

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

Before Commissioners: Susan K. Duffy, Chair
Shari Feist Albrecht
Dwight D. Keen

In the Matter of the Application of TDR) Docket No: 20-CONS-3043-CUIC
Construction, Inc. for a permit to authorize the)
enhanced recovery of saltwater into the) CONSERVATION DIVISION
Moldenhauer #W-42 well, located in Franklin)
County, Kansas.) License No: 32218

In the Matter of the Application of TDR) Docket No: 20-CONS-3079-CUIC
Construction, Inc. for a permit to authorize the)
enhanced recovery of saltwater into the) CONSERVATION DIVISION
Moldenhauer #30 and Moldenhauer #45 wells,)
located in Franklin County, Kansas.) License No: 32218

FINAL ORDER

Applicant TDR Construction, Inc. (Operator) seeks injection authority for its already-completed Moldenhauer #W-42, Moldenhauer #30, and Moldenhauer #45 wells. At each well, Operator seeks a maximum liquid injection rate of 40 barrels per day and a maximum injection pressure of 650 pounds per square inch.¹ Protesters Scott Yeargain and Polly Shteamer (Protesters) oppose granting of injection authority due to concerns about waste and pollution of water resources. For the reasons described below, the Commission grants Operator's application.

I. Procedural Background

1. On July 10, 2019, Operator filed its application in Docket 20-CONS-3043-CUIC. On August 5, 2019, Protesters filed their joint protest in the docket.
2. On August 30, 2019, Operator filed its application in Docket 20-CONS-3079-CUIC. On September 5, 2019, Protesters filed their joint protest in the docket.

¹ See Docket 20-CONS-3043-CUIC (Moldenhauer #W-42), Application pp. 1, 3 (Jul. 10, 2019); Docket 20-CONS-3079-CUIC (Moldenhauer #30 & Moldenhauer #45), Application pp. 1, 3, 14 (Aug. 30, 2019).

3. On September 9, 2019, Operator filed a motion to dismiss Protesters in Docket 20-3043; on September 27, 2019, Operator filed a motion to dismiss Protesters in Docket 20-3079.

4. On October 1, 2019, the Commission denied Operator's motion to dismiss Protesters in Docket 20-3043 as it pertained to Protesters' failure to attend a prehearing conference, but held the remainder of the motion to dismiss in abeyance.

5. On October 16, 2019, the Commission, via its prehearing officer, consolidated Docket 20-3043 and Docket 20-3079 for hearing on a common record.

6. On October 29, 2019, the Commission issued an order holding in abeyance Operator's motion to dismiss Protesters in Docket 20-3079.

7. On February 20, 2020, the Commission held its evidentiary hearing and then took the matter under advisement.²

8. Notice of the application in Docket 20-3043 was published by Operator in the *Ottawa Herald* on July 6, 2019, and notice of the application in Docket 20-3079 was published by Operator in the *Ottawa Herald* on August 8, 2019.³ Notice of the hearing was published by Operator in *The Wichita Eagle* on December 20, 2019, and in the *Ottawa Herald* on December 21, 2019.⁴

9. At hearing, Operator was represented by Keith Brock of Anderson & Byrd, LLP; Protesters appeared pro se; Commission Staff was represented by Litigation Counsel Kelcey Marsh.⁵

II. Jurisdiction & Legal Standards

10. Under K.S.A. 74-623, the Commission has exclusive jurisdiction and authority to regulate oil and gas activities. Pursuant to Section 1425 of the Safe Drinking Water Act (SWDA), found at 42 U.S.C § 300f *et seq.*, the United States Environmental Protection Agency has granted the

² See Tr. 206:4-13.

³ See Docket 20-CONS-3043-CUIC, Affidavit of Publication – *Ottawa Herald* (Jul. 10, 2019); Docket 20-CONS-3079-CUIC, Affidavit of Publication – *Ottawa Herald* (Aug. 30, 2019).

⁴ See Affidavit of Publication – *The Wichita Eagle* (Dec. 27, 2019); Affidavit of Publication – *Ottawa Herald* (Dec. 27, 2019).

⁵ See K.A.R. 82-1-232(a)(2); Tr. 7:14-25.

Commission primacy over Class II injection well permitting such as that considered here.⁶ In other words, the United States Environmental Protection Agency has determined that the Commission's program, as approved, represents an effective program to prevent endangerment of underground sources of drinking water.⁷

11. Under K.S.A. 55-901(a), the owner or operator of any oil or gas well which may be producing and which produces salt water or waters containing minerals in an appreciable degree shall have the right to return such waters to any horizon from which such salt waters may have been produced, or to any other horizon which contains or had previously produced salt water or waters containing minerals in an appreciable degree, 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. Under K.S.A. 55-901(b), the Commission is directed to adopt such rules and regulations as may be just and equitable to carry out such provisions.

12. Under K.A.R. 82-3-400, injection is permitted only upon Commission approval, after an operator has filed an application in accordance with K.A.R. 82-3-401 and provided notice in accordance with K.A.R. 82-3-402.

13. K.A.R. 82-3-403 provides factors that must be considered when issuing an injection permit. K.A.R. 82-3-405 through 82-3-407 provide requirements an operator must meet for injection well-casing and cement, tubing and packer, and mechanical integrity.

14. Under K.A.R. 82-3-408(b), modifications of any injection well permit may be made only upon application to the conservation division.

⁶ See 49 Fed. Reg. 4735 (Feb. 8, 1984).

⁷ See *id.*

15. Under K.A.R. 82-3-135a, notices of applications must be made and published, and applications are held in abeyance pending the filing of any protest. Under K.A.R. 82-3-135b, a protest may be filed by any party having a valid interest; such protest must include a clear and concise statement of the direct and substantial interest in of the protester in the proceeding, including specific allegations as to the manner in which the grant of the application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas.

16. Under K.S.A. 55-601 *et seq.* and K.S.A. 55-701 *et seq.*, the Commission is obligated to consider the prevention of waste and the protection of correlative rights as it relates to production of oil or gas; questions of injection authorization are closely related to the production of hydrocarbons.

III. Testimony

17. On February 20, 2020, the Commission heard and accepted testimony from the following individuals, each of whom had previously submitted pre-filed testimony:

- a. Operator witness Lance Town (Town), owner of Operator and third-generation oil producer employed in the industry since 1991; self-employed as an oil producer and oil-field service provider since 1996.⁸
- b. Protester Scott Yeargain (Yeargain), testifying on his own behalf, a retired teacher with a Ph.D. in philosophy, Ph.D. minor in mathematics, and an undergraduate minor in chemistry.⁹
- c. Staff witness Jake Eastes (Eastes), Geology Specialist and Research Analyst, holder of a 2015 bachelor's degree in geology, a 2017 master's degree in petroleum geology, and employed by the Commission since September 2017;¹⁰ and

⁸ See Pre-Filed Direct Testimony of Town, 1:5 to 2:4. Town's pre-filed testimony was admitted at Tr. 16:13-17; Town only submitted direct testimony.

⁹ See Pre-Filed Direct Testimony of Shteamer and Yeargain, 1:4 to 2:4. Shteamer did not testify at hearing. Protesters' direct and rebuttal testimony were admitted at Tr. 73:1-4.

¹⁰ See Pre-Filed Testimony of Eastes, 2:3-17. Eastes's pre-filed testimony was admitted at Tr. 129:12-17.

d. Staff witness Rene Stucky (Stucky), Supervisor of the Commission's underground injection control and production departments, holder of a bachelor's degree in geology, with over 30 years as a petroleum geologist, and employed by the Commission since 2006.¹¹

IV. Findings of Fact

Issues Not Contested

18. The Commission will begin its analysis of Operator's applications by considering items that were not contested, but must be considered to grant an injection application. First, in regard to K.S.A. 55-901, no party disputes Operator owns oil wells producing oil and salt water from the Squirrel formation, or that the proposed injection would return produced salt water to said formation. The Commission credits Eastes's testimony on the above, and at any rate takes administrative notice of its various records demonstrating these facts.¹²

19. Second, in regard to K.A.R. 82-3-401, Eastes testified that the applications were filed in accordance with that regulation.¹³ In regard to K.A.R. 82-3-402, Eastes testified that notice of the applications appeared proper.¹⁴ The Commission finds such testimony credible.

20. Third, in regard to K.A.R. 82-3-405 through K.A.R. 82-3-407, and also K.A.R. 82-3-403(c) through (f), Eastes testified that the subject wells are completed in compliance with Commission regulations.¹⁵ The Commission finds such testimony credible.

21. Fourth, in regard to K.A.R. 82-3-403(a), Staff witnesses employed by the Conservation Division considered the maximum injection rate under 82-3-403(a)(1);¹⁶ the various

¹¹ See Pre-Filed Testimony of Stucky, 2:3-13. Stucky's pre-filed testimony was admitted at Tr. 169:2-6.

¹² See, e.g., Pre-Filed Testimony of Eastes, 3:8-14; 10:7-11. See also K.A.R. 82-1-230(h) ("In addition to matters that are required or permitted to be judicially noticed by K.S.A. 60-409 and amendments thereto, the presiding officer may take administrative notice of commission files and records in deciding matters pending before it.").

¹³ Pre-Filed Testimony of Eastes, 3:15-16.

¹⁴ *Id.* at 11:15 to 12:6.

¹⁵ See, e.g., *id.* at 3:15-16; 8:17-22.

¹⁶ See, e.g., *id.* at 9:1 to 10-19.

pressures under 82-3-403(a)(2);¹⁷ the type of fluids and rock characteristics under 82-3-403(a)(3);¹⁸ the adequacy and thickness of the zones and the base of water under K.A.R. 82-3-403(a)(4);¹⁹ and the construction of all wells within a quarter-mile radius under K.A.R. 82-3-403(a)(5).²⁰ The Commission finds such testimony credible.

22. Fifth, Operator's applications are technically amendments to an injection permit, adding wells to the permit and designating a new pilot well.²¹ Thus, K.A.R. 82-3-408 is implicated. The Commission finds Operator has indeed submitted its applications on a form furnished by the Commission, and again credits Staff's testimony that notice was proper.

Issues Contested: Protesters' Standing

23. In September, Operator filed motions to dismiss Protesters in these dockets, which the Commission held in abeyance. At hearing, Operator renewed its motions to dismiss.²² The Commission now takes up the renewed motions.

Legal Standards

24. Under K.A.R. 82-3-135b, each protest against the granting of an application for an order or permit filed pursuant to K.A.R. 82-3-135a shall be considered under various conditions and requirements. A protest may be filed by any person having a valid interest in the application, and among other things, the protest must "include a clear and concise statement of the direct and substantial interest of the protester in the proceeding, including specific allegations as to the manner in which the grant of the application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas."²³

¹⁷ *Id.*

¹⁸ *See, e.g., id.* at 7:1 to 8:16.

¹⁹ *Id.*

²⁰ *Id.* at 10:20 to 11:14.

²¹ *See* Docket 20-CONS-3043-CUIC (Moldenhauer #W-42), Application p. 1; Docket 20-CONS-3079-CUIC (Moldenhauer #30 & Moldenhauer #45), Application p. 1; Pre-Filed Testimony of Eastes, 3:3-14.

²² Tr. 8:25 to 10:2; Tr. 202:21 to 204:10.

²³ K.A.R. 82-3-135b(a).

25. In order to meet the direct and substantial interest requirement of K.A.R. 82-3-135b, each protestant must demonstrate standing under Kansas' traditional two-part test.²⁴ In other words, each protestant must demonstrate [1] a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct.²⁵

26. A cognizable injury is established by showing that an individual personally suffers some actual or threatened injury as a result of the challenged conduct, and the injury must be particularized, *i.e.*, it must affect the plaintiff in a personal and individual way.²⁶ Mere allegations of possible future injury do not meet the requirements of standing.²⁷ Any threatened injury must be certainly impending.²⁸ An individual must assert his or her own legal rights and interests, and an injury must be more than a generalized grievance common to all members of the public.²⁹

27. At the pre-evidentiary stage of a proceeding, a party need only demonstrate a prima facie case for standing, meaning the Commission must determine if the facts alleged in the protest, and inferences to be made therefrom, demonstrate standing.³⁰ Once an evidentiary hearing has taken place, however, the burden increases to a preponderance of the evidence.³¹ The Kansas Supreme Court has defined preponderance of the evidence as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it’...[i]n other words, a ‘preponderance of the evidence’ means that evidence which shows a fact is more probably true than not true.”³²

²⁴ Docket No. 17-CONS-3689-CUIC, *Final Precedential Order*, ¶ 3 (Apr. 5, 2018).

²⁵ *Id.*

²⁶ Docket No. 17-CONS-3689-CUIC, *Written Findings and Recommendations*, ¶ 29 (Mar. 29, 2018), incorporated by reference into the *Final Precedential Order* at ¶ 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at ¶ 30.

³¹ *Id.*

³² *Id.*, citing *In re B.D.-Y*, 286 Kan. 686, 691 (2008) (citing Black's Law Dictionary 1182 (6th ed. 1990)).

Analysis

28. As an initial matter, the Commission notes that pleadings are not evidence, unless admitted as such. In this case, the evidence before the Commission pertaining to Protesters' standing is the pre-filed testimony admitted into the record and the live testimony at hearing.

29. The Commission has carefully reviewed Protesters' twenty-three pages of pre-filed direct testimony and sixteen pages of rebuttal testimony. Most of it is devoid of allegations regarding Protesters' direct and substantial interest in this matter; the following allegations come closest:

- a. They have a concern for water quality in their Marais de Cygnes watershed;³³
- b. Other oil and gas leases are blighted visually and environmentally; those other leases foreshadow what is happening on the Moldenhauer lease; and such consequences are borne by, among other things, Protesters' investments in eastern Franklin [County];³⁴ and
- c. They are within a 45-minute bicycle ride of two leases, not at issue in Operator's applications, and they allege those leases are visually and environmentally blighted.³⁵

30. Operator's cross-examination allowed Yeargain to more fully develop Protesters' allegations regarding their direct and substantial interest. Yeargain testified the following was all-encompassing of his direct interests.³⁶ Specifically, Yeargain testified:

- a. They have an affected rental property, inasmuch as several renters have sent their children to Central Heights school district, which is on Rural Water District #6 water;
- b. They float the Marais des Cygnes river via canoe; and

³³ See Pre-Filed Direct Testimony of Shteamer and Yeargain, 17:15.

³⁴ See *id.* at 18:2-18.

³⁵ See *id.* at 18:18 to 19:3.

³⁶ See Tr. 75:21-24.

- c. They have grandchildren who visit one of their neighbors, and there they drink Rural Water District #6 water.³⁷

31. In regard to the affected rental property, Yeargain stated that his tenants do not send their children to Central Heights school district, but some of his previous tenants had.³⁸ Yeargain was unsure how much he would reduce rent if the school district had to source water from elsewhere.³⁹ Yeargain also stated that, within the last few years, the school district had sourced water from elsewhere due to copper contamination.⁴⁰

32. In regard to the canoe floats, the testimony reflects that Protesters float the Marais des Cygnes and are concerned that the river is not safe for whole body immersion.⁴¹ The testimony did not reflect how often Protesters float the river or any future float plans. Yeargain did not object to the proposition that fluid from the wells subject to the applications at hand would have to flow over half a mile of dry ground to reach a creek in order to flow into the Marais des Cygnes.⁴² He also did not object to the proposition that the wells are ten to twelve miles away from the river.⁴³

33. In regard to Protesters' grandchildren, Yeargain's testimony remained substantially undeveloped, although he did testify that he does not represent them in any legal sense.⁴⁴

34. Individually and as a whole, the Commission finds Protesters' interests in this proceeding are not direct and substantial. Protesters' alleged economic loss of rental income due to hypothetical future tenant's children receiving bottled water at school due to possible future pollution from the wells at issue has not been sufficiently developed so as to be either direct or substantial by a preponderance of the evidence. The proposed economic injury, to the extent it is identified, is not

³⁷ See Tr. 74:7 to 75:24.

³⁸ See Tr. 77:17 to 80:12.

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See Tr. 81:25 to 83:14.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See Tr. 76:10 to 77:9.

certainly impending, nor can there fairly be said to be a causal connection between the proposed injury and the granting of Operator's applications.

35. Intent to revisit the Marais des Cygnes at some unidentified future time, where hypothetical pollution might deny opportunity for full body immersion, does not demonstrate an actual injury or threatened imminent injury.⁴⁵ Further, to the extent an alleged injury exists, the necessary causal connection, given among other considerations the distance between the wells and the river, falls far short of the preponderance of the evidence standard.

36. Protesters' other allegations, including those regarding environmental and visual blight, fail to develop a causal connection between the *granting of the applications* and the injury. Protesters allege the injection applications should not be granted because the Moldenhauer lease is uneconomical and therefore will become improperly abandoned. But even if the Commission accepts the premise that the lease is uneconomical and will therefore become improperly abandoned, Protesters fail to explain how granting the applications will result in any injury. The wells at issue have already been completed; potential complications of improper abandonment attach regardless of approval of the applications. And even if there was a causal connection, Protesters fail to distinguish their alleged injury from that which would accrue to the general public.

37. Accordingly, the Commission finds that Protesters failed to establish, by a preponderance of the evidence, the direct and substantial interest necessary to maintain their protest against Operator's applications. Operator's motion to dismiss Protesters is granted.

Issues Contested: Pollution of Water Resources

38. Even if Protesters had standing, their claims would not alter the final result in this matter. Of the three authorized specific grounds for protest of injection applications under K.A.R. 82-3-135b, Protesters express especial concerns with potential pollution of water resources of the state

⁴⁵ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

of Kansas,⁴⁶ as well as broader concerns regarding waste.⁴⁷ The Commission finds these concerns do not merit denial of Operator's applications.

39. In regard to potential pollution of water resources, a substantial portion of Protesters' testimony revolves around the idea that the Moldenhauer lease is uneconomical, and thus will wind up improperly abandoned.⁴⁸ But Protester Yeargain in this matter was a lay witness; Protester Shteamer did not testify. Witnesses with more expertise would be necessary to convince the Commission that the lease in question is uneconomical. Even if the lease at issue is, or becomes, uneconomical, it does not logically follow that the lease will wind up improperly abandoned.

40. Further, Protesters express concern that granting of Operator's applications will negatively affect water quality in Franklin County Rural Water District #6.⁴⁹ The Commission finds the distances involved render it extremely unlikely that activities on the Moldenhauer lease will cause such pollution. Protester Yeargain admits it is half a mile to a creek and twelve miles to the Marais des Cygnes.⁵⁰ Staff witnesses Eastes and Stucky, both licensed geologists, credibly testified that the wells have been completed pursuant to Commission regulations. In addition, Commission regulations have been approved by the United States Environmental Protection Agency as an effective program to prevent endangerment of underground sources of drinking water.

41. Thus, the Commission finds Protesters' concerns regarding pollution of water resources insufficient to support denial of Operator's applications.

⁴⁶ See, e.g., Tr. 74:7 to 75:24; 81:25 to 82:24.

⁴⁷ See, e.g., Pre-Filed Testimony of Shteamer and Yeargain, 2:6 to 12:14 (At Page 11: "We claim its [*sic*] all these oil leases together, and we need to begin someplace, so let's begin with leases which display a declining curve analysis which indicate the damned things cannot pay their operating expenses and their plugging costs. And the Moldenhauer qualifies.") Issues of correlative rights were not raised; the Commission finds that correlative rights would not be negatively implicated by granting of Operator's application.

⁴⁸ See, e.g., Pre-Filed Testimony of Shteamer and Yeargain, 2:5 to 19:5.

⁴⁹ See, e.g., *id.* at 19:6 to 22:3.

⁵⁰ See Tr. 81:25 to 83:14.

42. In regard to waste, the Commission is tasked, via K.S.A. 55-604, with its prevention. Waste is defined in K.S.A. 55-602 as including, in addition to its ordinary meaning, economic waste, underground waste, surface waste, and waste of reservoir energy. Again, much of Protesters' testimony revolves around the proposition that the Moldenhauer lease is uneconomical to produce. And so, the argument goes, sinking continued resources into an uneconomical proposition constitutes waste.⁵¹ Again, though, witnesses with more expertise would be necessary to convince the Commission that the lease in question is uneconomical.

43. Even if the proposition was proven, however, Operator is willing to continue to produce the lease. So the Commission would have to weigh such economic waste against, among other things, the potential waste of stranded reserves if Operator's applications were denied. In addition, the wells at issue have already been drilled; most costs of placing them into service as injection wells have already been spent. So even if Protesters' contentions regarding the economics of the lease are correct, the economic waste of granting Operator's applications would be minimal.

44. Finally, Operator witness Town, with decades of experience in the industry,⁵² testified that approval of Operator's applications is necessary to conduct an effective waterflood to increase hydrocarbon production.⁵³ No party contested this testimony, and the Commission credits it. Harming the economics of the lease absent legal necessity would also constitute waste. The Commission also does not see how denial of Operator's applications would *improve* the economics of the lease; in this respect, denial of Operator's applications would not prevent waste at all.

45. Thus, the Commission finds Protesters' concerns regarding waste are insufficient to support denial of Operator's applications.

⁵¹

⁵² See Pre-Filed Direct Testimony of Town, 1:11 to 2:9.

⁵³ See *id.*, 4:19 to 5:12.

46. Absent credible testimony to the contrary, the Commission finds appropriate cause to approve Operator's applications.

V. Conclusions of Law

47. For the above reasons, the Commission concludes that all statutory and regulatory requirements have been met, and that Operator's applications should be granted.


THEREFORE, THE COMMISSION ORDERS:

- A. Operator's motions to dismiss Protesters are granted.
- B. Operator's applications are granted.
- C. If Operator did not provide to Staff correspondence regarding whether Operator planned to plug, return to production, or temporarily abandon the five idle wells within the area of review, Operator is directed to promptly do so.⁵⁴
- D. 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).⁵⁵
- E. 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.

Duffy, Chair; Albrecht, Commissioner; Keen, Commissioner (Recused)

Dated: 05/28/2020



Lynn M. Retz
Secretary to the Commission

Mailed Date: 05/28/2020

JRM

⁵⁴ See Pre-Filed Testimony of Eastes, 12:11-14.

⁵⁵ 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).

CERTIFICATE OF SERVICE

20-CONS-3043-CUIC, 20-CONS-3079-CUIC

I, the undersigned, certify that a true copy of the attached Order has been served to the following by means of first class mail and electronic service on 05/28/2020.

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