

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

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

STAFF'S BRIEF AND RECOMMENDATION

The Staff of the State Corporation Commission of the State of Kansas (Staff and Commission, respectively) files this *Brief and Recommendation*, as required by the Commission's November 21, 2017, *Order Opening General Investigation*.¹

I. Background

1. On November 21, 2017, the Commission issued an *Order Opening General Investigation*, to examine legal issues pertaining to notice requirements for injection applications filed between October 2008 and the present.² As described in the order, on October 24, 2008, K.A.R. 82-3-135a was amended to extend the protest period for underground injection well applications from 15 days to 30 days.³

2. On February 19, 2018, Staff filed a *Report and Recommendation* pursuant to the Order Opening General Investigation.⁴ As described in the *Report and Recommendation*, approximately 1,007 applications for injection authority regarding approximately 2,111 wells were processed between October 2008 and February 2018 where an operator's published notice stated interested parties only had 15 days to file a protest.⁵

¹ *Order Opening General Investigation*, ¶14-15. Staff's deadline to file was extended to June 22, 2018, pursuant to the Commission's *Order Clarifying Deadlines* (Mar. 27, 2018), ¶8, B.

² *Order Opening General Investigation*, ¶6, 16, A.

³ *Id.*, ¶1.

⁴ See *id.*, ¶7.

⁵ See *Notice of Filing of Staff's Report and Recommendation*, Exhibit A at Page 2.

3. Between March 8, 2018, and April 26, 2018, dozens of persons entered appearances, intervened, filed briefs, and filed public comments in this docket.

II. Staff's Recommendation

4. As directed by the Commission's *Order Opening General Investigation*, the purpose of this *Brief and Recommendation* is to recommend 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 only 15 days to object to or protest the application.⁶ Staff's recommendation is that the Commission should close this docket and take no further action.

5. Staff makes this recommendation for three reasons. First, the discrepancies between the notices published by operators and the legal protest timeframe did not violate any Commission regulation. Second, the law is clear that such discrepancies were not fatal defects to the Commission's jurisdiction or authority to approve the injection applications. Third, there is no evidence that any person's due process rights were affected by the publications.

A. No Commission regulation was violated by the publications.

6. Kansas Administrative Regulations, as approved by the United States Environmental Protection Agency, exclusively govern Class II injection applications in Kansas.⁷ All Class II injection applications must have notice published pursuant to the provisions of K.A.R. 82-3-135a.⁸ Specifically, K.A.R. 82-3-135a(c) provides that notice of each application must be published in at least one issue of the official county newspaper.⁹ K.A.R. 82-3-135a, however, provides no instruction regarding what must be made part of the publication.

⁶ *Order Opening General Investigation*, ¶C.

⁷ See Federal Register Vol. 49, No. 27, at 4735; see also SDWA Section 1425(a)(2); Section 1421(b)(1).

⁸ See K.A.R. 82-3-135a(a).

⁹ See K.A.R. 82-3-135a(a) for the scope of the regulation, and K.A.R. 82-3-135a(c) for the requirement.

7. Although all Class II injection applications are governed by the notice provisions of K.A.R. 82-3-135a, some injection applications are also governed by the notice provisions K.A.R. 82-3-402(b).¹⁰ Under that regulation, operators may elect to provide area notice by, among other things, publishing notice of the application in the official county newspaper.¹¹ Although K.A.R. 82-3-402(b) requires that certain information be included as part of the published notice, it does not require the operator to identify any protest period.¹² No Commission regulation provides any consequence for providing inaccurate extraneous information as part of the published notice. Staff believes the fact that no Commission regulation was violated by the publications weighs against taking any action detrimental to the holders of the permits subsequently issued.

B. The publication discrepancies did not affect the Commission’s legal jurisdiction and authority to issue injection permits.

8. Staff agrees with the following legal analysis, first submitted in this docket in Triple T Oil, LLC’s April 13, 2018, brief:

The Kansas Supreme Court has addressed the specific question presented in this Docket many times, and has consistently held that “[a] notice for service by publication . . . cannot be regarded as void by reason of the fact that the day fixed for answer was earlier than [it should have been].” *Foster v. Motley*, 114 Kan. 812 (1923). A misstatement of the answer period in a published notice is a “palpable irregularity but 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.*¹³

9. Triple T Oil’s brief discusses other cases that universally reach similar conclusions.¹⁴ The case law is clear: the Commission had legal jurisdiction and authority to issue

¹⁰ See K.A.R. 82-3-400.

¹¹ K.A.R. 82-3-402(b)(3).

¹² *Id.*

¹³ Brief by Triple T Oil, LLC, page 5.

¹⁴ *Id.*, pages 5-7.

the injection permits even where the protest period in the published notice was inaccurate. This fact, along with the fact that no Commission regulation was violated by the publications, weighs against taking any action detrimental to the holders of the permits subsequently issued.

C. There is no evidence that any person's due process rights were negatively affected by the publication discrepancies.

10. There are only a limited set of circumstances in which a potentially interested person could have been affected by any publication discrepancy. Specifically, 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 or protest specifically because such person labored under the mistaken belief that one only had 15 days, rather than 30 days, to do so.

11. Without any evidence of any person fitting the above fact pattern, there is no evidence of any harm whatsoever; that is, there is no evidence of any person's rights being negatively affected. Without any harm, without any violation of Commission regulations, and given the Commission had the legal jurisdiction and authority to issue the permits, there is simply no cause for the Commission to take any further action in this docket.

III. Conclusion

12. This general investigation was opened in part to address legal questions pertaining to publication of notice of underground injection well applications.¹⁵ Such questions have now been thoroughly briefed. Staff has been tasked with the limited directive of 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 only 15 days to object to or protest the application.¹⁶ It would have been best practice for

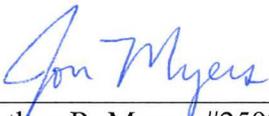
¹⁵ *Order Opening General Investigation*, ¶6.

¹⁶ *Id.*, ¶C.

operators to have not published inaccurate information regarding protest periods. Just as clearly, no Commission regulation was violated and the Commission had full legal jurisdiction and authority to issue the injection permits based upon the applications as presented.

13. Given the above, and without any concrete allegation by a party with standing regarding a specific permit that such person's rights were negatively affected by a specific publication notice, Staff recommends the appropriate course of action would be for the Commission to close this docket and take no further action. If at any time a person wishes to contest the continuing validity of an issued permit, such person may petition the Commission for remedy under an appropriate legal theory, should one exist. To date, that has not happened. Without a live controversy, the appropriate course of action for an agency exercising authority in a quasi-judicial capacity is to take no further action.

Respectfully submitted,



Jonathan R. Myers, #25975
Litigation Counsel, Kansas Corporation Commission
266 N. Main, Suite 220
Wichita, Kansas 67202
Phone: 316-337-6200; Fax: 316-337-6211

CERTIFICATE OF SERVICE

18-CONS-3224-CINV

I, the undersigned, certify that the true copy of the attached Staff's Brief and Recommendation has been served to the following parties by means of electronic service on 6/22/18.

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

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

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

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

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

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

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

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

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

CERTIFICATE OF SERVICE

18-CONS-3224-CINV

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

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

JONATHAN R. MYERS, LITIGATION COUNSEL
KANSAS CORPORATION COMMISSION
Conservation Division
266 N. Main St. Ste. 220
WICHITA, KS 67202-1513
Fax: 316-337-6211
j.myers@kcc.ks.gov

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

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

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

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

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

/S/ Paula J. Murray

Paula J. Murray