

ENFORCEMENT ACTION AGAINST TIMOTHY MICHAEL ELFORD, D.B.A. SANDHAWK PRODUCTION COMPANY (OPERATOR NO. 747699) AND/OR PATRICIA A. HARRISON, D.B.A. KODY OIL CO. (OPERATOR NO. 473767) FOR VIOLATIONS OF STATEWIDE RULES ON THE GULF HANNAH FEE B (17044) LEASE, WELL NOS. 2, 3, 5 AND 24, HULL FIELD, LIBERTY COUNTY, TEXAS

APPEARANCES:

FOR MOVANT:

Scott Holter
Staff Attorney

MOVANT:

Enforcement Section
of the Railroad Commission

FOR RESPONDENT:

Timothy M. Elford
Sole Proprietor

RESPONDENT:

Timothy Michael Elford
D.B.A. Sandhawk Production Company

AMENDED PROPOSAL FOR DECISION

PROCEDURAL HISTORY

DATE OF REQUEST FOR ACTION:	April 30, 2002
DATE CASE INITIALLY HEARD:	September 16, 2002
DATE OF REOPENED HEARING:	March 10, 2003
HEARD BY:	James M. Doherty, Hearings Examiner
RECORD CLOSED:	March 10, 2003
AMENDED PFD CIRCULATION DATE:	April 24, 2003
REISSUED DATE:	April 30, 2003
CURRENT STATUS:	Protested

STATEMENT OF THE CASE

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

1. Whether the respondents Timothy Michael Elford, D.B.A. Sandhawk Production Company (“Elford”) and/or Patricia A. Harrison, D.B.A. Kody Oil Co. (“Kody”) 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 Gulf Hannah Fee B (17044) Lease (“subject lease”), Well Nos. 2, 3, 5 and 24 (“subject wells”), Hull Field, Liberty County, Texas;
2. Whether Elford and/or Kody have violated provisions of Statewide Rule 3(a) [Tex. R.R. Comm’n, 16 T.A.C. §3.3(a)] by failing to maintain identification signs at the lease entrance, tank battery, and sites of Well Nos. 2, 3, 5 and 24 on the subject lease, and should be required to place the lease in compliance with Statewide Rule 3(a);
3. Whether Elford and/or Kody have 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 the subject wells or otherwise place the subject lease and subject wells in compliance with Statewide Rules 14(b)(2) and 3(a).
4. Whether Elford and/or Kody should be assessed administrative penalties of not more than \$10,000.00 per day for each offense committed regarding the subject lease and subject wells; and
5. Whether any violations of Statewide Rules 14(b)(2) and 3(a) by Elford and/or Kody 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).

The original, first amended, and second amended complaints of the Enforcement Section (“Enforcement”) named only Elford as a respondent. Elford appeared at the original hearing on September 16, 2002, and presented evidence. Scott Holter, Staff Attorney, appeared representing Enforcement, and Enforcement’s original hearing file for this docket was admitted into evidence.

On December 12, 2002, a Proposal for Decision was issued by the hearings examiner, which recommended that the complaint against Elford be dismissed with prejudice. Enforcement filed exceptions, and at the regularly scheduled conference on January 21, 2003, the Commission remanded the case to staff for further consideration. Following this remand, Enforcement served its third amended complaint which named both Elford and Kody as respondents.

A reopened hearing was scheduled, and a new notice of hearing was served on Elford and Kody. The reopened hearing was held on March 10, 2003. Elford again appeared and presented evidence. Scott Holter, Staff Attorney, appeared to represent Enforcement, and Enforcement’s amended and updated hearing file was admitted into evidence. Kody did not appear.

Enforcement staff recommends that an administrative penalty of \$9,437.50 be assessed

against Elford and/or Kody and that Elford and/or Kody be ordered to place the subject lease and wells into compliance with Statewide Rules 14(b)(2) and 3(a). The examiner officially notices that on March 19, 2003, the Commission approved a Form P-4 changing the operator of the subject lease and wells from Elford to IPACT, a bonded operator. The examiner recommends that: (1) no penalty be assessed against Elford and that as to Elford this complaint proceeding be dismissed with prejudice; and (2) a penalty be assessed against Kody in the amount of \$9,500.00.

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 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. Statewide Rule 3(a)(3) requires the posting of an identification sign at the tank battery showing the name of the property, name of the operator, and number of acres in the property, among other information.

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 evidence that Elford is a sole proprietor doing business as Sandhawk Production Company. Elford last filed a Form P-5 Organization Report on January 2, 2001, and his

P-5 has been delinquent since January 2002. At the time of his last P-5 renewal, Elford filed as financial assurance a nonrefundable fee in the amount of \$750.00. Elford has no prior history of Commission orders entered against him for violations of Commission rules.

Kody is also a sole proprietorship, and Patricia A. Harrison is owner. Kody has an active Form P-5 Organization Report. Kody last filed a Form P-5 on November 4, 2002, at which time it filed financial assurance in the amount of \$1,120.00. Kody has no prior history of Commission orders entered against it for violations of Commission rules.

Elford designated himself as operator of the subject lease by filing a Form P-4 (Producer's Transportation Authority and Certificate of Compliance), which was effective November 1, 1996, and approved April 11, 1997.

Enforcement presented production records showing that except for 60 barrels of oil reported in November 2001, no production has been reported for the subject lease since April 2000. District Office inspection reports dated from June 11, 2001, through July 8, 2002, stated that Well No. 3 was inactive. District Office inspection reports dated from July 12, 2001, through July 8, 2002, stated that Well Nos. 2, 5 and 24 were inactive (with the exception of a report dated May 15, 2002, that Well No. 2 was pumping oil and saltwater and a report dated May 20, 2002, stating that Well No. 24 was "flowing on tubing"). A May 20, 2002, inspection report stated that Well Nos. 2, 3, and 24 were sealed. Inspection reports dated July 19, 2002, and January 23, 2003, indicated that all of the subject wells were inactive and sealed.

The most recent plugging extension for Well No. 2 expired on January 2, 2001. There is no indication in Commission records that plugging extensions were granted for Well Nos. 3, 5, and 24. At the time of the hearing, no plugging extensions were in effect for the subject wells, and no Plugging Record (Form W-3) or Cementing Affidavit (Form W-15) had been filed or approved for the subject wells. The District Office estimated that the cost to plug the subject wells would be \$40,700.00.

A District Office inspection report dated June 11, 2002, stated that there were no identification signs of the type required by Statewide Rule 3(a) at the "lease road" or at the site of Well No. 3. Subsequent inspection reports for various dates between August 3, 2001, and September 21, 2001, stated that identification signs were missing at the lease entrance, the tank battery and at the site of all of the subject wells. Further inspection reports between December 6, 2001, and January 23, 2003, stated that signs were missing at the tank battery and well sites, but did not indicate that a sign was missing at the lease entrance.

The enforcement case file presented by Enforcement contains a copy of a settlement agreement between Elford and John R. Harrison in Cause No. 57435, John R. Harrison v. Timothy M. Elford, in the 253rd District Court, Liberty County, Texas. This settlement agreement, which is dated June 13, 2001, provided that Elford would assign the subject lease and all related equipment to John R. Harrison or his designee, Kody Oil Company. The enforcement case file also contains

an assignment dated June 13, 2001, pursuant to which Elford assigned the subject lease to Kody Oil Company. Counsel for Enforcement represented that these documents were delivered to him by Jerry Williams, President of IPACT, to support the filing of a two signature Form P-4 proposing a change of operator from Elford to IPACT. The enforcement case file contains this Form P-4, which was filed with the Commission on June 27, 2002.

The enforcement case file also contains Forms P-1 (Producer's Monthly Report of Oil Wells) filed for the subject lease for the months of August 2001 through April 2002 (except for February 2002), filed in the name of Kody Oil Company and signed by "Cotton" Harrison, reporting that for the month of November 2001, wells on the subject lease produced 60 barrels of oil and reporting zero production during the remaining months. These Forms P-1 show no dispositions of oil from the subject lease. There is no explanation in the Forms P-1 of the disposition of the 60 barrel difference between the 83 barrels of oil reported by Kody to be on hand at the end of November 2001, and the 23 barrels reported to be on hand at the beginning of December 2001.

The file also contains a December 6, 2001, District Office inspection report for the subject lease which originally showed the operator of the lease as Kody Oil Company. A line is drawn through the name Kody Oil Company, and the word "Sandhawk" entered above. A January 17, 2002, inspection report includes the comment "Total of 6 wells on this lease as per Cotton Harrison." A May 20, 2002, inspection report includes the following comments: "Met with Cotton Harrison. Mr. Harrison said he had 60 days to test wells. But he has no problem with sealing well."

District Office inspection reports for the subject lease reflect some changes in the status of wells after the June 2001 assignment from Elford to Kody Oil Company. An inspection report dated August 3, 2001, indicated that the pumping unit was not attached to Well No. 2, and the well had no flow line. A January 17, 2002, inspection report stated that Well No. 2 had no flow line or pumping unit. These inspection reports contrast with later reports for May 15, 2002, and May 20, 2002, which reported that Well No. 2 was pumping oil and saltwater.

An inspection report for January 17, 2002, reported that Well No. 3 was equipped with rods and a pumping unit, but had no power. A May 20, 2002, inspection report stated that Well No. 3 had no flow line or pumping unit. These inspection reports contrast with a July 8, 2002, inspection report which stated that all wells on the lease had flow lines and pumping units. An inspection report for May 20, 2002, stated that Well No. 5 had no flow line, but a July 8, 2002, inspection report stated that Well No. 5 was equipped with a flow line.

Enforcement takes the position that the evidence shows that the subject wells are noncompliant with Statewide Rules 14(b)(2) and 3(a). Enforcement believes that Elford is the responsible operator because the last Form P-4 approved for the subject lease designated Elford as the operator. Enforcement recommends that Elford be assessed an administrative penalty in the amount of \$9,437.50, based on four violations of Statewide Rule 14(b)(2) at \$2,000.00 each, five violations of Statewide Rule 3(a) at \$250.00 each, and one corrected violation of Statewide Rule 3(a) at \$187.50. In the event Elford is determined not to be the responsible party, the examiner is

requested by Enforcement to determine Kody's responsibility and, if appropriate, to assess the recommended penalty against Kody.

Respondents' Evidence and Position

Timothy M. Elford, sole proprietor of Sandhawk Production Company, appeared and presented evidence. He testified that he entered into a settlement agreement in June 2001, with John R. "Cotton" Harrison, who is the husband of Kody's owner Patricia A. Harrison, in Case No. 57435 in the 253rd District Court of Liberty County, Texas, pursuant to which he assigned the subject lease and an adjacent lease to Harrison (actually Kody Oil Company). Elford signed a Form P-4 to change the operator of the lease from Elford to Kody, and left it up to Harrison and Harrison's attorney to file the P-4 with the Commission. When Elford received his P-5 renewal packet for 2002, he did not renew because he believed he had divested himself of his only lease and wells.

On or about June 15, 2001, Elford met Harrison either on the subject lease or nearby in Liberty, and removed Sandhawk's identification signs from the lease. Elford produced the identification signs at the hearing, but because of their size they were not made a part of the record. At the same time, Elford turned over to Harrison all the subject well files, including logs, maps, Forms P-1, engineering reports, and core samples.

In about May 2002, after he had received Commission correspondence relating to this enforcement action, Elford contacted Harrison's attorney, who advised Elford that Harrison would take care of the matter. Thereafter, a representative of IPACT, with which Elford had not previously been familiar, came to Elford's office in Houston indicating that IPACT had agreed to become operator of the subject lease. The IPACT representative had Elford sign a Form P-4 to change the operator of the lease from Elford to IPACT. Elford concluded that Harrison had arranged for IPACT to become the operator of record of the subject lease. Elford stated his understanding that IPACT had filed with the Commission the Form P-4 which he had signed for IPACT, and the week before the reopened hearing IPACT advised Elford that it had submitted to the Commission a new mineral lease from the mineral owner to support the Form P-4.

Elford testified that when he signed over the lease and all the equipment to Harrison, it was the last he hoped to hear of the situation. When Elford picked up his identification signs from the lease in June 2001, he had no intention of returning. He did not return to the lease at any time after June 15, 2001, and had no connection with any activities on the lease after that date. At the time of the assignment of the lease to Kody in June 2001, Elford understood that John and Patricia Harrison were taking over all operations and obligations for the subject lease. John Harrison's attorney advised Elford that the Harrisons would take over all operations immediately, file all necessary paperwork, and restore the subject wells to production.

Kody Oil Co. did not appear at the hearing or present evidence.

Examiner's Official Notice

The examiner has officially noticed from Commission P-5 records that when Elford last renewed his P-5 Organization Report, he filed as financial assurance a nonrefundable annual fee in the amount of \$750.00. Official notice has also been taken of Commission records showing that the subject lease and wells were the only on-schedule lease and wells of which Elford was the designated operator at the time of the hearing.

The examiner has also officially noticed from Commission P-5 records that Kody Oil Co. is an active P-5 operator, whose owner is reported on the most recently filed Form P-5 to be Patricia Harrison. Official notice has also been taken from Commission P-4 records that the subject lease was transferred to Elford from Kody Oil Co. as the next previous operator, and at an earlier date, the subject lease was operated by Spinner Oil Company, of which John R. Harrison was a partner.

The examiner has further officially noticed from Commission P-4 records that: (1) on November 19, 2001, a Form P-4 was filed with the Commission to change the operator of the subject lease from Elford (Sandhawk) to Kody Oil Co.; (2) the Form P-4 was signed by Timothy Michael Elford for Sandhawk and by Patricia A. Harrison for Kody; and (3) the Form P-4 does not bear any notation that it was approved by the Commission. P-4 records which are a part of the enforcement case file in the present docket indicate that a W-1X was needed for noncompliant wells, and that the Form P-4 was sent unapproved to Central Records on July 17, 2002.

The examiner has also officially noticed that Kody Oil Co. became the operator of the Gulf-26 (22769) Lease by Form P-4 effective June 14, 2001, approved January 16, 2002, and that the previous operator of the Gulf-26 (22769) Lease was Elford.

The examiner has also officially noticed Commission Form P-4 and Form T-1 (Monthly Transportation and Storage Report) records showing that: (1) Plains Marketing, L.P. is the designated gatherer for the Kody Oil Co. Gulf-26 (22769) Lease; and (2) Plains Marketing, L.P. reported to the Commission on Forms T-1 that it had received from Kody Oil Co. from the Gulf Hannah Fee B (17044) Lease 157 barrels of oil for November 2001, 307 barrels of oil for March 2002, 179 barrels of oil for April 2002, and 161 barrels of oil for July 2002.

The examiner has also officially noticed from Commission records that subsequent to the filing of a Form P-4 seeking a change of operator of the subject lease from Elford to IPACT, documentation of IPACT's good faith claim of a current right to operate the lease was filed consisting of: (1) a Contract Operating Agreement dated June 18, 2002, between IPACT and Kody, designating IPACT the operator; and (2) an Oil, Gas and Mineral Lease dated December 23, 2002, between Elwood T. Barrett, II, lessor, and Kody Oil Co., lessee. The Form P-4 changing the operator of the subject lease and wells from Elford to IPACT was approved by the Commission on March 19, 2003.

EXAMINER'S OPINION

The evidence proves that the subject lease and wells were in violation of Statewide Rules

14(b)(2) and 3(a). The remaining issue is whether either Elford or Kody is the operator responsible for the violations. The examiner concludes that Elford is not responsible and that as to Elford the complaint should be dismissed with prejudice. The examiner concludes further that Kody is responsible for the alleged violations and that an administrative penalty should be assessed against Kody.

Statewide 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 the entity responsible for properly plugging the well. The presumption of responsibility may be rebutted only at a hearing called for the purpose of determining plugging responsibility. This rule applies here because the Form P-4 transferring the subject lease to Elford was effective November 1, 1996, and approved April 11, 1997.

The critical September 1, 1997, filing cut-off date referenced in Statewide Rule 14(c)(2) is the effective date of amendments to §89.002(a)(2) of the Texas Natural Resources Code which defines “operator” for the purposes of Chapter 89 of the Code. *See* Acts 1997, 75th Leg., ch. 89, §1, eff. Sept. 1, 1997. Prior to the effective date of these amendments, §89.002(a)(2) provided that:

“‘Operator’ means a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation . . .”.

The 1997 amendments to §89.002(a)(2) provided that an “operator” is a person who assumes responsibility for the physical operation and control of a well as shown by a form the person files with the Commission and the Commission approves.

By promulgation of Statewide Rule 14(c)(2), the Commission recognized that the definition of “operator” provided by the 1997 amendments to §89.002(a)(2) could not be applied retroactively to operators who had taken Form P-4 transfers of leases or wells *prior* to the September 1, 1997, effective date of the amendments. *See* preamble to 1998 amendments to Statewide Rule 14 at 23 *TexReg* 9301 (“The statutory change was effective September 1, 1997 and the effect of operator designations filed prior to that date cannot be altered retroactively.”) For entities designated operators by Form P-4 filing prior to September 1, 1997, the previous definition of “operator” continues to apply. This assumes importance since §89.011(a) of the Texas Natural Resources Code provides that the *operator* of a well shall properly plug the well when required and in accordance with the Commission’s rules that are in effect at the time of the plugging.

Elford defended against Enforcement’s complaint by attempting to rebut the presumption of Statewide Rule 14(c)(2) that he is the person responsible for plugging the subject wells. He did so by attempting to show that another operator, Kody Oil Co., had taken an assignment from Elford of the subject lease and wells and had assumed the well plugging responsibility.

The Commission previously has recognized that the responsibility of an operator for

regulatory compliance on a lease taken by Form P-4 transfer prior to September 1, 1997, may end upon the assumption of physical operation and control of the lease and wells by a subsequent operator, regardless of whether the Commission has approved a Form P-4 transfer of the lease and wells to the subsequent operator. In the preamble to the 1998 amendments to Statewide Rule 14 [23 *TexReg* 9300], the Commission stated:

“For wells on which the most recent operator designation form was filed prior to September 1, 1997, Commission rules regarding plugging responsibility remain unchanged - the designated operator is presumed to be responsible for plugging but that presumption may be rebutted upon a showing at a hearing that *some other entity has assumed responsibility for the physical operation and control of the well.*”
(Emphasis added)

Smith & Weaver, *Texas Law of Oil and Gas*, Vol. 3, Chapter 14 at page 14-31 (LexisNexis 2002) is to the same effect.

The Commission recently has applied this principle in a case similar to the case at hand. *See*, for example, Oil & Gas Docket No. 03-0222092, *Enforcement Action Against J. A. Leonard and/or AIM Consultants, Inc. for Violations of Statewide Rules on the Coffield -F- (10327) Lease, Well No. 1, Chriesman Field, Burlson County, Texas* (Final Order served October 25, 2002) (Subsequent operator found to have assumed well plugging responsibility pursuant to settlement agreement where he reentered and reworked well).

A preponderance of the evidence in this case shows that Kody Oil Co. has assumed physical operation and control of the subject lease and wells. Kody, designee of John R. “Cotton” Harrison and sole proprietorship of Patricia A. Harrison, took an assignment of the subject lease and wells, and all related equipment, from Elford on June 13, 2001, pursuant to settlement agreement of the same date signed by Elford and John R. (“Cotton”) Harrison. Shortly after the assignment, Elford met Harrison on or near the subject lease, removed Sandhawk’s identification signs, and left the lease for good. Elford had no connection with any activities on the lease after June 15, 2001. Elford signed a Form P-4 to transfer the subject lease to Kody pursuant to the assignment and gave it to Harrison to file with the Commission. On November 19, 2001, this Form P-4 signed by Elford and by Patricia A. Harrison for Kody was filed with the Commission, proposing a change of operator from Elford to Kody, although the P-4 was never approved in that required Form W-1X filings were not made.

At the same time Elford assigned the subject lease to Kody, he also assigned an adjacent lease, the Gulf-26 (22769) Lease. Kody filed a Form P-4 to change the operator of this lease from Elford to Kody, and the Form P-4 was approved by the Commission on January 16, 2002, effective June 14, 2001, the day after the assignment of the lease from Elford to Kody. Forms P-1 show that Kody has produced the Gulf-26 (22769) Lease, and has made dispositions of oil from the lease, since the assignment from Elford.

Subsequent to the assignment of the Gulf Hannah Fee B (17044) Lease from Elford, Kody filed for the lease, in its own name as operator, a Form P-1 (Producer's Monthly Report of Oil Wells), signed by Cotton Harrison, reporting that 60 barrels of oil had been produced on the lease by Kody during November 2001. Additional Forms P-1, signed by Cotton Harrison, were filed for the subject lease in the name of Kody as operator covering the months of August-October 2001, December 2001, January 2002, and March-April 2002, although zero production was reported for these months.

After the date of the assignment from Elford to Kody, District Office inspectors found Harrison on the subject lease, furnishing inspectors with information about the wells on the lease and acting as spokesman for the lease as to testing and sealing of the wells. A District Office inspection report dated in December 2001 actually named Kody as the operator of the subject lease, although Kody's name subsequently was lined-out and Sandhawk's name interlineated. District Office inspection reports also established that changes in the status of wells on the subject lease occurred, particularly as to the manner in which the wells were equipped, after the assignment from Elford to Kody and after Elford left the lease. At least one of the subject wells was found to be pumping oil and saltwater, and another was found to be flowing on tubing, on the occasion of inspections during May 2002. It reasonably may be inferred from the evidence that these changes were the result of Kody's operations.

In December 2002, Kody took a new mineral lease from the mineral owner of the subject property, and in June 2002, Kody entered into an agreement with IPACT pursuant to which IPACT was to become the designated operator of the lease. The Commission has now approved a Form P-4 changing the operator of the subject lease from Elford to IPACT. The evidence considered as a whole leads inevitably to the conclusion that Kody occupied the subject lease and operated the subject wells following the June 2001 assignment from Elford.

Elford rebutted the presumption of Statewide Rule 14(c)(2) that he is the person responsible for plugging the subject wells. The wells have been placed into compliance as a result of the Commission's recent approval of the transfer of the wells to IPACT, a bonded operator. The period of noncompliance prior to Elford's assignment of the subject lease and wells to Kody is *de minimus*. Accordingly, as to Elford the complaint should be dismissed with prejudice.

The issue remains as to Kody's responsibility for the violations alleged by Enforcement. Kody was given notice that the Commission would consider this issue and was given the opportunity to defend against the allegations in the third amended complaint at the reopened hearing. The notice of the reopened hearing, and a copy of the third amended complaint naming Kody as a respondent, were received by Kody as is evidenced by a signed receipt for certified mail in the enforcement case file. Allegations in the third amended complaint put Kody on notice that Elford was contending that Kody is responsible for the alleged violations by reason of the fact that Kody had assumed physical operation and control of the subject lease and wells after the assignment to Kody and after Elford left the lease. This notwithstanding, Kody did not appear at the reopened hearing.

The examiner concludes that Kody assumed the responsibility for violations of Statewide Rules on the subject lease by exercise of physical operation and control, perhaps as early as June 13, 2001, but certainly by November 2001 when it reported on a Form P-1 that it had produced 60 barrels of oil on the lease. There is no legal requirement, and certainly no equitable principle, that Kody be absolved from responsibility for regulatory compliance on the subject lease simply because Kody failed to do the things necessary to obtain approval of the Form P-4 which it filed to change the operator of the lease from Elford to Kody.

Enforcement has expressed the following concerns: (1) Kody took the assignment of the subject lease and wells and exercised physical operation and control after the effective date of the 1997 amendments to §89.002 of the Texas Natural Resources Code; (2) the lease and wells were not in compliance at the time of the assignment; (3) The Commission never approved a Form P-4 changing the operator of the lease from Elford to Kody; (4) §89.002(a)(2) defines “operator” as “a person who assumes responsibility for the physical operation and control of a well as shown by a form the person files with the Commission and the Commission approves; and (5) §89.002(a)(2) provides also that in the event of a sale or conveyance of an unplugged well or the right to operate an unplugged well, a person ceases being the operator for the purpose of §89.011 of the Code only if the well was in compliance with Commission rules relating to safety or the prevention or control of pollution at the time of sale or conveyance and once the person who acquires the well: (a) specifically identifies the well as a well for which the person assumes plugging responsibility on forms required and approved by the Commission; (b) has a Commission-approved organization report as required by §91.142 of the Code; (c) has a Commission-approved bond or other form of financial security under §§91.103-91.107 covering the well; and (d) places the well in compliance with Commission rules.

The current definition of “operator” in §89.002(a)(2) does not deprive the Commission of discretion to find that a person who has exercised physical operation and control of a well has the responsibility for the regulatory compliance of the well where: (a) the Commission has not approved a Form P-4 designating the person as operator; and (b) another person is the operator of record by virtue of a Form P-4 filed prior to September 1, 1997.

The exercise of physical operation and control of a well is still the essential element of the current definition of “operator” in §89.002(a)(2). This definition enables the Commission to treat a Form P-4 filed *after* September 1, 1997, as conclusive on the question of where the responsibility for regulatory compliance lies. However, there is no provision of Chapter 89 of the Code providing that in the case where the Commission has determined that the operator of record as indicated by a Form P-4 filed *prior* to September 1, 1997, has successfully rebutted the presumption of responsibility pursuant to Statewide Rule 14(c)(2), the Commission is without discretion to assign regulatory responsibility elsewhere based on a manifestation of physical operation and control *other* than filing and approval of a Form P-4.

When enacting the 1997 amendments to §89.002, the legislature is presumed to have been aware that: (1) “operator” previously had been defined as “a person who is responsible for the

physical operation and control of a well at the time the well is about to be abandoned or ceases operation;” (2) the new definition of “operator” provided by the 1997 amendments could not be applied retroactively to persons who had become operators prior to the effective date of the amendments; and (3) in the pre-September 1, 1997, era the Commission had permitted P-4 operators of record to rebut the presumption of regulatory responsibility for a well by proof that another person had assumed responsibility by the exercise of physical operation and control.

Statutes are interpreted according to legislative intent. By the 1997 amendments to §89.002, the legislature did not intend to deprive persons who became operators prior to September 1, 1997, of the opportunity to avoid plugging liability by showing that another person had assumed responsibility by the exercise of physical operation and control. Neither did it intend that the Commission would be powerless to impose the plugging liability on another person who exercised such physical operation and control. To conclude otherwise would mean that the legislature intended to create a circumstance in which *no* person could be found to have the plugging responsibility for a well. The legislature should not be presumed to have intended an absurd result. In the event of a determination that Elford rebutted the presumption of responsibility for the subject lease and wells pursuant to Statewide Rule 14(c)(2), the Commission has the discretion to find that Kody assumed this responsibility by the exercise of physical operation and control, notwithstanding the fact that Kody failed to do all the things necessary to obtain Commission approval of a Form P-4 change of operator.

Section 89.002(a)(2), as amended effective September 1, 1997, also says that in the event of a sale or conveyance of an unplugged well, a person ceases being the operator only if the person who acquires the well “specifically identifies the well as a well for which the person assumes plugging responsibility on forms required and approved by the Commission.” If applied broadly, this provision would wipe-out the effect of Statewide Rule 14(c)(2) which permits operators of record designated by filing of a Form P-4 prior to September 1, 1997, to rebut the presumption of responsibility for a well by showing that some other person has assumed responsibility by exercise of physical operation and control. Broad application would also result in the retroactive application to persons designated as operator by Forms P-4 filed prior to the effective date of the 1997 amendments of the strict plugging liability based on Form P-4 filings provided by the current definition of “operator” in §89.002.

The “sale or conveyance” provision of §89.002(a)(2) has more to do with the issue of whether Elford’s responsibility has ceased than with the issue of whether Kody’s responsibility has attached. Ironically, the “sale or conveyance” provision initially enacted in 1993 was intended as a “safe harbor” provision for the benefit of *previous* operators who had sold wells and needed protection from subsequent claims that the seller retained well plugging responsibility because the purchaser had never assumed physical operation and control of the wells. *See Smith & Weaver, Texas Law of Oil and Gas, Vol. 3, Chapter 14 at pp. 14-29 and 14-30 (LexisNexis 2002).* Where the purchaser actually assumed physical operation and control, it was unnecessary to apply this provision to accomplish the intended result.

The examiner has the duty to harmonize and give effect to both Statewide Rule 14(c)(2) and §89.002(a)(2). The definition of “operator” which applies to a person who became operator by Form P-4 filing prior to September 1, 1997, is “a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation.” With this former definition and the provisions of Statewide Rule 14(c)(2) in mind, the examiner concludes that the “sale or conveyance” provision of §89.002(a)(2) means that if a person who became operator by Form P-4 filing prior to September 1, 1997, sells or conveys a well, *in the absence of assumption of responsibility by the purchaser through exercise of physical operation and control*, the responsibility of the seller for the regulatory compliance of the well ceases only when the purchaser files a Form P-4 which is approved by the Commission.

Under the proper Statewide Rule 14(c)(2) analysis, the fact that Elford made an assignment to Kody is not an essential consideration in the determination of whether Elford rebutted the presumption of responsibility. Since Kody assumed responsibility by exercise of physical operation and control, the result would be the same even in the absence of an assignment.

When Kody took the assignment from Elford and occupied the subject lease, Kody knew, or should have known, that the lease and wells were not in compliance with the Commission’s Statewide Rules. The wells had not produced since April 2000, and no plugging extension was in effect or applied for by Kody. Kody knew of the need to obtain approval of a Form P-4 change of operator from Elford to Kody. Kody filed a Form P-4 for this purpose in November 2001, but failed to make the Form W-1X filings necessary to obtain approval of the Form P-4. John R. Harrison was observed on the lease by District Office inspectors and must have known that there were no identification signs posted as required by Statewide Rule 3(a). Although Kody produced at least some of the wells, the wells were not restored to active status by the filing of production reports indicating production of at least 10 barrels of oil per month for 3 consecutive months, as required by Statewide Rule 14(a)(1)(A). Although as of at least May 2002, Elford notified Harrison’s attorney of the pendency of this enforcement action and was advised that Harrison would take care of the matter, Kody did nothing effective to place the lease and wells in compliance or to resolve the question of the proper operator of record until December 2002 when Kody obtained a new mineral lease from the mineral owner and facilitated a Form P-4 transfer of the lease and wells to IPACT, approved by the Commission on March 19, 2003.

Kody cannot be said to have acted in good faith, and an administrative penalty should be assessed against Kody. The examiner concludes that Kody should be ordered to pay an administrative penalty in the amount of \$9,500.00, consisting of 4 violations of Rule 14(b)(2) at \$2,000.00 each and 6 violations of Rule 3(a) at \$250.00 each. The Rule 3(a) violations to which the recommended penalty pertains consist of missing identification signs at the sites of Well Nos. 2, 3, 5 and 24, at the lease entrance and at the tank battery on the lease. Although Enforcement requested a penalty of \$187.50 for the sign violation at the lease entrance on the ground that this violation may have been corrected, District Office inspection reports with dates between June 11, 2001 and July 19, 2002, stated that there was still no sign posted at the lease entrance, and the examiner concludes that \$250.00 is an appropriate penalty for a sign violation of this duration. The inspection report

dated January 23, 2003, made no mention of a sign missing at the lease entrance, but neither did it state that a sign had been posted there to correct the violation reported in previous inspection reports. The penalties recommended conform to guidelines in the recommended standard penalty schedule for enforcement cases.

Based on the record in this case, the examiner recommends that the Commission adopt the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Timothy Michael Elford, D.B.A. Sandhawk Production Company (“Elford”) was given at least 10 days notice of this proceeding by certified mail, addressed to his most recent Form P-5(Organization Report) address. Elford appeared at the hearing and presented evidence.
2. Patricia A. Harrison, D.B.A. Kody Oil Co. (“Kody”) was given at least 10 days notice of this proceeding by certified mail addressed to her most recent Form P-5 (Organization Report) address. The receipt for certified mail was signed and returned to the Commission on February 18, 2003. Kody failed to appear at the hearing.
3. Sandhawk Production Company is a sole proprietorship, and Timothy Michael Elford is owner.
4. Kody Oil Co. is a sole proprietorship, and Patricia A. Harrison is owner. Patricia A. Harrison is the spouse of John R. “Cotton” Harrison.
5. Elford’s P-5 Organization Report has been delinquent since January 2002. When Elford received his P-5 renewal packet for 2002, he did not renew because he believed that he had divested himself of his only lease and wells. At the time of his last P-5 renewal, Elford filed as financial assurance a nonrefundable fee in the amount of \$750.00.
6. Kody’s P-5 Organization Report is active. Kody last filed a Form P-5 on November 4, 2002, and Kody filed as financial assurance a nonrefundable fee in the amount of \$1,120.00.
7. Elford and Kody have no history of previous Commission orders entered against them for violations of Commission rules.
8. Elford designated himself to the Commission as the operator of the Gulf Hannah Fee B (17044) Lease (“subject lease”), Well Nos. 2, 3, 5 and 24 (“subject wells”), by filing a Form P-4 (Producer’s Transportation Authority and Certificate of Compliance) with the Commission, effective November 1, 1996, and approved April 11, 1997. The subject lease and wells were the only on-schedule leases and wells for which Elford was designated to the Commission as operator as of the dates of the hearing.

9. No production has been reported to the Commission for the subject lease since April 2000, except for 60 barrels of oil reported by Kody Oil Co. for November 2001.
10. On the occasion of 12 District Office inspections between June 11, 2001, and January 23, 2003, Well No. 3 on the subject lease was inactive. On the occasion of 10 District Office inspections between July 12, 2001, and January 23, 2003, Well Nos. 2, 5 and 24 on the subject lease were inactive, except that on May 15 and May 20, 2002, Well No. 2 was pumping oil and saltwater, and on May 20, 2002, Well No. 24 was found to be flowing on tubing.
11. The most recent Statewide Rule 14(b)(2) plugging extension for Well No. 2 on the subject lease expired on January 2, 2001. No plugging extensions were obtained for Well Nos. 3, 5 or 24. The subject wells have not been plugged, and the estimated cost to plug the wells is \$40,700.00.
12. On the occasion of 10 District Office inspections of the subject lease between June 11, 2001, and January 23, 2003, the identification sign required by Statewide Rule 3(a) was missing at the site of Well No. 3. On the occasion of 7 District Office inspections between August 3, 2001, and January 23, 2003, identification signs were missing at the site of Well Nos. 2, 5 and 24. On the occasion of 5 District Office inspections between June 11, 2001, and July 19, 2002, an identification sign was missing at the lease road.
13. On June 13, 2001, pursuant to settlement agreement in Cause No. 57435, John R. Harrison v. Timothy M. Elford, in the 253rd District Court, Liberty County, Texas, Elford assigned the subject lease and wells, and all related equipment, to John R. "Cotton" Harrison's designee, Kody Oil Co. At the same time, Elford assigned to Kody an adjacent lease, the Gulf-26 (22769) Lease.
14. Following the assignment, in June 2001, Elford met John R. ("Cotton") Harrison on or near the subject lease, removed the identification signs posted by Sandhawk Production Company, and left the lease. Elford did not return to the lease following June 15, 2001, and was not associated with any activities on the lease after that date.
15. At the time of the assignment in June 2001, Elford signed a Form P-4 to change the operator of the subject lease and wells from Elford to Kody and gave the Form P-4 to John R. ("Cotton") Harrison for filing with the Commission. On November 19, 2001, a Form P-4 bearing signatures for Elford and Kody, was filed with the Commission to change the operator of the subject lease and wells from Elford to Kody. This Form P-4 was not approved by the Commission due to Kody's failure to make required Form W-1X (Application for Future Re-Entry of Inactive Wellbore and 14(b)(2) Extension Permit) filings.
16. Kody also filed with the Commission a Form P-4 seeking a change of operator from Elford

- to Kody for the adjacent Gulf-26 (22769) Lease. This Form P-4 was approved by the Commission on January 16, 2002, effective June 14, 2001.
17. Kody also filed with the Commission Forms P-1 (Producer's Monthly Report of Oil Wells) for the subject lease for each month during August 2001 through April 2002 (except February 2002) naming Kody as operator, reporting that during November 2001, Kody produced 60 barrels of oil on the lease and reporting zero production for the remaining months. These Forms P-1 were signed on behalf of Kody by John R. ("Cotton") Harrison.
 18. Kody also filed Forms P-1 for the adjacent Gulf-26 (22769) Lease, reporting production and dispositions of oil from this lease.
 19. On the occasion of District Office inspections of the subject lease on January 17 and May 20, 2002, John R. ("Cotton") Harrison was on the subject lease or in contact with the inspectors, providing information as to the number of wells on the lease and acting as spokesman for the lease as to testing and sealing of the subject wells. On May 20, 2002, Harrison informed the inspectors that he had 60 days to test the wells, but had no problem with sealing a well.
 20. After the assignment of the subject lease and wells from Elford to Kody Oil Company, and after Elford left the subject lease, changes were made in the operational status of wells on the lease and the manner in which the wells were equipped. As of District Office inspections on August 3, 2001 and January 17, 2002, Well No. 2 had no pumping unit or flow line, but as of a further inspection on May 15 and May 20, 2002, Well No. 2 was pumping oil and saltwater. As of an inspection on May 20, 2002, Well No. 3 had no flow line or pumping unit, but as of a further inspection on July 8, 2002, the well had been equipped with a pumping unit and flow line. As of an inspection on May 20, 2002, Well No. 5 had no flow line, but as of a further inspection on July 8, 2002, the well had been equipped with a flow line. As of the May 20, 2002, inspection, Well No. 24 was flowing on tubing.
 21. After Elford was advised of the commencement of this enforcement action, he contacted John R. ("Cotton") Harrison's attorney who advised Elford that Harrison would take care of the matter.
 22. In about May or June 2002, a representative of IPACT advised Elford that IPACT intended to become operator of the subject lease, and Elford signed a Form P-4 for this purpose. On June 27, 2002, a Form P-4 was filed with the Commission to change the operator on the subject lease from Elford to IPACT.
 23. On March 19, 2003, the Form P-4 seeking a change of operator of the subject lease and wells from Elford to IPACT was approved by the Commission. In connection with this Form P-4, IPACT filed with the Commission a copy of an Oil, Gas and Mineral Lease covering the subject lease, dated December 23, 2002, between Elwood T. Barrett II, lessor, and Kody Oil

- Co., lessee. IPACT also filed a copy of a Contract Operating Agreement between IPACT and Kody, designating IPACT as operator of the lease.
24. Kody Oil Company assumed physical operation and control of the subject lease and wells after assignment of the lease and wells to Kody by Elford and after Elford left the lease.
 25. Failure to properly identify the subject lease, wells, and tank battery by the posting of identification signs required by Statewide Rule 3(a) had the potential for causing confusion and delay in remedying a violation or emergency and posed a threat to the public health and safety.
 26. Usable quality groundwater in the area was 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.
 27. Kody Oil Co. has not demonstrated good faith since it failed to timely plug the subject wells or otherwise place the subject lease and wells in compliance with Statewide Rules 3 and 14.

CONCLUSIONS OF LAW

1. Proper notice of hearing was timely issued to the appropriate persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction have occurred.
3. Timothy Michael Elford, D.B.A. Sandhawk Production Company was not the person who was responsible for the physical operation and control of the Gulf Hannah Fee B (17044) Lease (“subject lease”), Well Nos. 2, 3, 5 and 24 (“subject wells”) at the time the wells were about to be abandoned or ceased operation.
4. Timothy Michael Elford, D.B.A. Sandhawk Production Company rebutted the presumption of Statewide Rule 14(c)(2) that as the designated operator of the subject lease on the most recent Commission approved Form P-4, he was the person responsible for the physical operation and control of the wells and the person responsible for properly plugging the wells.
5. After assumption of responsibility by Kody Oil Co., Timothy Michael Elford, D.B.A. Sandhawk Production Company was not responsible for properly plugging the subject wells or otherwise placing the wells into compliance with Commission rules.
6. Kody Oil Co. assumed responsibility for compliance with Statewide Rules 3(a) and 14(b)(2)

[Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.3(a) and 3.14(b)(2)] with respect to the subject lease and wells by exercising physical operation and control after Timothy Michael Elford, D.B.A. Sandhawk Production Company left the lease.

7. As of at least November 2001 and thereafter, Kody Oil Co. was the operator responsible for compliance with Statewide Rules 3(a) and 14(b)(2) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.3(a) and 3.14(b)(2)] and Chapter 89 of the Texas Natural Resources Code with respect to the subject lease and wells.
8. From at least November 2001 through March 18, 2003, the subject wells were not properly plugged or otherwise in compliance with Statewide Rule 14 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.14], or Chapters 85, 89 and 91 of the Texas Natural Resources Code.
9. By failing to post identification signs at the lease entrance, locations of the subject wells, and at the tank battery on the subject lease, Kody Oil Co. violated Statewide Rule 3(a) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.3(a)]. Kody was out of compliance with Statewide Rule 3(a) from at least November 2001 through March 18, 2003.
10. The documented violations committed by Kody Oil Co. 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).
11. The complaint against Timothy Michael Elford, D.B.A. should be dismissed with prejudice. An administrative penalty in the amount of \$9,500.00 should be assessed against Kody Oil Co.

RECOMMENDATION

The examiner recommends that the above findings and conclusions be adopted and the attached order approved: (1) assessing an administrative penalty in the amount of \$9,500.00 against Kody Oil Co.; and (2) dismissing this complaint proceeding against Timothy Michael Elford, D.B.A. Sandhawk Production Company with prejudice.

Respectfully submitted,

James M. Doherty
Hearings Examiner