

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

In the matter of the petition of Daylight)	Docket Nos.: 25-CONS-3040-CMSC
Petroleum, LLC (Operator) to open a docket)	
pursuant to K.S.A. 55-605(a) regarding a fluid)	CONSERVATION DIVISION
leak in Section 16, Township 30 South, Range)	
<u>16 East, Wilson County, Kansas.</u>)	License No.: 35639

RESPONSE BRIEF OF COMMISSION STAFF

Staff of the State Corporation Commission of the State of Kansas (Staff and Commission, respectively) submits its *Response Brief* (Response) pursuant to the Presiding Officer Order Setting Post-Hearing Briefing Schedule issued on March 10, 2025. In support of its Response, Staff states as follows:

I. INTRODUCTION

1. On April 7, 2025, a Post Hearing Brief of Daylight Petroleum, LLC (Brief) was filed by Operator. Operator's Brief incorrectly states that the docket asks the Commission to determine the appropriate manner in which to address a breakout which has occurred beneath a building on the Johnson lease.¹ However, Operator opened this docket to determine if plugging a well located beneath a building constitutes waste as provided under K.S.A. 55-601 and K.S.A. 55-602.² As will be discussed in further detail below, Operator has provided no evidence or legal analysis to support its position that plugging a well causes waste, even if a building is damaged in the course of plugging that well. While Staff has testified that it believes the well beneath this particular building can be plugged without causing damage, any damage that is caused is a civil matter that will need to be addressed between Operator and the landowner. Operator's Brief poses three questions that Operator demands the Commission to answer: (1) Has the Commission found that an abandoned well exists beneath the commercial building?; (2) If an

¹ Post Hearing Brief of Daylight Petroleum, LLC, p. 1 (Apr. 7, 2025).

² Daylight Petroleum, LLC Application, ¶15 (July 29, 2024).

abandoned well is found, then will it constitute waste to damage the commercial building in order to plug the well?; and (3) How much time or money spent searching for the well is enough before the Commission would consider monitoring wells as a permanent solution?³

2. Staff's Response will provide legal arguments and information that will be helpful to the Commission in deciding the outcome of this docket. The topics addressed will include: (a) that there is sufficient evidence to determine an abandoned well exists below the building, (b) that if locating and plugging the abandoned well causes damage to the building, then it does not constitute waste; and (c) that District #3 Staff is best suited to determine when Operator has made a sufficient effort to locate and plug the abandoned well.

II. ARGUMENT

A. There is sufficient evidence to determine a well exists below the building on the Johnson lease.

3. It is well established that in matters before the Commission, the Commission reviews the matters under a preponderance of evidence standard and must ensure any decision is based upon evidence "that is substantial when viewed in light of the records as a whole."⁴ The preponderance standard is defined as "evidence which shows a fact is more probably true than not true."⁵ Applying this standard, there is a greater likelihood of an abandoned well being located beneath the building than any other alternative. Operator's Brief attempts to mislead the Commission into applying a greater standard of proof than what is necessary by alleging that Staff has failed to meet its burden of proof by "substantial, competent evidence to prove that an abandoned well actually exists."⁶ However, the evidence provided to the Commission clearly

³ Daylight Post Hearing Brief at p. 3.

⁴ Docket 09-CONS-139-CUIC, Order on Appeal, ¶5 (Apr. 19, 2010). Docket 10-CONS-289-CUIC, Order Approving Application, ¶22 (Sep. 29, 2010). See K.S.A. 2009 Supp. §77-621.

⁵ Docket 19-139 at ¶5 and Docket 10-289 at ¶22. See *In re B.D.-Y.*, 286 Kan. 686, 691 (2008), (citing *Ortega*, 255 Kan. at 527-28).

⁶ Daylight Post Hearing Brief at p. 4.

demonstrates that the burden of proof has been met regarding this issue, which establishes that an abandoned well more likely than not exists below the building and that Operator is responsible for plugging the well.

4. K.S.A. 55-150(j) provides that “Well” means a hole or penetration of the surface of the earth, drilled or recompleted for the purpose of: (1) Producing oil or gas; (2) injecting fluid, air or gas in the ground in connection with the exploration for or production of oil or gas; (3) obtaining geological information in connection with the exploration for or production of oil or gas by taking cores or through seismic operations; (4) disposing of fluids produced in connection with the exploration for or production of oil or gas; (5) providing cathodic protection to prevent corrosion to lines, tanks or structures, or (6) injecting or withdrawing natural gas. “Well” is also defined under K.A.R. 82-3-120 as any hole or penetration of the surface of the earth for geological, geophysical, or any oil and gas activity. The Commission’s regulations go on to define eleven different types of wells specifically under that definition. Here, Staff has already conducted its investigation pursuant to K.S.A. 55-178 and K.S.A. 55-182 to determine that an abandoned well more likely than not exists below the building on the Johnson lease.⁷

5. Staff was able to combine decades of experience of dealing with abandoned wells in Eastern Kansas along with the facts available in order to determine an abandoned well is located under the building. All of the facts available point to an abandoned well existing beneath the building. Operator does not contest that its injection into the Olnhausen Farms #6 well led to the breakout beneath the building. At the time the breakout occurred, Staff documented produced fluid and oil inside of the building and at the surface where the breakout occurred.⁸ After the breakout occurred, Staff had Operator conduct an injection test to determine this connection and

⁷ Evidentiary Hearing Transcript, p. 113:16-115:2 (Mar. 6, 2025).

⁸ Pre-Filed Direct Testimony of Levi Burnett on Behalf of Commission Staff, Exhibit LB-2 (Nov. 1, 2024).

the results of that test confirmed the connection as the fluids appearing at surface were similar to the fluids being injected into the Olnhausen Farms #6 well.⁹ Additionally, Staff required Operator to conduct a satisfactory MIT on the Olnhausen Farms #6 well.¹⁰ This was done to ensure the integrity of the Olnhausen Farms #6 well and that the fluids coming up through the abandoned well were from the injection formation and not channeling through a shallower zone than the injection formation. Further, evidence was presented to show Operator conducted a frac job on the Olnhausen Farms #6 into this formation allowing the fluid injected into the well to flow more freely to the surrounding area.¹¹ We also know that Operator's injection operations caused multiple other abandoned wells to break out on or around its leases.¹² All of this evidence points to the fluid injected into the Olnhausen Farms #6 well most likely channeling to the surface via an abandoned oil well where the breakout occurred. Operator's Brief only provided three potential alternatives for the breakout by either a fault, water well, or geological exploratory well.¹³ However, none of those alternatives are plausible or likely. Operator's witnesses testified on the stand that there was not a fault in the area of the breakout.¹⁴ Additionally, it is not plausible or likely that the abandoned well is a water well, since it was drilled into a producing formation causing oil and produced fluids to appear at the surface of the breakout. This means the abandoned well was drilled too deep to be a water well. Lastly, a geophysical exploratory well is included in the definition of "well" under K.S.A. 55-150(j)(3), so it would fall within the definition of well for the purposes of the Commission's investigation. All

⁹ *Id.* See also Pre-Filed Direct Testimony of Julie Shaffer on Behalf of Commission Staff, Exhibit JS-2 (Nov. 1, 2024).

¹⁰ Direct Testimony of Julie Shaffer at p. 2 of Exhibit JS-2.

¹¹ Direct Testimony of Levi Burnett at p. 7:1-13.

¹² *Id.* at p. 8:1-8.

¹³ Daylight Post Hearing Brief at p. 4.

¹⁴ Transcript at p. 227:9-228:7 and 271:12-272:2.

of these facts point to Staff meeting any burden that it has to show that an abandoned well most likely exists beneath the building.

6. Based on the preponderance of the evidence standard needed to determine that a well exists, Staff has met its burden. Operator Brief cites to K.S.A. 77-621(7)&(8) when making its argument that the Commission must make its decision based on “substantial, competent evidence.”¹⁵ However, that argument appears to be incorrect. Operator’s Brief cites to the Kansas Judicial Review Act in attempting to apply this standard to the facts before the Commission.¹⁶ While there is not exactly a K.S.A. 77-621(7) and (8), K.S.A. 77-621(c)(7) and (8) provides that the court shall grant relief only if it determines that the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard proof of evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or the agency action is otherwise unreasonable, arbitrary, or capricious. There is no logical reason for this argument to be made in Operator’s Brief. First, the Judicial Review Act does not currently apply to this docket since judicial review has not yet been sought. Second, there is nowhere in the cited language which indicates the burden of proof is substantial, competent evidence. Even if Operator’s Brief is correct in its argument, Staff has provided the Commission with enough information and evidence to determine an abandoned well exists beneath the building to the burden of proof Operator desires.

7. Operator’s Brief appears to question Staff’s expertise and testimony as being nothing more than subjective opinion.¹⁷ However, District #3 Staff have decades of experience investigating, locating, and plugging abandoned wells in Eastern Kansas. There is nothing that

¹⁵ Daylight Post Hearing Brief at p. 5.

¹⁶ *Id.*

¹⁷ *Id.*

indicates that Staff's investigation into this matter was improper or that their analysis of the facts and evidence referenced above was incorrect based on their experience and the injection tests and MIT they required Operator to run. Operator never raised any issues with Staff's expertise, procedures, investigation, or analysis of the facts before it until Operator's Brief. It is also more likely than not that pollution is occurring to fresh and usable water beneath the building based on the chloride levels seen in the samples taken and tested from the surrounding monitoring wells.¹⁸ That pollution does not completely stop just because Operator has ceased injecting into the Olnhausen Farms #6 well. Ceasing injection does nothing to eliminate the pathways through which pollution or downward drainage is occurring. There was no evidence presented to indicate that Staff's actions and conclusions were inconsistent from any other person investigating an abandoned well with experience in this area. All of this information when combined together clearly indicates that an abandoned well is most likely located beneath the building.

B. Any damage to the building while locating and plugging the abandoned well does not constitute waste.

8. As Staff indicated in its initial Brief, damage to a building does not constitute waste. There is nothing in Kansas statutes, specifically K.S.A. 55-601, 55-602, 55-701, and 55-702, which would indicate that waste is caused by plugging wells. Further, there is no indication in those statutes that waste is caused if damage occurs while plugging abandoned wells. It is important to remember that it was Operator who asked the Commission in its Petition to determine if destroying a building constituted waste. Operator has failed to meet its burden of proof in this regard and Operator's Petition should be denied based on the failure to meet that burden of proof and based on the language available in Kansas Statutes.

¹⁸ Prefiled Rebuttal Testimony of Julie Shaffer on Behalf of Commission Staff, p. 4:10-11:10 (Jan. 31, 2025).

9. Operator's Brief claims that the Commission has applied a narrow interpretation of the term "waste".¹⁹ However, Staff merely cited and applied the plain language of the statutes to this situation while neither narrowing nor broadening the statutory language. As Staff has previously stated, the waste referred to in the statutes referenced in Operator's Petition directly relate to the production of oil and natural gas, not plugging abandoned wells. Operator's Brief provides different ways the Commission has referenced waste, but these ways should have little to no bearing on the captioned matter. For example, Operator's Brief alleges a contradiction in the way waste is defined and the Commission's interpretation of waste in its orders granting exceptions to the 10-year time limitation of temporary abandonment.²⁰ However, as part of those types of applications, operators are required to provide information related to K.S.A. 55-601, 55-602, 55-701 and 55-702 by showing there is a potential future use for the well by providing the current production rate for the lease, as well as an estimation of the remaining reserves for the lease. This captioned matter is distinguishable from that reference to waste as there is no potential use for the wellbore or indication plugging the well implicates the referenced statutes.

10. Additionally, Operator's Brief references court cases that are not applicable to the captioned matter. For example, Operator's Brief references a case (Aylward Production Corp.) which concerned fixing minimum allowables and another case (Kansas-Nebraska Natural Gas. Co. v. State Corporation Commission) where the court was concerned with the Commission's authority to fix a minimum wellhead price for natural gas.²¹ Both of those causes actually involved the production of oil and/or natural gas and would be directly related to preventing waste as contemplated by K.S.A. 55-602 and 55-702. Those cases would also be distinguishable from requiring an operator to plug a breakout, abandoned well and do not have any applicability

¹⁹ Daylight Post Hearing Brief at p. 9.

²⁰ *Id.* at p. 9-10.

²¹ *Id.* at p. 10.

in this matter. Likewise, Operator's Brief references a Shawnee County District Court case (*R.T. Enterprises of Kansas, Inc. v. The State Corp. Comm.*) regarding an application for a well location exception for several oil wells in Eastern Kansas.²² The District Court determined that the KCC had authority to issue setbacks pursuant to its authority to regulate economic waste,²³ but there is nothing about the referenced case that appears to apply to plugging abandoned oil/gas wells. However, that case did provide that the KCC has considerable interest in preventing pollution caused by oil and gas activities pursuant to K.S.A. 74-623(a), K.S.A. 65-171d, and K.S.A. 55-602.²⁴ Lastly, Operator's Brief alleges that preventing waste is the primary duty of the Commission (*Southwest Kansas Royalty Owners Association v. Kansas Corporation Commission*).²⁵ However, that case specifically regards producing natural gas wells in western Kansas when comparing preventing waste against protecting correlative rights. That case does not include any statement or analysis which would indicate preventing waste takes priority over protecting fresh and usable water regarding abandoned wells. Operator's Brief takes snippets from unrelated and unapplicable cases regarding the production of oil and/or natural gas and tries to twist them into applying them to the captioned matter despite there being nothing similar between those cases and the facts before the Commission in the captioned matter. It is an apples and oranges argument that should not be considered persuasive regarding this abandoned well. Leaving an unplugged, abandoned well which has already broken out beneath a building does nothing to protect all fresh-water strata, and oil and gas bearing strata encountered by the well. Determining that plugging an abandoned well constitutes waste would be inconsistent with the

²² *Id.* at p. 10.

²³ KCC Docket 14-CONS-550-CWLE, *Final Order on Remand*, ¶4 (Oct. 10, 2017).

²⁴ *Id.* at ¶3.

²⁵ Daylight Post Hearing Brief at p. 12.

statutory duty to protect fresh and usable water, the way that Kansas statute applies waste, and the way that the Commission and Kansas courts have applied the term.

C. It should be District #3 Staff's determination on whether Operator has made sufficient effort to locate and plug the well.

11. There are few occasions when an operator or Staff is unable to locate a well that Commission records indicate has been drilled. In that scenario, District Staff generally determines whether or not a sufficient effort has been made to locate and plug the well. The last question posed in Operator's Brief was whether there will be a time when enough effort has been placed into looking for the abandoned well before monitoring wells are a viable option. It is a dangerous question to answer because it allows Operator a goal line to continue to do the bare minimum without actually attempting to locate the well. Operator's Brief essentially advocates for the Commission to apply a cost-burden analysis to this situation. However, if the Commission goes down that route, then it will have to apply a similar analysis to every abandoned well and pollution matter moving forward. The cost of plugging abandoned wells and addressing pollution issues should not be a factor or take precedence over actually addressing the abandoned well/pollution which is occurring. Operator's Brief alleges that Operator has spent over \$105,000 voluntarily searching for the abandoned well.²⁶ However, this statement is misleading as Mr. Benjamin testified that \$105,000 was spent on cleanup, investigation work, offset well testing, drilling monitoring wells and piezometer wells, sampling, and lab analysis.²⁷ Most of those expenses do not apply to searching for the abandoned well. Instead the money was spent in order to attempt to avoid searching for the abandoned well by determining the extent of the pollution caused by the breakout as a result of Operator's injection operations.

²⁶ *Id.* at p. 14.

²⁷ Pre-Filed Testimony of Art Benjamin on Behalf of Daylight Petroleum, LLC, p. 11:4-8 (Dec. 13, 2024).

12. Staff is concerned whether Operator will actively attempt to locate and plug the abandoned well in this matter even if they are directed to do so by the Commission. The breakout at issue occurred almost two years ago and Operator has made little effort to actually locate the abandoned well. Additionally, Operator indicates that it has sold all of its production in Kansas, keeping only its liabilities, and does not intend to operate in the state in the near future. Operator's Brief requests the Commission to instruct Staff pursuant to K.S.A. 55-182 to conduct any exploratory or plugging operations that Daylight refuses to perform. K.S.A. 55-182 provides that agents of the Commission shall have the right of ingress and egress upon any lands where any well is located and the lands adjacent thereto and to occupy such lands as are necessary in the permitting, monitoring, inspecting, investigating, supervising, plugging, replugging or repairing of any such well. Any agent when entering upon any land to permit, monitor, inspect, investigate, supervise, plug, replug or repair a well, shall not be liable for any damages necessarily resulting therefrom, except damages to growing crops, livestock, or improvements on the land. Upon completion of activities on such land, such agent shall restore the premises to the original contour and condition as nearly as practicable.

13. Here the solution should be simple. Operator's Petition should be denied by the Commission for the reasons stated above and the reasons provided in Staff's Brief. Along with denying Operator's Petition, the Commission should find Operator responsible for locating and plugging the abandoned well at issue pursuant to K.S.A. 55-178 and 55-179. K.S.A. 55-178(b) provides that upon receipt of any complaint filed pursuant to this section, the Commission shall conduct an investigation for the purpose of determining whether the well is an abandoned well causing or likely to cause loss of any usable water or pollution of any usable water strata or the imminent loss or pollution of any usable water. As a result of the investigation, the Commission

may take any action or issue any order pursuant to the provisions of the Kansas Administrative Procedure Act as may be appropriate. Further, K.S.A. 55-179 provides that if the Commission finds that any person is, in fact, legally responsible for the care and control of such well, the Commission may issue any orders obligating any such person to plug the well or to otherwise cause such well to be brought into compliance with all rules and regulations of the Commission and may order any other remedies as may be just and reasonable. The Commission clearly has the statutory authority to direct Operator to locate and plug the abandoned well in this matter. Operator states that the building owner has been adamant that it will not permit Operator to damage the building and that Operator cannot exceed the permission given it by the landowner.²⁸ However, the referenced landowner did not provide any testimony in this docket indicating as such and there has been no indication this permission takes precedence over Kansas statutes regarding investigating and plugging abandoned wells. Nonetheless, if Operator fails to locate and plug the abandoned well at issue in this matter, then the Commission should direct Staff to locate and plug the well and assess all costs incurred to Operator.

III. CONCLUSION

14. Operator requested to open this docket in the attempt to raise the legal argument that being required to locate and plug an abandoned well beneath a building should be considered economic waste. For the reasons stated above, Operator has failed to show how it has met its burden of proof to have its Petition granted by the Commission. The arguments that Operator has made in this matter are not supported by any legal reasoning or by the evidence that has been presented to the Commission. Additionally, Operator's Brief incorrectly asserts that the breakout has been contained.²⁹ However, the only way to truly contain a breakout is by locating

²⁸ Daylight Post Hearing Brief at p. 15.

²⁹ *Id.*

and plugging the abandoned well through which the breakout occurred. Operator has proposed to permanently shut down the Olnhausen Farms #6 well, but that does not eliminate the channels that have been created between that well and the abandoned well beneath the building nor the pollution or downward drainage that is being caused through that abandoned well. Operator has proposed to continue to engage GSI to perform groundwater monitoring on a quarterly basis for the foreseeable future, but that option fails to bring any actual resolution to this matter as it does not actually address the issue and because Daylight appears to be shutting down its operations in Kansas for the foreseeable future. Lastly, Operator proposed to voluntarily move this site to the KDHE's VCPRP program which is also not a viable option for the reasons discussed in Mr. Hoffman's testimony and at hearing.

15. Ultimately, the Commission should deny Operator's Petition and find that Operator is responsible for the care and control of the abandoned well its operations caused to break out on the Johnson lease pursuant to K.S.A. 55-178 and 55-179. If any damage occurs to improvements on the land, then it will be Operator's responsibility to work with the landowner to address the damages. If Operator fails to address the abandoned well, then the Commission can give Staff the authority to locate and plug the well and assess the costs to Operator.

WHEREFORE, Staff respectfully submits this Response in support of its position that the Commission should deny Operator's Petition and require Operator to locate and plug the abandoned well, and for any such other relief as the Commission deems just and equitable

Respectfully Submitted,

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CERTIFICATE OF SERVICE

25-CONS-3040-CMSC

I, the undersigned, certify that a true and correct copy of the attached Motion has been served to the following by means of electronic service on April 21, 2025.

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