**OIL & GAS DOCKET NO. 03-0225208**

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**ENFORCEMENT ACTION AGAINST ERROL BRUCE GARY, D.B.A. GARY OIL & GAS (OPERATOR NO. 296665) FOR VIOLATIONS OF STATEWIDE RULES ON THE KATE WHITEHEAD "B" (21664) LEASE, WELL NOS. 4 AND 5, PIERCE JUNCTION FIELD, HARRIS COUNTY, TEXAS; ON THE STRIBLING, W. F. (02379) LEASE, WELL NO. 2, HUMBLE FIELD, HARRIS COUNTY, TEXAS; AND ON THE STRIBLING, W. F. 'A' (04846) LEASE, WELL NO. 1, HUMBLE FIELD, HARRIS COUNTY, TEXAS**

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**OIL & GAS DOCKET NO. 03-0225839**

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**ENFORCEMENT ACTION AGAINST ERROL BRUCE GARY, D.B.A. GARY OIL & GAS (OPERATOR NO. 296665) FOR VIOLATIONS OF STATEWIDE RULES ON THE LEVY, MABLE LIPPER -A- (02445) LEASE, WELL NO. 1, HUMBLE LIGHT (RIVERSIDE) FIELD, HARRIS COUNTY, TEXAS**

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**APPEARANCES:**

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| **FOR MOVANT:** | **MOVANT:** |
| Scott Holter<br>Staff Attorney | Enforcement Section<br>of the Railroad Commission |
| **FOR RESPONDENT:** | **RESPONDENT:** |
| Bruce Gary<br>Owner | Errol Bruce Gary,<br>D/B/A Gary Oil & Gas |

## PROPOSAL FOR DECISION

## PROCEDURAL HISTORY

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| **DATE CASE HEARD:** | September 16, 2002 |
| **HEARD BY:** | James M. Doherty, Hearings Examiner |
| **PFD CIRCULATION DATE:** | November 14, 2002 |
| **CURRENT STATUS:** | Protested |

## STATEMENT OF THE CASE

This hearing was called by the Commission on the recommendation of the District Office to determine the following:

1. Whether the respondent Errol Bruce Gary, D.B.A. Gary Oil & Gas ("Gary") should be required to plug or otherwise place in compliance with Statewide Rule 14(b)(2) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE ("T.A.C.") §3.14(b)(2)] the Kate Whitehead "B" (21664) Lease ("Whitehead Lease"), Well Nos. 4 and 5, Pierce Junction Field, Harris County, Texas; the Stribling, W. F. (02379) Lease ("Stribling Lease"), Well No. 2, Humble Field, Harris County, Texas; the Stribling, W. F. 'A' (04846) Lease ("Stribling 'A' Lease"), Well No. 1, Humble Field, Harris County, Texas; and the Levy, Mable Lipper -A- (02445) Lease ("Levy Lease"), Well No. 1, Humble Light (Riverside) Field, Harris County, Texas;

2. Whether Gary has violated provisions of Statewide Rule 14(b)(2)(E) [Tex. R.R. Comm'n, 16 T.A.C. §3.14(b)(2)(E)] on the Whitehead Lease, Well Nos. 4 and 5; the Stribling Lease, Well No. 2; the Stribling 'A' Lease, Well No. 1; and the Levy Lease, Well No. 1;

3. Whether Gary has violated provisions of Statewide Rule 8(d)(1) [Tex. R.R. Comm'n, 16 T.A.C. §3.8(d)(1)] on the Whitehead Lease and on the Levy Lease, and should be required to place the leases in compliance with Statewide Rule 8;

4. Whether Gary has violated provisions of Statewide Rule 3(a) [Tex. R.R. Comm'n, 16 T.A.C. §3.3(a)] on the Levy Lease;

5. Whether Gary has violated provisions of Title 3, Oil and Gas, Subtitles A, B, and C, Texas Natural Resources Code, Chapter 27 of the Texas Water Code, and Commission rules and laws pertaining to safety or prevention or control of pollution by failing to plug or otherwise place the subject leases and wells in compliance with Statewide Rules 3, 8, and 14;

6. Whether Gary should be assessed administrative penalties of not more than $10,000.00 per day for each offense committed regarding the subject leases and wells; and

7. Whether any violations of Statewide Rules 3, 8, and 14 by Gary should be referred to the Office of the Attorney General for further civil action pursuant to TEX. NAT. RES. CODE ANN. §81.0534 (Vernon 2001).

With the agreement of all parties, these two dockets were consolidated for purposes of hearing and preparation of a Proposal for Decision. Respondent appeared through its owner, Bruce Gary, and Mr. Gary presented evidence. Scott Holter, Staff Attorney, appeared representing the Railroad Commission of Texas, Enforcement Section. The Enforcement Section's hearing files for both dockets were admitted into evidence. The record was closed on September 16, 2002.

In Oil & Gas Docket No. 03-0225208, Enforcement recommends that a $27,500.00 penalty be assessed against Gary, based on $1,000.00 for one violation of Statewide Rule 8(d)(1), $2,000.00 for each of four violations of Statewide Rule 14(b)(2), $2,000.00 for each of four violations of Statewide Rule 14(b)(2)(E), an enhancement of $2,500.00 for Gary's history of prior violations, and an enhancement of $8,000.00 for alleged reckless conduct by Gary in failing to conduct H-15 tests.

In Oil & Gas Docket No. 03-0225839, Enforcement recommends that a $10,000.00 penalty be assessed against Gary, based on two violations of Statewide Rule 3(a) at $250.00 each, one violation of Statewide Rule 8(d)(1) at $1,000.00, one violation of Statewide Rule 14(b)(2) at $2,000.00, one violation of Statewide Rule 14(b)(2)(E) at $2,000.00, an enhancement of $2,500.00 for Gary's history of prior violations, and an enhancement of $2,000.00 for alleged reckless conduct by Gary in failing to conduct a H-15 test.

The examiner recommends that Gary be assessed a penalty of $19,500.00 in Oil & Gas Docket No. 03-0225208, based on one violation of Statewide Rule 8(d)(1) at $1,000.00, four violations of Statewide Rule 14(b)(2) at $2,000.00 each, four violations of Statewide Rule 14(b)(2)(E) at $2,000.00 each, and an enhancement of $2,500.00 for Gary's history of prior violations.

The examiner recommends that Gary be assessed a penalty of $8,000.00 in Oil & Gas Docket No. 03-0225839, based on two violations of Statewide Rule 3(a) at $250.00 each, one violation of Statewide Rule 8(d)(1) at $1,000.00, one violation of Statewide Rule 14(b)(2) at $2,000.00, one violation of Statewide Rule 14(b)(2)(E) at $2,000.00, and an enhancement of $2,500.00 for Gary's history of prior violations.

The examiner also recommends that Gary be ordered to plug the subject wells, and place the Whitehead Lease and Levy Lease in compliance with Statewide Rule 8.

## BACKGROUND

The operator of a well must properly plug the well when required and in accordance with the Commission's rules. *See* TEX. NAT. RES. CODE ANN. §89.011(a). The Commission's Statewide Rule 14(b)(2) provides that plugging operations on each dry or inactive well shall be commenced within a period of one year after drilling or operations cease and shall proceed with due diligence until completed.

Rule 14(c)(2) provides that as to any well for which the most recent Commission-approved operator designation form was filed prior to September 1, 1997, the entity designated as operator on that form is presumed to be the entity responsible for the physical operation and control of the well and to be the entity responsible for properly plugging the well. The presumption of responsibility may only be rebutted at a hearing called for the purpose of determining plugging responsibility.

Statewide Rule 14(b)(2)(E) provides, among other things, that the operator of any well more than 25 years old that becomes inactive shall plug or test such well to determine whether the well poses a potential threat of harm to natural resources, including surface and subsurface water, oil and gas. Test results must be filed on Form H-15 (Test on an Inactive Well More than 25 Years Old) within 30 days of completion of the test.

Statewide Rule 3(a)(1) requires the posting of an identification sign at the principal entrance of the property showing the name of the property as carried on the records of the Commission, the name of the operator, and the number of acres in the property. Statewide Rule 3(a)(2) requires the posting of an identification sign at each well site, showing the name of the property, the name of the operator, and the well number.

With certain exceptions not relevant here, Rule 8(d)(1) prohibits any person from disposing of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes.

If a person violates provisions of Title 3 of the Texas Natural Resources Code or a Commission rule pertaining to safety or the prevention or control of pollution, the person may be assessed a civil penalty by the Commission not to exceed $10,000.00 a day for each violation. In determining the amount of the penalty, the Commission must consider the respondent's history of previous violations, the seriousness of the violation, any hazard to the health or safety of the public, and the demonstrated good faith of the respondent. *See* TEX. NAT. RES. CODE ANN. §81.0531.

## DISCUSSION OF THE EVIDENCE

### Enforcement's Evidence and Position

Enforcement presented Form P-5 records showing that Gary is a sole proprietorship, and Errol Bruce Gary is owner. The examiner has officially noticed Commission P-5 records showing that Gary's Organization Report has been delinquent since May 1, 2001, and at the time of Gary's last renewal of his Organization Report in May 2000, Gary posted financial assurance in the amount of $1,500.00. Enforcement presented evidence of a prior Commission order in Oil & Gas Docket No. 03-0220360, dated August 7, 2001, wherein Gary was found to have committed three violations of Statewide Rule 14(b)(2) and three violations of Statewide Rule 14(b)(2)(E) on the Wagner, Louis W. (02418) Lease, Well Nos. 1, 2, and 3, Humble Field, Harris County, Texas, and assessed an administrative penalty of $12,000.00.

With respect to the violations of Statewide Rules 3(a), 8(d)(1), 14(b)(2), and 14(b)(2)(E) alleged by Enforcement in these dockets, Enforcement presented the affidavit of Mark England, Compliance Engineer, Field Operations, stating that: (1) in the event of a pollution or safety violation or other emergency, the lack of legible signs as required by Statewide Rule 3(a) may cause confusion as to the responsible operator and actual location of the violation or emergency, and delays in containing and remediating the violation or emergency, which is serious and may threaten the public health and safety; (2) any unauthorized discharge or disposal of oil, saltwater, basic

sediment or other oil and gas waste is a potential source of pollution to surface and subsurface waters if not remediated to prevent seepage and run-off; (3) any wellbore, cased or otherwise is a potential conduit for flow from oil or saltwater zones to zones of usable quality water or to the surface; (4) holes or leaks may develop in cased wells, allowing oil or saltwater to communicate with usable quality zones or to flow to the surface; (5) uncased wells allow direct communication between zones and provide unimpeded access to the surface; (6) casing leaks and/or fluid levels above the base of usable quality water indicate a possible pollution hazard, and without the test required by Statewide Rule 14(b)(2)(E) and supporting documentation (Form H-15), the Commission cannot determine if the well poses a threat to natural resources.

## (a) Oil & Gas Docket No. 03-0225208

In this docket, Enforcement alleges one violation of Statewide Rule 8(d)(1) based on the depositing of a pile of oily soil inside the firewall on the Whitehead Lease, four violations of Statewide Rule 14(b)(2) based on inactivity for more than one year of Whitehead Lease, Well Nos. 4 and 5, Stribling Lease, Well No. 2, and Stribling 'A' Lease, Well No. 1, and four violations of Statewide Rule 14(b)(2)(E) based on failure of Gary to conduct H-15 tests on the aforementioned wells which are more than 25 years old.

Enforcement presented Form P-4 records showing that: (1) Gary was designated operator of the Whitehead Lease, Well Nos. 4 and 5, by filing Form P-4 effective February 1, 1996; and (2) Gary was designated operator of the Stribling Lease, Well No. 2, and the Stribling 'A' Lease, Well No. 1, by filing Forms P-4 effective February 1, 1997.

Through Commission production records, Enforcement showed that no production reports have been filed with the Commission for the Stribling Lease, Well No. 2, and the Stribling 'A' Lease, Well No. 1, since at least January 1, 1993. For the Whitehead Lease, Well Nos. 4 and 5, production was last reported in March 1998. Zero production was reported for the Whitehead Lease from April 1998, through September 1999, and no production reports were filed thereafter.

District Office inspection reports presented by Enforcement showed that on the occasions of inspections of the Whitehead Lease, Well Nos. 4 and 5, on September 29 and October 18, 1999, January 14, February 15, and March 14, 2000, and April 29 and August 13, 2002, Well Nos. 4 and 5 were found to be inactive and without pumping units. District Office inspection reports for the Stribling Lease, Well No. 2, dated February 17 and April 21, 1999, January 18, February 17, March 28, and April 6, 2000, and April 26 and August 12, 2002, stated that Well No. 2 was inactive and without electricity. District Office inspection reports for the Stribling 'A' Lease, Well No.1, dated February 17 and April 21, 1999, February 17, 2000, and April 26 and August 12, 2002, stated that Well No. 1 was inactive and without electricity.

Form W-1X records presented by Enforcement showed that the last plugging extension for the Stribling 'A' Lease, Well No. 1, expired in May 1999, and that subsequent requests for plugging

extensions in 2000-2001 were denied. These same records showed that requests for plugging extensions for the Whitehead Lease, Well Nos. 4 and 5, and the Stribling Lease, Well No. 2, in 1999-2001 were all denied. An affidavit of the Commission's Secretary confirmed that no plugging extensions currently are in effect for any of these wells.

Enforcement's hearing file contains correspondence from the landowner to the District Office, dated September 17, 1999, stating that the oil and gas lease covering the Whitehead Lease, Well Nos. 4 and 5, had expired, and the operator had not responded to the landowner's request to plug the wells. Correspondence from Gary to the District Office, dated November 16, 1999, stated that appropriate forms for plugging the Whitehead Lease, Well Nos. 4 and 5, were in the process of being filed and the wells would be plugged. Enforcement's hearing file also contains a Form W-3A signed by Gary on February 17, 2000, for the Whitehead Lease, Well No. 5. This form indicates that it was approved February 24, 2000, and expired August 8, 2000.

A District Office inspection report dated March 14, 2000, stated that a Form W-3A had been filed for the Whitehead Lease, Well No. 5, but that the well was not plugged, and two inspection reports dated April 29 and August 13, 2002, confirmed that the well was still unplugged. An affidavit of the Commission's Secretary stated that no Plugging Record (Form W-3) or Cementing Affidavit (Form W-15) had been filed or approved, and no Forms W-3A (Notice of Intention to Plug and Abandon) are in effect for any of the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No.2, or the Stribling 'A' Lease, Well No. 1.

Enforcement also presented completion records showing that the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, and the Stribling 'A' Lease, Well No. 1, are more than 25 years old. Form H-15 records presented by Enforcement showed that: (1) the Forms H-15, evidencing the test required by Statewide Rule 14(b)(2)(E), for the Whitehead Lease, Well Nos. 4 and 5, have been delinquent since June 30, 1998; (2) the Form H-15 for the Stribling Lease, Well No. 2, has been delinquent since July 22, 1994; and (3) the Form H-15 for the Stribling 'A' Lease, Well No. 1, has been delinquent since August 7, 1995. An affidavit of the Commission's Secretary confirmed that no Form H-15 test has been filed and approved for these wells.

A District Office inspection report dated April 29, 2002, stated that on the Whitehead Lease, a pile of oily soil measuring 8 feet around and 2 feet high had been deposited inside the firewall. A subsequent inspection report dated August 13, 2002, reported that this condition persisted as of that date. An affidavit of the Commission's Secretary stated that no permit had been issued to Gary for the discharge of oil and/or gas wastes from or onto the Whitehead Lease.

Between March 1, 1999, and April 7, 2000, on 15 occasions, the District Office corresponded directly with Gary, or sent Gary a copy of correspondence to the Deputy Director of Field Operations or the Assistant Director of Compliance, regarding the need to resolve the alleged violations of Statewide Rules 8, 14(b)(2), and/or 14(b)(2)(E) on the Whitehead, Stribling, and Stribling 'A' Leases. Plug Hearing Data sheets prepared by the District Office made estimates of the cost to plug the wells as follows: (1) Whitehead Lease, Well Nos. 4 and 5 - $18,615.00; (2)

Stribling Lease, Well No. 2 - $5,100.00; and (3) Stribling 'A' Lease, Well No. 1 - $5,100.00.

Severance records presented by Enforcement showed that the Whitehead Lease was severed on March 28, 2000 (Rule 14(b)(2) violation), and July 30, 1998 (delinquent H-15). The Stribling Lease was severed on August 22, 1994 (delinquent H-15), and March 1, 2000 (Rule 3 and 14(b)(2) violations). The Stribling 'A' Lease was severed on September 6, 1995 (delinquent H-15), and April 6, 2000 (Rule 3, 8, and 14(b)(2) violations). None of these severances has been resolved.

**(b) Oil & Gas Docket No. 03-0225839**

In this docket, Enforcement alleges two violations of Statewide Rule 3(a) based on missing or incorrect identification signs at the lease entrance to the Levy Lease and at the site of Levy Lease, Well No. 1, one violation of Statewide Rule 8(d)(1) based on deposits of basic sediment and oil waste in old tank bottoms contained in cut-off tanks on the Levy Lease, one violation of Statewide Rule 14(b)(2) based on inactivity for more than one year of the Levy Lease, Well No. 1, and one violation of Statewide Rule 14(b)(2)(E) based on Gary's failure to perform a H-15 test on the Levy Lease, Well No. 1, which is more than 25 years old.

Enforcement presented Form P-4 records showing that Gary was designated operator of the Levy Lease, Well No. 1, by filing Form P-4 effective February 1, 1997. Well records presented by Enforcement showed that Levy Lease, Well No. 1 was permitted as an injection well on January 15, 1969, injection activity for the well was last reported in October 1984, the injection permit for the well was canceled on August 31, 1994, and the well was thereafter classified as an oil well. Production records presented by Enforcement showed that no production reports have been filed for Levy Lease, Well No. 1, since at least January 1994.

District Office inspection reports presented by Enforcement showed that on the occasions of inspections of the Levy Lease, Well No. 1, on February 17, March 28, and May 8, 2000, and May 9, May 21, and August 12, 2002, Well No. 1 was found to be inactive. The well was found to be without rods or pumping unit, and all surface equipment had been removed. Form W-1X records presented by Enforcement showed that requested plugging extensions for Levy Lease, Well No. 1 had been denied for 1999-2001. An affidavit of the Commission's Secretary confirmed that no plugging extension currently is in effect for this well. This affidavit also stated that no Plugging Record (Form W-3) or Cementing Affidavit (Form W-15) has been filed or approved and no Form W-3A (Notice of Intention to Plug and Abandon) is in effect for the well.

Enforcement also presented completion records showing that the Levy Lease, Well No. 1, is more than 25 years old. Form H-15 records presented by Enforcement showed that a Form H-15 test required by Statewide Rule 14(b)(2)(E) for this well has been delinquent since July 8, 1996. An affidavit of the Commission's Secretary confirmed that no Form H-15 test has been filed or approved for the Levy Lease, Well No. 1.

A District Office inspection report dated February 17, 2000, stated that there was no

identification sign of the type required by Statewide Rule 3(a) at the lease entrance to the Levy Lease and the identification sign posted at the site of Levy Lease, Well No. 1, was incorrect in that it listed the name of a previous operator. The sign at the site of Well No. 1 was still incorrect as of an inspection made on May 8, 2000. As of inspections made on May 9 and August 12, 2002, it was reported that the alleged identification sign violations had been corrected.

A District Office inspection report dated May 9, 2002, stated that there existed on the Levy Lease metal tanks which had been cut-off near their bottoms, and oil was said to be contained in the tank bottoms. A photograph of one of these tanks is attached to this Proposal for Decision as Appendix 1. No oil was observed outside the cut-off tanks. A subsequent inspection report dated May 21, 2002, stated that the cut-off tanks contained "BS&W". An inspection report dated August 12, 2002, reported that the tanks, which had been cut-off about 8 inches above the ground, still existed on the lease. An affidavit of the Commission's Secretary stated that no permit had been issued to Gary for the discharge of oil and/or gas wastes from or onto the Levy Lease.

On February 28, April 7 and May 16, 2000, the District Office corresponded directly with Gary, or sent Gary a copy of correspondence to the Deputy Director of Field Operations, regarding the need to resolve the alleged violations on the Levy Lease. A Plug Hearing Data sheet prepared by the District Office estimated that the cost to plug the Levy Lease, Well No. 1, would be $2,348.50. The Levy Lease was severed on August 7, 1996 (delinquent H-15), and May 16, 2000 (Rule 3 and 14(b)(2) violations), and the severances remain unresolved.

**Respondent's Evidence and Position**

Bruce Gary, owner of Gary Oil & Gas, appeared and presented evidence on behalf of respondent. Mr. Gary testified that he took over the Levy Lease in 1997, and the two cut-off tanks were on the lease when he took over. He stated that the cut-off tanks contained fresh water, and vegetation was growing out of the tanks. According to Mr. Gary, he did not know that maintenance of the tanks in this condition was a violation of Commission rules. He stated that no oil or saltwater had been discharged outside the cut-off tanks on the lease.

Mr. Gary also testified that he has been attempting to locate the mineral owners under the Levy, Stribling, and Stribling 'A' Leases in order to attempt to obtain a new mineral lease. He stated his understanding that without a valid mineral lease, he is not able to obtain approval for the transfer of the leases to a new operator. According to Mr. Gary, transfer of the leases to IPACT or Sawtooth is a possibility.

Mr. Gary did not dispute Enforcement's allegation that the subject wells are inactive and unplugged. He indicated that it was his intention to plug the Whitehead Lease, Well Nos. 4 and 5, and to either plug or produce the remainder of the subject wells. Mr. Gary stated that if the Levy Lease, Well No. 1, were restored to activity, it would probably be as an injection well, with the Stribling Lease, Well No. 2, and the Stribling 'A' Lease, Well No. 1, probably being the producers.

Mr. Gary stated that his failure to plug the subject wells, or to perform H-15 tests, was in part due to problems experienced with a surface owner in gaining access to the leases, and partly due to problems with lease access during rainy weather. He testified that he recently hired a bulldozer to assist in building a road to gain access to the Whitehead Lease.

Mr. Gary also testified that the pile of oily sand found by the District Office inside the firewall on the Whitehead Lease was the result of Gary's effort to dismantle the tank battery on the lease. He stated that the oily sand had come out of the formation under the lease and had accumulated in the gun barrel. Mr. Gary testified that he did not know he needed a permit to pile up the oily sand inside the firewall. He stated that since the inspections which found the oily sand pile, he had brought in sealed drums and placed the oily sand in them. He presented a photograph of the drums and the area where the oily sand pile previously existed.

Mr. Gary confirmed that he has not paid the $12,000.00 administrative penalty assessed against Gary Oil & Gas in Oil & Gas Docket No. 03-0220360.

## EXAMINER'S OPINION

The violations of Statewide Rule 14(b)(2) alleged by Enforcement are not disputed by Gary. Neither does Gary dispute that he is the operator responsible for compliance with Statewide Rule 14(b)(2) with respect to the subject wells. It is clear from the evidence that the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, the Stribling 'A' Lease, Well No. 1, and the Levy Lease, Well No. 1, have all been inactive for substantially in excess of one year and that the wells have not properly been plugged. It is also evident that no plugging extensions are in effect for any of these wells. The examiner therefore concludes that Gary committed the violations of Statewide Rule 14(b)(2) alleged by Enforcement.

The alleged violations of Statewide Rule 14(b)(2)(E) are also proved by the evidence. There is undisputed evidence that the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, the Stribling 'A' Lease, Well No. 1, and the Levy Lease, Well No. 1, are inactive wells that are more than 25 years old, and that Gary has not performed H-15 tests on the wells to determine whether the wells pose a potential threat of harm to natural resources or filed Forms H-15 with the Commission.

The evidence further shows that Gary violated Statewide Rule 3(a) by failing to maintain, at all times, the identification signs required by the rule at the entrance to the Levy Lease and at the site of the Levy Lease, Well No. 1. These violations were occurring at least as of the date of an inspection of the Levy Lease on February 17, 2000, and an incorrect sign was still posted at the site of Well No. 1 as of a further inspection on May 8, 2000.

The piling up by Gary of oily soil inside the firewall on the Whitehead Lease constituted a violation of Statewide Rule 8(d)(1), regardless of the source of the oily soil. This is not altered by the fact that the oily soil may have been removed from the gun barrel during the course of

dismantling the tank battery. The pile of oily soil, measuring 8 feet around and 2 feet high, was first observed by District Office inspectors on April 29, 2002. Even if Gary placed the oily soil in barrels prior to the hearing, the oily soil pile persisted on the lease from at least April 29, 2002, through at least August 13, 2002, and there appears to be no good reason why the soil could not have been placed in barrels and properly disposed of at the time it was removed from the gun barrel. The act of depositing the oily soil into a pile inside the firewall on the lease was an act of disposal within the meaning of Statewide Rule 8(d)(1), and the evidence shows that Gary did not have a permit for such disposal.

Whether the two tanks on the Levy Lease, which are cut-off about 8 inches above the ground, and contain basic sediment and other oil waste, violate Statewide Rule 8(d)(1) presents a more difficult question. Enforcement does not contend that any oil or gas waste was discharged outside the cut-off tanks, and inspection reports indicate that no such discharge was evident. Enforcement counsel conceded that he had not previously seen an Enforcement Section allegation of a Rule 8(d)(1) violation in these fact circumstances. Nonetheless, the examiner concludes that this did violate Rule 8(d)(1).

Rule 8(d)(1) provides that no person may dispose of any oil and gas wastes by any method without obtaining a permit to dispose of such wastes. Oil and gas wastes include any materials to be disposed of which have been generated in connection with activities associated with the exploration, development, and production of oil or gas, including, without limitation, sludge, waste oil, and other liquid, semiliquid, or solid waste materials. Disposal includes the engaging in any act of disposal, including, without limitation, conducting, draining, discharging, emitting, throwing, releasing, depositing, burying, landfarming, or allowing to seep, or to cause or allow any such act of disposal.

Allowing deposits of basic sediment and water and other oil wastes to remain in tanks which have been cut-off 8 inches above the ground and which are open to the atmosphere is, in terms of a pollution risk, hardly distinguishable from causing or allowing live oil or other oil and gas wastes to exist on the ground inside a tank battery firewall. In either case, there is a material risk that the oil and gas wastes will be washed out of the containment area during periods of heavy rainfall. Photographs of at least one of the cut-off tanks on the Levy Lease showed a material accumulation of liquid, which Mr. Gary said was fresh water, inside the tank. Presumably, this liquid sits on top of, and has constituents of, the basic sediment and other oil and gas wastes observed inside the tanks by District Office inspectors at an earlier date. It defies logic to suggest that a Rule 8(d)(1) violation occurs only when the water level reaches 8 inches and the water laps over the cut-off tops of the tanks.

When Gary designated himself the operator of the Levy Lease by filing Form P-4, he assumed the responsibility for regulatory compliance on the lease. The examiner concludes that when Gary allowed deposits of basic sediment and other oil and gas wastes to remain in tanks which were cut-off 8 inches above the ground and left open to the atmosphere, he committed an act of disposal of oil and gas wastes prohibited by Rule 8(d)(1).

On the basis of the factors which the Commission must consider pursuant to TEX. NAT. RES. CODE §81.0531, the examiner recommends that Gary be ordered to pay administrative penalties of $19,500.00 for the violations in Oil & Gas Docket No. 03-0225208 and $8,000.00 for the violations in Oil & Gas Docket No. 03-0225839. The recommended penalty in Oil & Gas Docket No. 03-0225208 is for four violations of Statewide Rule 14(b)(2) at $2,000.00 each, four violations of Statewide Rule 14(b)(2)(E) at $2,000.00 each, one violation of Statewide Rule 8(d)(1) at $1,000.00, and an enhancement of $2,500.00 based on Gary's history of prior outstanding violations as evidenced by the Commission's final order in Oil & Gas Docket No. 03-0220360. The recommended penalty in Oil & Gas Docket No. 03-0225839 is for two violations of Statewide Rule 3(a) at $250.00 each, one violation of Statewide Rule 8(d)(1) at $1,000.00, one violation of Statewide Rule 14(b)(2) at $2,000.00, one violation of Statewide Rule 14(b)(2)(E) at $2,000.00, and an enhancement of $2,500.00 for Gary's history of prior outstanding violations as evidenced by the Commission's final order in Oil & Gas Docket No. 03-0220360.

The penalties recommended by the examiner are deemed reasonable and appropriate based on Gary's history of prior violations and the fact that the violations committed here are serious and presented a threat to the public health and safety. Gary cannot be said to have demonstrated good faith in view of his failure to place the subject wells and leases into compliance following repeated requests for compliance from the District Office. The penalties recommended by the examiner conform to standard penalties for the violations committed by Gary as provided by the Commission's recommended standard penalty schedule for enforcement cases. The $2,500.00 enhancement in each docket also conforms to the Commission's recommended guideline for enhancement of penalties in enforcement cases for prior violations, which, as pertinent here, provides for an enhancement of $2,500.00 where total administrative penalties assessed during the 5 years prior to the present enforcement action are between $10,000.00 and $25,000.00.

The examiner has declined to adopt the recommendation of Enforcement staff that the penalties in each docket be further enhanced based on an allegation of "reckless conduct" by Gary in failing to conduct H-15 tests. The decision not to recommend these "reckless conduct" enhancements does not arise from any leniency consideration, because on the facts of this case Gary is not deserving of leniency. The facts presented here simply do not support "reckless conduct" enhancements.

Webster's Third International Dictionary (G & C Merriam 1976) defines "reckless" as meaning, among other things, "lacking in caution," "deliberately courting danger," and "heedless". Black's Law Dictionary, Sixth Edition (West 1990) defines "reckless" as meaning, among other things, "careless," "heedless," "inattentive," and "indifferent to consequences".

H-15 tests are required for the purpose of determining whether a well poses a potential threat to natural resources. It is hard to imagine a failure to perform a H-15 test that does not involve some element of "careless," "inattentive," "heedless," or "indifferent" conduct. Presumably, however, this was taken into account when the standard (unenhanced) penalty in the penalty guidelines for Rule 14(b)(2)(E) violations was formulated. It is not here necessary to attempt to define the

particular type of "reckless conduct" that would be required in order to justify a reckless conduct enhancement of the standard penalty for a Rule 14(b)(2)(E) violation. It is sufficient to say that in this case, Enforcement has not demonstrated any wanton disregard for the public health and safety that sets this case apart from other cases involving the same violation wherein standard (unenhanced) penalties have been assessed.

The examiner also recommends that the Commission order Gary to plug the subject wells and place the Whitehead and Levy Leases in compliance with Statewide Rule 8. Gary should be ordered to plug the subject wells in that they have been inactive anywhere from 4 to 9 years, and there is no credible evidence to suggest that the wells can be restored to production. In addition, the evidence indicates that the mineral leases underlying the subject leases have expired, and Gary has no good faith claim of a current right to operate the leases.

Based on the record in these dockets, the examiner recommends adoption of the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

1. Errol Bruce Gary D.B.A. Gary Oil & Gas ("Gary") was given at least 10 days notice of this proceeding by certified mail, addressed to his most recent Form P-5 (Organization Report) address. Mr. Gary appeared and participated at the hearing.

2. Gary is a sole proprietorship, and Errol Bruce Gary is owner.

3. Gary's P-5 Organization Report has been delinquent since May 1, 2001. When Gary last renewed his P-5 Organization Report in May 2000, he filed as financial assurance the sum of $1,500.00.

4. Gary designated himself to the Commission as the operator of the Kate Whitehead "B" (21664) Lease ("Whitehead Lease"), the Stribling, W. F. (02379) Lease ("Stribling Lease"), the Stribling, W. F. 'A' (04846) Lease ("Stribling 'A' Lease"), and the Levy, Mable Lipper -A- (02445) Lease ("Levy Lease") by filing Forms P-4 (Producer's Transportation Authority and Certificate of Compliance) with the Commission, effective as follows: Whitehead Lease - Effective February 1, 1996; Stribling Lease - Effective February 1, 1997; Stribling 'A' Lease - Effective February 1, 1997; and Levy Lease - Effective February 1, 1997.

5. For the Whitehead Lease, Well Nos. 4 and 5, production was last reported in March 1998. Zero production was reported for the Whitehead Lease from April 1998, through September 1999, and no production reports were filed thereafter.

6. No production reports have been filed with the Commission for the Stribling Lease, Well No. 2, and the Stribling 'A' Lease, Well No. 1, since at least January 1, 1993.

7. The Levy Lease, Well No. 1, was permitted as an injection well on January 15, 1969, and injection activity for the well was last reported to the Commission in October 1984. The injection permit for this well was canceled on August 31, 1994, and the well was thereafter classified as an oil well. No production reports have been filed with the Commission for the Levy Lease, Well No. 1, since at least January 1994.

8. On the occasions of District Office inspections of the Whitehead Lease, Well Nos. 4 and 5, on September 29 and October 18, 1999, January 14, February 15, and March 14, 2000, and April 29 and August 13, 2002, the wells were inactive and had no pumping units.

9. On the occasions of District Office inspections of the Stribling Lease, Well No. 2, on February 17 and April 21, 1999, January 18, February 17, March 28, and April 6, 2000, and April 26 and August 12, 2002, the well was inactive and without electricity.

10. On the occasions of District Office inspections of the Stribling 'A' Lease, Well No. 1, on February 17 and April 21, 1999, February 17, 2000, and April 26 and August 12, 2002, the well was inactive and without electricity.

11. On the occasions of District Office inspections of the Levy Lease, Well No. 1, on February 17, March 28, and May 8, 2000, and May 9, May 21, and August 12, 2002, the well was inactive and had no rods or pumping unit.

12. The only plugging extension obtained for the Stribling 'A' Lease, Well No. 1, expired in May 1999. No plugging extensions have been obtained for the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, or the Levy Lease, Well No. 1.

13. The Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, the Stribling 'A' Lease, Well No. 1, and the Levy Lease, Well No. 1, have been inactive for more than one year, have not been plugged, and no plugging extensions currently are in effect.

14. The estimated cost to the State of plugging the Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, the Stribling 'A' Lease, Well No. 1, and the Levy Lease, Well No. 1 is as follows: Whitehead Lease, Well Nos. 4 and 5 -$18,615.00; Stribling Lease, Well No. 2 - $5,100.00; Stribling 'A' Lease, Well No. 1 - $5,100.00; and Levy Lease, Well No. 1 - $2,348.50.

15. Usable quality groundwater in the area is likely to be contaminated by migrations or discharge of saltwater and other oil and gas wastes from the subject wells. Unplugged wellbores constitute a cognizable threat to the public health and safety because of the possibility of pollution.

16. The Whitehead Lease, Well Nos. 4 and 5, the Stribling Lease, Well No. 2, the Stribling 'A'

Lease, Well No. 1, and the Levy Lease, Well No. 1, are more than 25 years old. Form H-15 tests required by Statewide Rule 14(b)(2)(E) for these wells are delinquent as follows: Whitehead Lease, Well Nos. 4 and 5 - delinquent since June 30, 1998; Stribling Lease, Well No. 2 - delinquent since July 22, 1994; Stribling 'A' Lease, Well No. 1 - delinquent since August 7, 1995; and Levy Lease, Well No. 1 - delinquent since July 8, 1996.

17. Casing leaks and/or fluid levels above the base of usable quality water indicate a possible pollution hazard. Without a H-15 test and the filing of supporting documentation (Form H-15) with the Commission, the Commission cannot determine whether a well poses a threat to natural resources.

18. As of the date of a District Office inspection of the Whitehead Lease on April 29, 2002, a pile of oily soil measuring 8 feet around and 2 feet high had been deposited inside the firewall on the lease. This condition had not been remediated as of the date of a further inspection on August 13, 2002. Gary has been issued no permit by the Commission for the discharge of oil and/or gas wastes from or onto the Whitehead Lease.

19. As of the date of a District Office inspection of the Levy Lease on May 9, 2002, there existed on the lease metal tanks which had been cut-off 8 inches above the ground, containing waste oil, basic sediment and water, and which were open to the atmosphere and susceptible to overflow during periods of heavy rainfall. This condition continued to exist as of the date of subsequent inspections on May 21 and August 12, 2002. Gary has been issued no permit by the Commission for the discharge of oil and/or gas wastes from or onto the Levy Lease.

20. Any unauthorized discharge or disposal of oil, saltwater, basic sediment, or other oil and gas waste is a potential source of pollution to surface and subsurface waters if not remediated to prevent seepage and run-off.

21. On the occasion of a District Office inspection of the Levy Lease on February 17, 2000, there was no identification sign of the type required by Statewide Rule 3(a) at the lease entrance and the identification sign posted at the site of Levy Lease, Well No. 1, was incorrect in that it listed the name of a previous operator. The sign at the site of Well No. 1 was still incorrect as of the date of a subsequent inspection on May 8, 2000. As of inspections made on May 9 and August 12, 2002, the required identification signs had been posted.

22. In the event of a pollution or safety violation or other emergency, the lack of legible signs as required by Statewide Rule 3(a) may cause confusion and delay in containing and remediating the violation or emergency and threaten the public health and safety.

23. Gary has a history of prior violations of Commission rules relating to safety or the prevention or control of pollution. In Oil & Gas Docket No. 03-0220360, by final order

dated August 7, 2001, the Commission found that Gary had committed three violations of Statewide Rule 14(b)(2) and three violations of Statewide Rule 14(b)(2)(E) on the Wagner, Louis W. (02418) Lease, Humble Field, Harris County, Texas, and ordered Gary to pay an administrative penalty of $12,000.00. This penalty remains unpaid by Gary.

24. Gary has not demonstrated good faith since he failed to plug the subject wells, or place the subject leases and wells in compliance with Commission rules, in response to repeated requests for compliance from the District Office.

## CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued by the Railroad Commission to appropriate persons legally entitled to notice.

2. All things necessary to the Commission attaining jurisdiction over the subject matter and the parties in this hearing have been performed or have occurred.

3. Errol Bruce Gary D.B.A. Gary Oil & Gas ("Gary") is the operator of the Kate Whitehead "B" (21664) Lease ("Whitehead Lease"), Well Nos. 4 and 5, the Stribling, W. F. (02379) Lease ("Stribling Lease"), Well No. 2, the Stribling, W. F. 'A' (04846) Lease ("Stribling 'A' Lease"), Well No. 2, and the Levy, Mable Lipper -A- (02445) Lease, Well No. 1 ("subject leases" and "subject wells"), as defined by Commission Statewide Rules 14, 58 and 79 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE ("T.A.C.") §§3.14, 3.58, and 3.69] and Chapters 85 and 89 of the Texas Natural Resources Code.

4. As operator, Gary has the primary responsibility for complying with Statewide Rules 3, 8, and 14 [Tex. R.R. Comm'n, 16 T.A.C. §§3.3, 3.8, and 3.14], Chapters 89 and 91 of the Texas Natural Resources Code, and other applicable statutes and Commission rules, respecting the subject leases and wells.

5. The subject wells are not properly plugged or otherwise in compliance with Statewide Rule 14(b)(2) [Tex. R.R. Comm'n, 16 T.A.C. §3.14(b)(2)], or Chapters 85, 89 and 91 of the Texas Natural Resources Code. The Whitehead Lease, Well Nos. 4 and 5, have been out of compliance with Statewide Rule 14(b)(2) since at least April 1, 1999. The Stribling Lease, Well No. 2, has been out of compliance with Statewide Rule 14(b)(2) since at least January 1, 1994. The Stribling 'A' Lease, Well No. 1, has been out of compliance with Statewide Rule 14(b)(2) since May 1999, when the last plugging extension expired. The Levy Lease, Well No. 1, has been out of compliance with Statewide Rule 14(b)(2) since at least November 1, 1985.

6. By failing to perform H-15 tests on the subject wells, Gary violated Statewide Rule 14(b)(2)(E) [Tex. R.R. Comm'n, 16 T.A.C. §3.14(b)(2)(E)]. The Whitehead Lease, Well

Nos. 4 and 5, have been out of compliance with Statewide Rule 14(b)(2)(E) since June 30, 1998. The Stribling Lease, Well No. 2, has been out of compliance with Statewide Rule 14(b)(2)(E) since July 22, 1994. The Stribling 'A' Lease, Well No. 1, has been out of compliance with Statewide Rule 14(b)(2)(E) since August 7, 1995. The Levy Lease, Well No. 1, has been out of compliance with Statewide Rule 14(b)(2)(E) since July 8, 1996.

7. By causing or allowing the unpermitted discharge or disposal of oil and/or gas wastes on the Whitehead Lease and the Levy Lease, Gary violated Statewide Rule 8(d)(1) [Tex. R.R. Comm'n, 16 T.A.C. §3.8(d)(1)] and Chapter 91 of the Texas Natural Resources Code. The Whitehead Lease was out of compliance with Statewide Rule 8(d)(1) from at least April 29, 2002, through at least August 13, 2002. The Levy Lease was out of compliance with Statewide Rule 8(d)(1) from at least May 9, 2002, through at least August 12, 2002.

8. By failing to post, at all times, an identification sign at the principal entrance of the Levy Lease, showing the name of the lease, name of the operator, and number of acres in the lease, and by failing to post, at all times, an identification sign at the well site of the Levy Lease, Well No. 1, showing the name of the lease, name of the operator, and the well number, Gary violated Statewide Rule 3(a) [Tex. R.R. Comm'n, 16 T.A.C. §3.3(a)]. The Levy Lease was out of compliance with Statewide Rule 3(a) from at least February 17, 2000, through at least May 8, 2000.

9. The documented violations committed by Gary constitute acts deemed serious and a hazard to the public health, and demonstrate a lack of good faith, as provided by TEX. NAT. RES. CODE ANN. §81.0531(c) (Vernon 2001).

## RECOMMENDATION

The examiner recommends that the above findings and conclusions be adopted and the attached orders approved, requiring the operator Errol Bruce Gary D.B.A. Gary Oil & Gas to:

1. Plug the Kate Whitehead "B" (21664) Lease, Well Nos. 4 and 5, Pierce Junction Field, Harris County, Texas; the Stribling, W. F. (02379) Lease, Well No. 2, Humble Field, Harris County, Texas; the Stribling, W. F. 'A' (04846) Lease, Well No. 1, Humble Field, Harris County, Texas; and the Levy, Mable Lipper -A- (02445) Lease, Well No. 1, Humble Light (Riverside) Field, Harris County, Texas;

2. Clean-up and place in compliance with Statewide Rule 8 [Tex. R. R. Comm'n, 16 T.A.C. §3.8] the Kate Whitehead "B" (21664) Lease, Pierce Junction Field, Harris County, Texas; and the Levy, Mable Lipper -A- (02445) Lease, Humble Light (Riverside) Field, Harris County, Texas;

3. Pay an administrative penalty in Oil & Gas Docket No. 03-0225208 in the amount of NINETEEN THOUSAND FIVE HUNDRED DOLLARS ($19,500.00); and

4. Pay an administrative penalty in Oil & Gas Docket No. 03-0225839 in the amount of EIGHT THOUSAND DOLLARS ($8,000.00).

Respectfully submitted,

James M. Doherty
Hearings Examiner