

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

Before Commissioners: Pat Apple, Chairman
Shari Feist Albrecht
Jay Scott Emler

In the matter of the failure of Benjamin M.) Docket No.: 17-CONS-3100-CPEN
Giles (“Operator”) to comply with K.A.R. 82-)
3-111 at the Clearwater #2 and Clearwater #5) CONSERVATION DIVISION
wells in Butler County, Kansas.)
) License No.: 5446

**COMMISSION STAFF’S RESPONSE TO OPERATOR’S JUNE 2, 2017 MOTION AND
THE COMMISSION’S JUNE 8, 2017 ORDER ON COMPLIANCE WITH
SETTLEMENT AGREEMENT**

The Staff of the State Corporation Commission of the State of Kansas (“Staff,” and “Commission,” respectively) files its Response to Operator’s June 2, 2017, Motion, respectfully requesting the Commission deny Operator’s Motion. Furthermore, Staff moves the Commission for an Order directing Staff to enforce the terms of the Settlement Agreement approved by the Commission on February 2, 2017.

I. Background

1. On February 26, 2016, Commission Staff determined that Operator appeared to be in violation of K.A.R. 82-3-111 at the Clearwater #2 and Clearwater #5 wells, which had been inactive in excess of the time allowed by regulation without being plugged, returned to service, or approved for temporary abandonment status. As a courtesy and pursuant to general policy, Commission Staff sent a Notice of Violation letter to Operator, providing a March 27, 2016, deadline to bring the wells into compliance. Operator failed to bring the wells into compliance.

2. On September 7, 2016, Commission Staff determined that Operator appeared to continue to be in violation of K.A.R. 82-3-111 at the Clearwater #2 and Clearwater #5 wells. Staff recommended a penalty, which was issued by the Commission on September 15, 2016, and

gave Operator an October 21, 2016, deadline to bring the wells into compliance. Operator appealed, and Operator again failed to bring the wells into compliance.

3. On February 2, 2017, the Commission approved a Settlement Agreement between Staff and Operator, whereby Operator stipulated to the violations it originally contested and was given a deadline of May 18, 2017, to bring the wells into compliance by plugging them, returning them to service, or obtaining temporary abandonment status for them. Although Operator obtained compliance at the Clearwater #2, Operator again failed to bring the Clearwater #5 into compliance.

4. On May 18, 2017, a few hours before Operator's deadline to *obtain* compliance pursuant to the Settlement Agreement, Operator submitted a temporary abandonment application for the Clearwater #5. On May 24, 2017, pursuant to Staff policy, the application was denied for failure to demonstrate casing integrity. The same day, pursuant to the Settlement Agreement, Staff suspended Operator's license and assessed a \$5,000 penalty.

5. On May 30, 2017, Operator twice attempted a casing integrity test on the Clearwater #5. The well, which as Operator states is located in a low-lying area adjacent to the Whitewater River subject to frequent soaking by floodwater,¹ failed the test on both occasions.

6. On June 8, 2017, after working on the well during the preceding few days, Operator conducted a successful casing integrity test on the Clearwater #5 and obtained temporary abandonment status. No payment has been made by Operator for its violation of the May 18, 2017 deadline. Thus, Operator remains out of compliance with the Settlement Agreement. Although Operator also violated the May 30, 2017, deadline to avoid an additional \$5,000 penalty, Staff has not assessed an additional penalty for such violation.

¹ See Motion, Paragraph 3.

7. The Settlement Agreement was signed by counsel-represented Operator and approved by the Commission. In the Agreement, Operator explicitly waived its right to appeal any penalties or costs assessed under the Agreement and any suspension of Operator's license implemented by Staff due to Operator's failure to comply. Operator has nevertheless done so.

8. In the last four years, Operator has been penalized in the following dockets: 14-CONS-338-CPEN, 14-CONS-756-CPEN, 14-CONS-760-CPEN, 15-CONS-377-CPEN, 15-CONS-577-CPEN, 16-CONS-002-CPEN, 16-CONS-031-CPEN, 16-CONS-106-CPEN, 17-CONS-3100-CPEN, 17-CONS-3254-CPEN, 17-CONS-3329-CPEN, and 17-CONS-3397-CPEN. Operator's license has been suspended at least seven times during the same timeframe for non-compliance with several of the aforementioned penalty orders.

II. Argument

9. Operator's motion should be denied, and the Settlement Agreement as signed by Operator and approved by the Commission should remain in full force and effect. Operator's Clearwater #5 well has been out of compliance with K.A.R. 82-3-111 since October 2015.² During that time, Operator has been given multiple opportunities to bring the Clearwater #5 into compliance short of the situation in which it currently finds itself. Rather than bring the well into compliance with Commission regulations, and consistent with Operator's actions in previous dockets, Operator has consistently engaged in behavior that flouts Commission regulations.

10. In the present case, Operator filed a spurious motion significantly distorting the facts, again delaying the consequences for Operator's failure to comply with K.A.R. 82-3-111 and failure to ensure an inactive well did not pose a significant risk to fresh and usable water. Now, over a year after the regulatory deadline and weeks after the deadline in the Settlement

² See Operator's Motion, Exhibit A, Operator's February 2016 temporary abandonment application, in which Operator states the Clearwater #5 was shut-in on July 15, 2015. Under K.A.R. 82-3-111, operators have 90 days to obtain temporary abandonment status in such situations.

Agreement, Operator has finally resolved its compliance issue. Presumably, Operator now persists in its motion because Operator does not desire to suffer the consequences clearly laid out in the Settlement Agreement.

11. Operator, who has been licensed for over 30 years, has twenty-four violations across twelve dockets and seven license suspensions on its record from the last four years. Operator's experience before this Commission and with Staff has provided it ample opportunity to be acquainted with routine Commission processes such as the requirements for temporary abandonment approval. Operator should not be allowed to profess ignorance of procedures, violate the terms of its Settlement Agreement without consequence, flout its clear waiver of the right to appeal implementation of the Settlement Agreement, and now seek alternatives to clearly agreed-upon outcomes now that Operator has finally done what it was legally required to do.

12. Staff's standard policies, appropriately calculated to protect the public interest, were followed in this matter. These policies have remained consistent for well over a decade without any particular controversy. Allowing Operator any more leeway than provided in the Commission-approved Settlement Agreement, in other words, essentially rewarding Operator for filing a motion accusing Staff of "engaging in a pattern of bad faith behavior,"³ of dereliction of duty,⁴ and of making "infantile arguments,"⁵ would not serve the public interest, would undermine Staff's credibility and the Commission's ability to have its orders taken seriously by operators, and would be unfair to the vast majority of operators who are able to consistently manage their day-to-day operations without running afoul of Commission regulations.

13. Regarding the terms of the Settlement Agreement, Operator was required to plug the wells, return them to service, or obtain temporary abandonment status for the wells by May

³ See Motion, Page 7.

⁴ See Motion, Page 9.

⁵ *Id.*

18, 2017. These, essentially, are the three ways any operator can bring a well into compliance with temporary abandonment regulations. Operator notes that the Settlement Agreement requires a Staff-witnessed casing integrity test to return a well to service, but that the Agreement is silent regarding a Staff-witnessed casing integrity test if a well is temporarily abandoned. From this, Operator concludes that under no circumstances would a casing integrity test be required for a well to obtain temporary abandonment status. While this is the essence of the dispute at hand, Operator cannot claim ignorance of Staff policy regarding casing integrity tests, a policy that has been applied across tens of thousands of temporary abandonment applications for years.

14. To review the ways an operator can bring a well into compliance with temporary abandonment regulations, the first way is to plug the well; obviously, no casing integrity test is required in such circumstances. The second is to return a well to production. While under K.A.R. 82-3-104 Commission Staff may require the effectiveness of casing or sealing to be tested in whatever appropriate manner Staff desires, it is true that in settlement and compliance agreements involving K.A.R. 82-3-111 violations, Staff does not typically require an operator to conduct a casing integrity test at a well being returned to production.

15. In this case, however, despite verbal assertions from Operator to the contrary, Staff believed the Clearwater wells had casing leaks. This belief, of course, was proven correct on May 25, 2017, when the Clearwater #5, the well remaining at issue, failed a mechanical integrity test. Thus, in this case Staff specifically required a casing integrity test as part of the settlement if a well was to be returned to production, to avoid allowing a well suspected of casing leaks from continuing to create environmental risks. In a similar way, Staff required all production equipment necessary to remain installed for six months, because Operator presents unique compliance problems. Specifically, Operator frequently moves production equipment

from well to well, meaning that wells routinely move in and out of compliance with K.A.R. 82-3-111 in ways that wells of other entities, who generally appear more inclined to comply with Commission regulations, do not. In other words, these requirements were specifically made part of the Settlement Agreement to address problems specific to this Operator and these wells.

16. The third way an operator can bring a well into compliance with temporary abandonment regulations is to obtain temporary abandonment approval from Commission Staff. Under K.A.R. 82-3-111, Commission Staff may deny an application if necessary to prevent the pollution of fresh and usable water. In practice, this means that wells with high fluid levels, which are indicative of casing leaks, which in turn are indicative of pollution risks, are required to have a successful casing integrity test prior to approval from Commission Staff.⁶

17. Language regarding the need for a casing integrity test to obtain temporary abandonment was omitted from the Settlement Agreement for a very good reason – it is already standard Commission policy where there are high fluid levels, and thus unnecessary to negotiate or otherwise comment upon. Operator should know these general procedures regarding temporary abandonment, as Staff has denied approximately 29 of its applications in the last three years, and has approved approximately 18 of its other applications the last year.

18. Operator complains that on its submitted temporary abandonment applications, the fluid level at the Clearwater #5 was hundreds of feet below the surface, slightly lower than at other wells on the lease that were approved by Staff.⁷ These fluid levels, however, are unsubstantiated submissions from Operator which Staff has been unable to verify, and demonstrate significant change in the fluid level at the well. Further, Operator does not mention

⁶ Casing integrity tests require a demonstration of the ability to hold 300 pounds of pressure for 30 minutes. Contrary to Operator's assertion, this is not a "further embellishment," (see Motion, Paragraph 13) but rather is standard procedure. Operator should no doubt be aware of this, as the owner of multiple wells that have routinely been subject to such tests.

⁷ See Motion, Paragraph 12.

Staff's September 3, 2015, inspection, which found fluid at surface at the Clearwater #5. Fluid at surface, and fluctuating fluid levels in general, are indicative of casing leaks, an indication that was borne out upon the Clearwater #5 failing a casing integrity test on May 25, 2017.

19. Operator complains that the first time Staff denied Operator's temporary abandonment application it was because of a high fluid level, and that the second time Staff denied Operator's application it was because of failure to conduct a casing integrity test. Operator alleges the casing integrity test was "conjured"⁸ out of thin air, when in reality it is a perfectly logical outcome based on Staff's standard practices as well as experience. If a well has a high fluid level, it indicates a casing leak. If a well has a casing leak, it needs to be repaired. If it is repaired, an operator needs to demonstrate a sufficient repair has been made. The way an operator does that is through a casing integrity test. This is a long-standing, standard method of protecting water resources.

20. Operator's position seems to be that it does not matter the condition of the casing of the Clearwater #5, that it should be approved for temporary abandonment status regardless. This is not just contrary to clear Commission procedure, but belies the Settlement Agreement providing Operator over three months to obtain compliance at the well. It would be nonsensical for Staff and Operator to enter into an agreement giving Operator three months to submit a simple, one-page temporary abandonment application with basic details about the well, which Staff must simply process. In other words, both Staff and Operator knew work had to be done on the well; this is presumably why Operator had not obtained compliance for over a year, and why the Settlement Agreement provided three additional months to obtain compliance.

21. Although the essence of the matter at hand is in regard to the need to demonstrate casing integrity before obtaining temporary abandonment status, there are additional notions

⁸ *Id.*

raised in Operator's motion that merit comment. First, Operator insinuates Staff presented an ironclad settlement agreement to which Operator meekly and obligingly acquiesced.⁹ Without citation to any case law, Operator opines that since Staff drafted the provisions of the agreement, the language of the agreement must be construed against Staff.¹⁰ In fact, Staff counsel and Operator's counsel discussed possible terms of settlement on multiple occasions. Just as there are no valid legal grounds for Operator's belief regarding how the agreement should be construed, Staff's flexibility regarding the final terms it was willing to offer in negotiation with Operator's counsel are immaterial to the facts of this case, which are that Operator has failed to comply with the terms of the Settlement Agreement.

22. Second, Operator insinuates, without any citation to case law, that it somehow was not provided sufficient due process regarding these matters. These insinuations are false. For example, in Paragraph 11 of its motion, Operator states "Staff notified Operator's counsel – not Operator – that Operator's license would be suspended," and that "No individual signed the letter on behalf of Staff." However, the license suspension letter was clearly labelled as from Legal Department Staff. It would be a violation of attorney ethics codes for Staff's counsel to communicate with Operator in any way other than through Operator's counsel.

23. Further, Operator concludes on Page 10 of its motion, without any analysis whatsoever, that "Kansas statutes prohibit Staff from suspending Operator's license without notice and the opportunity for hearing." Yet as clearly described in Paragraph 4 of the Settlement Agreement, Operator itself waived such opportunity, and Operator was indeed clearly provided such notice.

⁹ See Motion, Paragraph 4, "Staff presented Operator with a Settlement Agreement it had prepared, the material terms of which were not negotiable. Operator signed the Settlement Agreement the same day," (emphasis in original), and Paragraph 5 "In Operator's experience, the requirement . . . is highly unusual, but Operator did not object because the Settlement Agreement was presented as non-negotiable."

¹⁰ See Motion, Page 8.

24. Finally, Operator attempts to manufacture controversy regarding the scheduling of casing integrity tests. Regarding the test that took place at the Clearwater #2, such well was in compliance with the Settlement Agreement by the deadline, and it is not clear to Staff how the casing integrity test conducted on that well is relevant to Operator's non-compliance at the Clearwater #5. Nevertheless, Staff denies Operator's claims. To the extent the Commission finds the details regarding the Clearwater #2 casing test relevant, Staff submits the following:

- a. On May 11, 2017, at approximately 9:30 a.m., Operator contacted Staff field personnel, stating that a casing integrity test needed to be conducted on the Clearwater #2, and Operator wanted to schedule it. Staff field personnel stated that he was not aware that a casing integrity test needed to be conducted.
- b. On May 11, 2017, at approximately 9:45 a.m., Staff field personnel contacted Operator, stating that after reviewing the Settlement Agreement, Staff field personnel was now aware of the need for the casing test. Staff and Operator scheduled the test for 2:00 p.m. that day.
- c. On May 11, 2017, at approximately 10:30 a.m., Operator's counsel emailed Staff's counsel, stating that Operator was "standing by ready to perform the casing integrity test" but that Staff was not willing to witness the test.
- d. On May 11, 2017, at approximately 10:45 a.m., Staff's counsel emailed Operator's counsel, stating that since approximately 9:45 a.m., as communicated to Operator, a Staff-witnessed casing integrity test had been scheduled for 2:00 p.m.
- e. On May 11, 2017, at approximately 1:30 p.m., Staff field personnel arrived on scene to witness the casing integrity test. At 2:30 p.m., Staff field personnel

left, as Operator was not ready to test the well. Staff and Operator rescheduled the test for 11:30 a.m. on May 12, 2017.

f. On May 12, 2017, Staff witnessed a casing integrity test for Clearwater #2.

25. In short, Staff field personnel, during a call initiated by Operator, mistakenly expressed a belief that a casing integrity test was not necessary, corrected the mistake on his own initiative within fifteen minutes, accommodated Operator's desire to conduct the test later that afternoon, and then was unable to witness said test because Operator was unprepared to conduct it. Operator's commentary regarding the test, which accuses Commission Staff of obfuscation, blame deflection, and recalcitrance,¹¹ is an unwarranted slander upon Staff, made all the more remarkable by Operator's own omission of key facts.

26. Regarding the scheduling of the casing integrity test at the Clearwater #5, Operator complains that when it called Staff the afternoon of Thursday, May 25th, Staff was unavailable on Friday, May 26th, in other words, the day before Memorial Day weekend. Staff notes that for mechanical integrity tests, it typically requires five-day notice. In this instance, Staff made itself available to witness a test at the Clearwater #5 within two business days. Pursuant to the Settlement Agreement, Operator had been provided months to resolve matters.

III. Conclusion

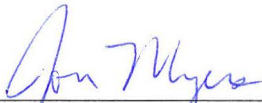
27. Operator, a repeat violator of Commission regulations, failed to timely comply with K.A.R. 82-3-111 at the Clearwater #5 despite having been given repeated opportunities to do so. Hours before its final deadline pursuant to the Settlement Agreement, Operator submitted a temporary abandonment application at Clearwater #5, which was denied because of a failure to demonstrate casing integrity. Operator, who had waived its right to appeal any penalty or suspension, nevertheless appealed. Operator argues that Staff should have ignored its long-

¹¹ See Motion, Paragraph 8.

standing policies and instead should have approved the application, despite the well, located in a low-lying area subject to flooding, having a casing leak. Operator's motion and the contents therein are completely without merit.

WHEREFORE, for the reasons described above, Staff respectfully requests that Operator's June 2, 2017, Motion be denied; for the Commission to order Staff to continue enforcing the terms of the Settlement Agreement; and for any other relief the Commission believes just and appropriate.

Respectfully submitted,



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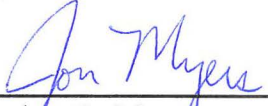
CERTIFICATE OF SERVICE

I certify that on 6/12/17, I caused a complete and accurate copy of this Response to be served via United States mail, with the postage prepaid and properly addressed to the following:

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