that its listing in the R&R be considered “as complete of a record of all applications filed during the requested timeframe as possible.”²⁷

²³ R&R, p. 2.

²⁴ R&R, p. 2.

²⁵ See Public Comment of Cindy Hoedel + 21 Kansas State Representative and Senators + 79 Kansas Citizens, ¶ 3.

²⁶ The number 29 is based on the Commission’s review of Staff’s Exhibits A and B.

²⁷ R&R, p. 2.

15. Although Staff’s Notice and Explanation of Service stated that Staff’s Exhibit B is “identical to Staff’s Exhibit A submitted February 19, 2018,” with two exceptions,²⁸ a careful review of both Exhibits shows that, while they are substantially similar, they are not identical, the two exceptions notwithstanding. However, any discrepancies between the two Exhibits do not affect the salient legal issues presented in this docket.

16. Of the numerous briefs submitted, only the Sierra Club brief advocated revoking improperly-noticed underground injection (UI) well permits (i.e., subject permits). The Sierra Club stated that “[t]he cumulative effects of what appears to be systemic noncompliance by UI applicants and Conservation Division Staff with notice requirements bear on the perception and willingness of the UI regulated community and KCC Staff to conform their practices to meet applicable regulatory requirements.”²⁹ The Sierra Club also argued that “individual Kansans, otherwise eligible to protest the 2111 UI wells permitted under defective published notices, have lost, absent remedial actions, their procedural due process rights and opportunities to engage the public participation process for which notice requirements are crucial.”³⁰

17. The Sierra Club argued the improper notices violated K.A.R. 82-3-135a(e) and that the regulation “should not be read narrowly or in an overly legalistic manner.”³¹ The Sierra Club further argued that the public is entitled to rely on the information contained in official notice, and even if the erroneous information included in the defective notices was gratuitous, “[a]llowing a regulatory pass on these improper notices infers that the filings made by UI applicants and permit holders may include materially inaccurate information with no regulatory consequence.”³²

²⁸ Notice and Explanation of Service, ¶ 4.

²⁹ Petition of Sierra Club, Douglas County, Kansas, Kathy Dowell, Tracy Brock, Larry Howard, Amy Adamson and Sarah Uher for Intervention or Alternatively, Petition for Designation as Interested Parties and Petitioners’ Merits Brief, ¶ 3 (Apr. 23, 2018) (Sierra Club Merits Brief).

³⁰ Sierra Club Merits Brief, ¶ 3.

³¹ Sierra Club Merits Brief, ¶ 22.

³² Sierra Club Merits Brief, ¶ 22.

18. The Sierra Club suggested that because some of the improperly-noticed UI applications drew protestants, other individuals would have been activated to become protestants had they been properly noticed.³³ Moreover, according to the Sierra Club, failure to afford individuals due process pertaining to Commission judgments renders such judgments void.³⁴ Furthermore, the Sierra Club asserted that “[t]here are other defects in the notices that are a function of the failure of the KCC to adopt regulations consistent with federal requirements.”³⁵

19. The Sierra Club asserted that the failure to adhere to the notice requirements of K.A.R. 82-3-402 violated its (i.e., the Petitioners) due process rights.³⁶ The Sierra Club also asserted that UI permit holders do not have a property right in their permits where they failed to follow notice requirements.³⁷ Moreover, according to the Sierra Club, the Commission may revoke improperly-noticed UI permits even though the time for appealing the grant of such permits under the Kansas Judicial Review Act (KJRA) has expired.³⁸ In addition, the Sierra Club pointed out that permits may be revoked for just cause pursuant to K.A.R. 82-3-408(a), and “[t]here is just cause for revocation of the permits at issue . . . based on the misrepresentations that regulatory requirements were met and the frequency of violations of procedural due process over the span of ten years related to the defective published notices.”³⁹

20. The Sierra Club recommended the Commission revoke all improperly-noticed UI permits since October 2008 pursuant to K.A.R. 82-3-408(a)⁴⁰ and align the Commission’s notice requirements with those specified in 40 C.F.R. § 124.⁴¹

³³ Sierra Club Merits Brief, ¶ 23.

³⁴ Sierra Club Merits Brief, ¶ 24.

³⁵ Sierra Club Merits Brief, ¶ 25.

³⁶ Sierra Club Merits Brief, p. 11.

³⁷ Sierra Club Merits Brief, ¶ 28.

³⁸ Sierra Club Merits Brief, ¶ 29.

³⁹ Sierra Club Merits Brief, ¶ 30.

⁴⁰ Sierra Club Merits Brief, ¶ 31.

⁴¹ Sierra Club Merits Brief, ¶ 32.

21. The public comments filed in the docket generally agreed with the Sierra Club's recommendation to revoke the improperly-noticed injection well permits and to require the operators to re-apply for their permits.

22. The legal briefs submitted by affected operators and oil and gas associations were generally allied in asserting that the Commission's approval of the improperly-noticed injection well applications amounts to harmless error that did not violate due process⁴² and does not nullify the validity of the permits.⁴³

Findings and Conclusions:

23. Pursuant to K.S.A. 74-623, the Commission has exclusive jurisdiction and authority to regulate oil and gas activities in Kansas. The Environmental Protection Agency (EPA) "determined that the Kansas UIC program for Class II injection wells meets the requirements of Sections 1422 and 1425 of the SDWA," and thereby, "approve[d] it."⁴⁴ Moreover, K.S.A. 55-901(a) allows for approval of an injection well "if the owner or operator of such well makes a written application to the state corporation commission for authority to do so, and written approval has been granted to the owner or operator after investigation by the state corporation commission." Thus, the Commission finds it had proper jurisdiction to grant the subject permits in this case.

24. The Commission finds that its jurisdiction and judgment in granting the subject permits did not become void for lack of an accurate statement of the protest period in the publication notice attending to the permit applications.⁴⁵ According to the Kansas Supreme Court, "[w]here

⁴² See e.g. Brief by RJ Energy, LLC, p. 7 (Apr. 23, 2018).

⁴³ See e.g. Brief by Pintail Petroleum, Ltd., p. 6 (Apr. 23, 2018).

⁴⁴ Federal Register, v. 49, No. 27 at p. 4736 (49 FR 4736) (Feb. 8, 1984).

⁴⁵ See *Foster v. Motley*, 114 Kan. 812, 220 P. 1036, 1038 (1923); *Young v. Newbold*, 114 Kan. 86, 217 P. 269, 270 (1923); *Allbritten v. National Acceptance Co. of Chicago*, 183 Kan. 5, 11 (1958); *Universal Modular Structures, Inc. v. Forrest*, 11 Kan. App. 2d 298, 300 (1986).

there is some notice, although defective, the judgment is not void. If there is notice, although irregular and defective, there is jurisdiction.”⁴⁶

25. EKOGA accurately summarized the state of the law on this point:

The law in this area is clear. Although a misstatement of the answer period in a published notice is a ‘palpable irregularity’ the Kansas Supreme Court has concluded ‘it cannot be regarded as a fatal defect.’ *Dumback v. Tarkowski*, 195 Kan. 26, 28 (1965). ‘The defect did not go to the jurisdiction of the court over the subject matter, or render the notice of hearing void.’ *Id.* Regarding the Affected Dockets, the Commission had jurisdiction over the subject matter and the parties and did not act in a manner inconsistent with due process. Therefore, the permits issued in the Affected Dockets are valid and not subject to collateral attack.

The issue presented by the Affected Dockets is actually much easier to resolve because the publication notice in K.A.R. 82-3-135a is not necessary to vest the Commission with personal jurisdiction over the parties – it merely refers to a public comment period to foster public participation. The notices evaluated by the Kansas Supreme Court in the cited cases were essential to establishing personal jurisdiction over the party defendants, and the Court still held a misstatement of the answer period in the notice did not impact the resulting judgment.⁴⁷

26. The Commission rejects Sierra Club’s contention that the Commission acted in a manner inconsistent with due process in granting the subject permits.⁴⁸ In this case, there is no question of an individual’s “right to protest.”⁴⁹ However, Sierra Club’s analysis of the *Lujan* and *Veneman* cases⁵⁰ does not demonstrate that any individual was denied due process regarding the subject permits. While the Sierra Club correctly noted that a due process violation occurs where an individual is denied a fundamental life, liberty, or property interest without “some process, such as notice and the opportunity to be heard,”⁵¹ it produced no evidence that any individual was denied a life or liberty interest by the grant of the improperly-noticed applications. Therefore, in order for a

⁴⁶ *Sharp v. McColm*, 79 Kan. 772, 101 P. 659, 661 (1909). The Court has held otherwise specifically in reference to the enactment of zoning ordinances. See e.g. *Genesis Health Club, Inc. v. City of Wichita*, 285 Kan. 1021, 1033-34 (2008).

⁴⁷ Brief by the Eastern Kansas Oil and Gas Association, pp. 3-4 (Apr. 23, 2018) (EKOGA Brief).

⁴⁸ See Sierra Club Merits Brief, ¶¶ 24, 26-27.

⁴⁹ Sierra Club Merits Brief, ¶ 27.

⁵⁰ See Sierra Club Merits Brief, ¶ 27.

⁵¹ Sierra Club Merits Brief, ¶ 26.

denial of due process claim to stand, there must be a showing that an individual was denied a property interest.

27. According to the Kansas Supreme Court, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁵² No evidence has been adduced that an individual had a legitimate claim to a protest of one of the subject applications which was then denied to that individual because of the improper notice. Sierra Club’s suggestion that, because “some defective UI application notices drew protestants, . . . proper notices would have activated other individuals to become protestants”⁵³ is wholly speculative, and even if proper notices would have drawn protests from other individuals, this provides no basis for finding that such other individuals would have had “a legitimate claim of entitlement to” protestant status in such dockets. The Commission is persuaded by Staff’s analysis that for an individual to show a due process violation, “such a person would have had to (1) see such notice within 30 days of its publication; (2) want to file an objection or protest; and (3) decide not to file an object[ion] or protest specifically because such person labored under the mistaken belief that one only had 15 days, rather than 30 days, to do so. . . . Without any evidence of any person fitting the above fact pattern, there is no evidence . . . of any person’s rights being negatively affected.”⁵⁴

28. Even had an individual asserted that a property interest was denied him or her, notice was not withheld from such an individual altogether.⁵⁵ There has been no allegation that any operator failed to make publication notice at all, and as the Commission’s *Order Opening General Investigation* made clear, “[t]he **sole purpose of this docket** is to create a record on the legal

⁵² *Stoldt v. City of Toronto*, 234 Kan. 957, 964 (1984) (internal quotations omitted).

⁵³ Sierra Club Merits Brief, ¶ 23.

⁵⁴ Staff’s Brief and Recommendation, ¶¶ 10-11.

⁵⁵ See Brief by Kansas Independent Oil and Gas Association, p. 2 (Apr. 23, 2018).

questions pertaining to *publication notice* for the underground injection well applications described above,” i.e., the subject applications.⁵⁶ As noted above, defective notice is not tantamount to no notice. Further, as numerous entities pointed out:

Notwithstanding the error concerning protest dates, proper notice was given by mailing and publication in the manner set forth by K.A.R. 82-3-135a. This notice placed all interested persons on notice that an injection well application was pending and that they had the right to object or protest the application. Any interested party could have easily objected to the time period fixed by the publication notice for filing protests, or moved to file a protest out of time.⁵⁷

Thus, the Commission finds there was no due process violation in granting the subject permits, and therefore, no remedial actions are necessary.

29. Regarding any subject wells that were permitted prior to the expiration of the 30-day protest period, the Commission finds that somewhere between 24 and 29 permits were granted under such circumstances, which accounts for less than 3% of the 1,007 applications at issue in this docket. The Commission concedes this error. However, the Commission finds 3% to be *de minimis*, particularly in light of the fact that the record contains no evidence that any individual with a substantial interest⁵⁸ in such specific permits has had his or her rights negatively affected. Further, the Kansas Supreme Court has ruled: “In this state error does not raise the presumption of prejudice. Experience has led to the classification of errors into those termed ‘prejudicial’ and *that greater legion denominated ‘harmless.’* For the former only can reversal be ordered.”⁵⁹ The Court has also ruled that “error which does not prejudice the substantial rights of a party . . . affords no basis for a reversal of a judgment and must be disregarded.”⁶⁰ Again, the Commission finds no record evidence

⁵⁶ *Order Opening General Investigation*, ¶ 16.

⁵⁷ EKOGA Brief, p. 7. See e.g. Brief by Triple T Oil, LLC, p. 10 (Apr. 13, 2018); Brief by Dinnis and Patricia Crownover, p. 9 (Apr. 19, 2018); Brief by Kansas Resource Exploration and Development LLC, p. 9 (Apr. 20, 2018); Brief of Lario Oil & Gas Co., Larson Engineering, Inc. and Charter Energy, Inc., ¶¶ 15-16 (Apr. 20, 2018).

⁵⁸ See K.A.R. 82-3-135b(a).

⁵⁹ *Home Ins. Co. v. Atchison, T. & S. F. Ry. Co.*, 189 Kan. 316, 320 (1962) (internal quotations omitted) (emphasis added).

⁶⁰ *Hagedorn by Hagedorn v. Stormont-Vail Reg'l Med. Ctr.*, 238 Kan. 691, 701 (1986).

that the substantial rights of any party have been prejudiced by the granting of any of the subject permits.⁶¹ Therefore, the Commission finds that granting of less than 3% of the total applications at issue prior to the expiration of the 30-day protest period is harmless error,⁶² and such permits are unsusceptible to collateral attack.⁶³

30. While the Commission acknowledges that the exclusive means of reviewing agency action is the KJRA,⁶⁴ the Commission need not consider the argument that the time for seeking judicial review of any subject permit is expired.⁶⁵ K.A.R. 82-3-408(a) gives the Commission authority to revoke an injection well permit for just cause, but the Commission finds no just cause to revoke any of the subject permits. The Commission rejects Sierra Club's argument that just cause for revocation exists due to "misrepresentations that regulatory requirements were met and the frequency of violations of procedural due process over the span of ten years."⁶⁶ The Commission has already found there were no violations of procedural due process, and the misrepresentations, which have not been shown to have negatively affected anyone's rights, do not rise to the level of "just cause" for revocation. The injection well permitting process exists to ensure that oil, gas or fresh and usable water resources are protected.⁶⁷ In this case, there has been no showing that these are threatened. Therefore, the Commission finds no grounds to revoke any of the subject permits.

31. The Sierra Club complained that, barring revocation, the Operators holding the subject permits will be "allow[ed] a regulatory pass on these improper notices," giving the impression that "permit holders may include materially inaccurate information with no regulatory

⁶¹ See Brief of Lario Oil & Gas Co., Larson Engineering, Inc. and Charter Energy, Inc., ¶ 18 (stating that "[s]ince the clerical error at issue did not affect anyone's substantive rights or result in any prejudice, it was harmless and should be disregarded by the Commission").

⁶² See *Farmland Indus., Inc. v. State Corp. Comm'n of Kansas*, 24 Kan. App. 2d 172, 176 (1997).

⁶³ See *Mitchell v. Aten*, 37 Kan. 33, 14 P. 497, 498 (1887).

⁶⁴ K.S.A. 77-601 *et seq.*; K.S.A. 55-606; *Schall v. Wichita State Univ.*, 269 Kan. 456, 482 (2000).

⁶⁵ See Brief by Pintail Petroleum, Ltd., p. 4.

⁶⁶ Sierra Club Merits Brief, ¶ 30.

⁶⁷ See K.A.R. 82-3-402(c).

consequence.”⁶⁸ This argument fails because: (1) the Conservation regulations do not require publication notice to say anything about a protest period or the number of days in such period; and (2) the Conservation regulations do not provide any particular penalty should the protest period not be stated, or be incorrectly stated, in the publication notice.⁶⁹ K.A.R. 82-3-135a(d) requires that “[n]otice of the application shall be published in at least one issue of the official county newspaper of each county in which the lands affected by the application are located.” It provides no requirements as to the content of such published notice, other than notice of the application itself. K.A.R. 82-3-135a(e) states: “Once notice of the application is published pursuant to subsection (d), the application shall be held in abeyance for . . . 30 days for environmental matters, pending the filing of any protest pursuant to K.A.R. 82-3-135b.” Publication notice is to be made “pursuant to subsection (d),” which again, provides no specific content requirements. The statement that “the application shall be held in abeyance for . . . 30 days” does not, on any reading, mean or imply that the published notice must state that a person wishing to protest the application has 30 days to do so. Indeed, the regulation does not require any specific content that must be included in the published notice other than “notice of the application,” which does not mandate that an operator publish notice of any protest period. Thus, the Commission finds that no explicit regulatory requirement regarding publication notice was violated,⁷⁰ and therefore, no action against subject permit holders is warranted.⁷¹

32. In addition, the Commission finds that all individuals who received publication notice of the subject applications, notwithstanding the inaccurate protest information contained

⁶⁸ Sierra Club Merits Brief, ¶ 22.

⁶⁹ See Staff’s Brief and Recommendation, ¶¶ 6-7.

⁷⁰ Thus, there is no violation of K.S.A. 55-154.

⁷¹ See Staff’s Brief and Recommendation, ¶ 7.

therein, were responsible to know the law on protest periods,⁷² namely, that they had 30 days to protest the specific application. Thus, any ostensible protestants were required to govern themselves according to the law on protest periods,⁷³ not according to the protest information gratuitously contained in the publication notice.

33. The Commission also finds compelling its “overriding obligation . . . to prevent waste.”⁷⁴ Indeed, the Commission’s “dominant purpose” and “foremost function” is the prevention of waste.⁷⁵ The Sierra Club ignored this central fact. The Commission finds that revocation of the subject permits without just cause would constitute waste, in direct contravention of the Commission’s overriding waste prevention duty. Thus, the Commission will not take such action.

34. Regarding Sierra Club’s Motion for Official Notice of Published Notices, Sierra Club cites to K.S.A. 77-524(f)(2) as a basis for the Commission to take “official notice” of two published notices by CK Oil.⁷⁶ K.S.A. 77-524(f)(2) gives the Commission discretion to take official notice of “the record of other proceedings before the state agency.” At this time, the Commission finds no “record of . . . proceedings before the state agency” with respect to the CK Oil publication notices because there are currently no Commission docket numbers associated with these notices. Thus, there is no docket of which to take notice. Moreover, the Commission finds CK Oil’s published notices are irrelevant to the instant investigation because the Commission has taken no action on CK Oil’s published notices, much less granted any permit sought by CK Oil connected to the published notices. Thus, the Commission denies Sierra Club’s Motion for Official Notice of Published Notices.

⁷² See *Atkins v. Parker*, 472 U.S. 115, 145 (1985); *Double M Const., Inc. v. State Corp. Comm’n*, 288 Kan. 268, 276 (2009).

⁷³ See *Double M Const., Inc.*, 288 Kan. at 276.

⁷⁴ *Trees Oil Co. v. State Corp. Comm’n*, 279 Kan. 209, 231 (2005).

⁷⁵ *Mobil Expl. & Producing U.S. Inc. v. State Corp. Comm’n of State of Kan.*, 258 Kan. 796, 807 (1995).

⁷⁶ Motion for Official Notice of Published Notices, p. 1.

35. Regarding Sierra Club's claim of "other defects in the notices that are a function of the failure of the KCC to adopt regulations consistent with federal requirements,"⁷⁷ the Commission finds, to borrow Sierra Club's own words, "that issues related to the legality of UIC permits on grounds other than the propriety of published notices are outside the purview of this docket,"⁷⁸ and therefore, denies Sierra Club's request to expand the scope of this docket.⁷⁹

Conclusion:

36. The Commission opened this general investigation to understand the facts regarding alleged deficiencies in publication notices of injection well applications going back to October 2008 and to address the relevant legal questions pertaining to such publication notices. These twin objectives have now been accomplished. Based on its review of the briefs and comments filed in this docket, the Commission finds no basis for revoking any of the subject permits. The Commission had proper jurisdiction to grant the subject permits. No individual has been denied due process by the granting of the subject permits. The error of granting less than 3% of the subject applications prior to the expiration of the 30-day protest period is harmless error, and revocation of the subject permits where, as here, there is no just cause to do so would nullify the Commission's overriding duty to prevent waste. Therefore, any collateral attack on the subject permits based on improper notice must fail.

37. Further, the Commission ratifies the subject permits in this docket, such that the Commission will not consider any future collateral attacks on the validity of the subject permits based on a theory of deficient or improper publication notice.

⁷⁷ Sierra Club Merits Brief, ¶ 25.

⁷⁸ Sierra Club Merits Brief, p. 11, fn. 17.

⁷⁹ Sierra Club Merits Brief, p. 11, fn. 17.

38. In addition, by this Order, all Kansas oil and gas operators are clearly notified that publication notices stating a fifteen (15) day protest period for applications on “environmental matters”⁸⁰ will be rejected.

THEREFORE, THE COMMISSION ORDERS:

A. No action shall be taken by the Commission against the subject permits in this docket, and all subject permits shall remain valid.

B. The validity of the subject permits in this docket is ratified such that the subject permits are not open to future challenge on the question of publication notice.

C. Any party may file and serve a petition for reconsideration pursuant to the requirements and time limits established by K.S.A. 77-529(a)(1).⁸¹

D. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner (recused)⁸²

Dated: 09/06/2018



Lynn M. Retz
Secretary to the Commission

Mailed Date: _____

MJD

⁸⁰ See K.A.R. 82-3-135a(c),(e).

⁸¹ K.S.A. 55-162; K.S.A. 55-606; K.S.A. 55-707; K.S.A. 77-503(c); K.S.A. 77-531(b).

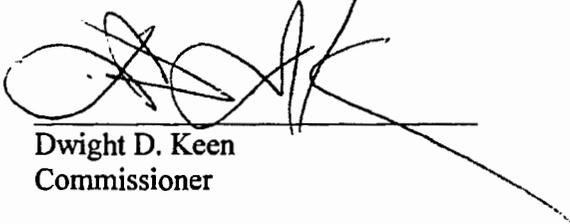
⁸² See Appendix A - Explanation of Recusal.

Explanation of Recusal

At the time of my appointment and confirmation as a KCC Commissioner, I made certain ethical commitments for honorable state service to the Governor, to the Senate Utilities Committee (as the confirmation vetting authority), to this agency and to the people of Kansas. These commitments have been publicly stated on several occasions. One such commitment is “(t)o recuse as a Commissioner from participating in rendering any judgment or decision in a quasi-judicial proceeding before the KCC where the circumstances present a risk of bias regarding a specific party to the proceeding that precludes the apolitical rendition of impartial justice.”

This Docket was initiated, open and ongoing prior to my becoming a KCC Commissioner. Although this is a general investigation Docket, the outcome of this matter does not affect every Kansas licensed oil and gas operator. However, this Docket specifically does affect approximately 317 operators of the roughly 2,225 current Kansas licensed operators of all types. Some of the licensed operators affected by the outcome of this Docket may fall within the purview of my recusal commitment noted above. Accordingly, to eliminate the possibility of any potential ethical conflict or even the perception or appearance of a conflict, it is necessary for me to invoke my recusal commitment and recuse from participating in this Docket.

The circumstances of this Docket should be distinguished from those prospective KCC docketed matters that will generally affect all Kansas licensed oil and gas operators alike or that exclusively affect operators with whom I have no conflict. In either of these circumstances, I do not intend to recuse.



Dwight D. Keen
Commissioner

CERTIFICATE OF SERVICE

18-CONS-3224-CINV

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 09/06/2018.

KEITH A. BROCK, ATTORNEY
ANDERSON & BYRD, L.L.P.
216 S HICKORY
PO BOX 17
OTTAWA, KS 66067
Fax: 785-242-1279
kbrock@andersonbyrd.com

DAVID E. PIERCE
DAVID E. PIERCE
4133 NW Brickyard Road
Topeka, KS 66618
david.pierce@washburn.edu

JOSEPH SCHREMMER, ATTORNEY
DEPEW GILLEN RATHBUN & MCINTERR. LC
8301 EAST 21ST ST. NORTH, SUITE 450
WICHITA, KS 67206-2936
joe@depewgillen.com

CHARLES C STEINCAMP
DEPEW GILLEN RATHBUN & MCINTERR. LC
8301 EAST 21ST ST. NORTH, SUITE 450
WICHITA, KS 67206-2936
Fax: 316-265-3819
chris@depewgillen.com

KARL N. HESSE
FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway
Suite 100
Wichita, KS 67206
khesse@foulston.com

ROBERT J. McFADDEN, ATTORNEY
FOULSTON SIEFKIN LLP
1551 N. Waterfront Parkway
Suite 100
Wichita, KS 67206
rmcfadden@foulston.com

JOHN T. BIRD
GLASSMAN BIRD POWELL, LLP
200 W. 13th Street
PO Box 727
Hays, KS 67601
jtbird@haysamerica.com

KARL F. HIRSCH
Hirsch, Heath & White, PLLC
901 CEDAR LAKE BLVD
OKLAHOMA CITY, OK 73114-7813
khirsch@hhwlawfirm.com

MICHAEL DUENES, ASSISTANT GENERAL COUNSEL
KANSAS CORPORATION COMMISSION
1500 SW ARROWHEAD RD
TOPEKA, KS 66604
Fax: 785-271-3354
m.duenes@kcc.ks.gov

LAUREN WRIGHT, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
Conservation Division
266 N. Main St. Ste. 220
WICHITA, KS 67202-1513
Fax: 316-337-6211
l.wright@kcc.ks.gov

CERTIFICATE OF SERVICE

18-CONS-3224-CINV

ROBERT V. EYE, ATTORNEY AT LAW
KAUFFMAN & EYE
4840 Bob Billings Pkwy, Ste. 1010
Lawrence, KS 66049-3862
Fax: 785-749-1202
bob@kauffmaneye.com

LANE PALMATEER, ATTORNEY
LANE R. PALMATEER
801E. Douglas Ave., 2nd Flr.
Wichita, KS 67202
lrpalmateer@gmail.com

JEFF KENNEDY
MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, LLP
100 N. Broadway
Suite 500
Wichita, KS 67202
Fax: 913-491-3341
jkennedy@martinpringle.com

STANFORD J. SMITH, JR., ATTORNEY
MARTIN, PRINGLE, OLIVER, WALLACE & BAUER, LLP
100 N BROADWAY STE 500
WICHITA, KS 67202
Fax: 316-265-2955
sjsmith@martinpringle.com

KAREN K. MCILVAIN
MCILVAIN LAW OFFICE, LLC
PO Box 703
Madison, KS 66860
mcilvainlaw@gmail.com

JONATHAN A. SCHLATTER, ATTORNEY
MORRIS LAING EVANS BROCK & KENNEDY CHTD
300 N MEAD STE 200
WICHITA, KS 67202-2745
Fax: 316-262-6226
jschlatter@morrislaing.com

DAVID BENGSTON
STINSON LEONARD STREET LLP
STINSON LEONARD STREET LLP
1625 N. Waterfront Parkway, Ste 300
Wichita, KS 67206
david.bengston@stinson.com

AMY FELLOWS CLINE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON, LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
Fax: 316-630-8101
amycline@twgfirm.com

TIMOTHY E. MCKEE, ATTORNEY
TRIPLETT, WOOLF & GARRETSON, LLC
2959 N ROCK RD STE 300
WICHITA, KS 67226
Fax: 316-630-8101
temckee@twgfirm.com

KENNETH L. COLE
WOELK & COLE
PO Box 431
Russell, KS 67665
woelkandcole@hotmail.com

/s/ DeeAnn Shupe
DeeAnn Shupe
