

March 21, 2005

OIL AND GAS DOCKET NO. 06-0238709

ENFORCEMENT ACTION AGAINST KELLY H. BAXTER, SOLE PROPRIETOR, DOING BUSINESS AS KELLY H. BAXTER OIL AND GAS CO. (OPERATOR NO. 056536) FOR VIOLATIONS OF STATEWIDE RULES ON THE PIPKINS, LILLIAN (10436) LEASE, WELL NO. 1, FOREST HILL (HARRIS SAND) FIELD, WOOD COUNTY, TEXAS.

APPEARANCES:

FOR MOVANT RAILROAD COMMISSION OF TEXAS:

Reese Copeland, Staff Attorney

FOR RESPONDENT KELLY H. BAXTER

Jamie Nielson, Attorney
Kelly H. Baxter

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

COMPLAINT FILED:	September 28, 2004
AMENDED COMPLAINT FILED:	November 10, 2004
NOTICE OF HEARING:	December 29, 2004
DATE CASE HEARD:	February 3, 2005
RECORD CLOSED:	February 10, 2005
PFD PREPARED BY:	Mark Helmueller, Hearings Examiner
PFD CIRCULATION DATE:	March 21, 2005
CURRENT STATUS:	Protested

STATEMENT OF THE CASE

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

1. Whether respondent should be required to plug or otherwise place in compliance with Statewide Rules 8 and 14, the Pipkins, Lillian (10436) Lease, Well No. 1, Forest Hill (Harris Sand) Field, Wood County, Texas;
2. Whether the respondent 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 comply with said statutes and Statewide Rules 8 and 14;
3. Whether the respondent should be assessed administrative penalties of not more than \$10,000.00 per day for each offense committed regarding said lease and wells;
4. Whether any violations should be referred to the Office of the Attorney General for further civil action pursuant to Tex. Nat. Res. Code Ann. § 81.0534.

Reese Copeland, Staff Attorney, appeared at the hearing representing the Railroad Commission of Texas, Office of General Counsel, Enforcement Section (“Enforcement”). Kelly H. Baxter (Baxter) also appeared represented by counsel and presented evidence at the hearing. Enforcement's hearing file was admitted into evidence.

Enforcement recommended that Baxter be ordered to bring the lease into compliance with Commission rules, properly plug the well, and pay a total administrative penalty of \$2,600.00. The administrative penalty is broken down as follows: \$2,000.00 for one violation of Statewide Rule 14(b)(2); and \$600.00 for one violation of Statewide Rule 8(d)(1). The examiner agrees with Enforcement’s recommendations.

DISCUSSION OF THE EVIDENCE

Organization and Permit Records

Commission records show that Baxter filed its initial Commission Form P-5 (Organization Report) with the Commission on August 8, 1995. The most recent Organization Report for Baxter was approved on October 4, 2004. Baxter is identified as owner of the company. Commission records show that as of February 22, 2005 Baxter is recognized as the operator of 96 wells with a total depth of 398,985 feet. Baxter submitted a \$50,000 letter of credit as his financial assurance with his last Organization Report filing.

Baxter was recognized as the operator of the Pipkins, Lillian (10436) Lease, Well No. 1, Forest Hill (Harris Sand) Field, (“subject lease” and/or “subject well”) after filing a Commission Form P-4 (Certificate of Compliance and Transportation Authority) which was approved by the Commission on February 11, 2002.

Commission records also indicate that a plugging extension for Well No. 1 on the subject lease was approved consistent with Baxter’s August 2003 Organization Report renewal based on his filing of a \$50,000.00 blanket letter of credit. The plugging extension was canceled by the P-5 Department on December 9, 2003 due to the unresolved violation of Statewide Rule 8(d)(1) on the subject lease. No further plugging extension for Well No. 1 has been approved.

Commission Inspections

Commission inspections of the subject lease were conducted on September 4, 2003, October 9, 2003, October 23, 2003, November 6, 2003, December 1, 2003, January 5, 2004, February 17, 2004, March 11, 2004, May 17, 2004, October 6, 2004, December 28, 2004, December 29, 2004 and January 18, 2005. The inspection reports document three violations of Commission rules including: 1) signs required to be posted at the lease entrance and tank battery displayed incorrect information in violation of Statewide Rule 3(a)¹; 2) unpermitted discharges of produced water and oil inside the firewall of the tank battery in violation of Statewide Rule 8(d)(1); and 3) the failure to properly plug Well No. 1 after December 9, 2003 when the Commission canceled the well’s plugging extension.

With respect to the violation of Statewide Rule 8(d)(1), the initial Commission inspection on September 4, 2003 found an area within the tank battery on the subject lease covered by standing water with oil floating on the surface. Follow up inspections report the unresolved violation and also document efforts to remediate the affected area inside the firewall of the tank battery.

The inspection on October 23, 2003 found that Baxter repaired the leaking pipe which caused the initial discharge, but no apparent attempt to remediate the areas affected by the spill. The inspection on November 6, 2003 observed that the standing fluids had been removed, and fresh dirt spread over the affected areas, but that the oil-impregnated soil had not been removed, allowing the oil to resurface. No further attempts to remediate the oil affected area were reported in the inspections on December 1, 2003, January 5, 2004, and February 17, 2004.

On March 11, 2004, another discharge violation was observed in the tank battery area due to an overflowing tank. In a further follow-up inspection on May 17, 2004, attempts to remediate the oil affected areas within the tank battery were again noted, but oil was again seeping through fresh dirt that had been spread over the old spills. No change in the conditions on the lease were reported in the inspection on October 6, 2004.

The inspections on December 28 and 29, 2004 documented Baxter’s use of a vacuum truck

¹ Inspections after October 23, 2003 observed that the sign violations had been corrected. Violations of Statewide Rule 3 reported in the initial inspection reports are not included in the complaint.

to remove free standing accumulated rainwater with oil on the surface from the area within the firewall. Additionally, after the water was removed, the inspector documented the use of a backhoe and dump truck to remove oil affected soil from within the tank battery.

In the most recent inspection on January 18, 2005, no new leaks were observed in the facilities at the tank battery, however, rainwater had again accumulated within the firewall. The inspector noted approximately 2 gallons of oil were floating on the surface of the accumulated water.

With respect to the violation of Statewide Rule 14(b)(2) the Commission inspections confirm that Well No. 1 on the subject lease is inactive. The last reported production was in November 2001.

ENFORCEMENT'S POSITION

Enforcement argues that subject lease is out of compliance with Rule 8(d)(1) because Baxter never properly remediated the oil affected area which was first documented in September 2003. Enforcement also asserts that the well is out of compliance with Rule 14(b)(2) because it was not properly plugged or restored to production after the plugging extension was canceled. Enforcement urges that Baxter be ordered to bring the lease into compliance with Commission rules, and pay an administrative penalty of \$2,600.00.

BAXTER'S POSITION

Baxter argues that he has cleaned-up the discharge violations and any remaining problems are de minimis. He acknowledges that he is the proper operator of the subject lease and is responsible for the current violations. He also admits that he does not currently have a valid lease, and that he therefore intends to plug the well himself within the next 30-45 days depending on rig availability. He further claims that another operator may be interested in taking over operations of the well, but that no actual offer has been made.

With respect to his efforts to remediate the affected area inside the firewall near the tank battery, Baxter claims that in the fall of 2003, as soon as the Commission brought the problem to his attention, that he spent a full day and \$700 cleaning up the area. He argues that these efforts are documented in the Commission's inspection reports in October and November 2003.

Baxter also asserts that he attempted again to remediate the entire affected area in May 2004. He contracted with a vacuum truck operator to remove all the standing fluids and then laid sand over the affected area. Baxter points to the May 17, 2004 inspection report to confirm this remediation effort.

Finally, Baxter claims he contracted with a site remediation specialist in December 2004 to conduct a final complete clean-up effort of the tank battery area. He again points to the Commission inspection reports of December 28th and 29th to confirm that the clean-up was completed at that time.

APPLICABLE AUTHORITY

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

Statewide Rule 14(b)(2) provides that the operator of a well must plug the well in accordance with Commission rules within one year after operations cease, unless an extension is granted. For wells transferred after September 1, 1997, the operator of a well for purposes of plugging liability is the person who assumed responsibility for the physical operation and control of a well as shown by an approved Form P-4 designating that person as operator.

EXAMINER'S OPINION

The violations of Statewide Rules 8 and 14 and Baxter's responsibility for the violations are uncontested. The only remaining issues to be determined are the provisions of any order directing compliance with Commission rules, and the amount of any administrative penalty.

Compliance Requirements

With respect to the provisions of a Commission Final Order requiring compliance with Statewide Rule 14(b)(2), Baxter's admission that he no longer has a valid lease provides the basis for a plug-only order in this docket. The subject well last reported production in November 2001. Baxter's vague assertion that another operator may be willing to take over the lease was not substantiated, and Baxter himself admits that he is prepared to plug the well as soon as a rig becomes available. In light of the lack of any current right to operate the subject lease, it is the examiner's recommendation that Baxter be required to plug the well. Finally, if either Baxter or another qualified operator is able to obtain a new oil, gas and mineral lease before a Final Order with a plug-only provision becomes final, any documentation could be proffered as evidence through a motion to submit late-filed exhibits or a motion for rehearing.

It also appears that ordering further compliance with the provisions of Statewide Rule 8(d)(1) remains an issue based on the recent inspection on January 18, 2005. Despite Baxter's efforts, it is clear from the inspection report that there is still oil-saturated soil inside the firewall. Further remediation is required to resolve this violation.

Amount of Administrative Penalty

Texas Natural Resources Code §81.0531(c) requires the Commission to consider four factors in determining the amount of an administrative penalty for a violation of Commission rules: 1) the permittee's history of previous violations; 2) the seriousness of the violation; 3) any hazard to the health or safety of the public; and 4) the demonstrated good faith of the person charged. In most Enforcement cases, a standard penalty guideline has already evaluated these factors in determining the amount of the administrative penalty sought in the complaint. Enhanced penalties for violations may be sought for several criteria, including: time out of compliance; actual or threatened environmental impact; threatened or actual hazard to the public; and, reckless or intentional conduct.

Violations of Rule 8(d)(1) have a recommended range from \$500.00 to \$6,000.00 under the guideline for standard penalties. This range appears to reflect both the nature of the substance discharged, and the affected area, as neither of those factors are identified elsewhere in the guideline as a basis for an enhanced administrative penalty. The penalty recommended by Enforcement in this case for the violation of Rule 8(d)(1) is at the low end of the guideline for standard penalties.

Enforcement's recommended administrative penalty for both the Rule 8(d)(1) and 14(b)(2) violations is consistent with existing Commission standard penalty guidelines. While the length of time associated with the discharge violation is significant and could be a basis for an enhanced penalty, it is also clear that at least some efforts have been made to bring the area into compliance. Further, all of the inspection reports show that the affected area has been confined by the tank battery firewall. In light of these facts, the examiner does not recommend a departure from the standard penalty recommendation made by Enforcement.

Additional Recommendations

The examiner further recommends pursuant to Texas Natural Resources Code §91.114 that Baxter be identified as an individual in a position of ownership or control during the time he violated Commission rules related to safety and the control of pollution. Accordingly, he would be subject to the restrictions of Texas Natural Resources Code §91.114(a)(2) for a period of no more than seven years from the date the order entered in this matter becomes final, or sooner, if the terms of the order are satisfied.

CONCLUSION

While respondent made an effort to resolve the discharge violation, it appears clear that full compliance has not been achieved. Further efforts are required to fully remediate the oil-impregnated soil within the tank battery. With respect to the violation of Rule 14(b)(2), the time period the well has been inactive, coupled with the admission that Baxter does not possess a current right to operate the well, warrant a recommendation that compliance for this violation be limited to properly plugging the well. Finally, the violations together justify the imposition of the administrative penalty recommended by Enforcement in the amount of \$2,600.00.

Based on the record in this docket, the examiner recommends adoption of the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Respondent Kelly H. Baxter, sole proprietor, doing business as Kelly H. Baxter Oil and Gas Co. ("Baxter") was given at least 10 days notice of this proceeding by certified mail, addressed to his most recent Form P-5 (Organization Report) address. Baxter appeared and through counsel presented evidence at the hearing.

2. Commission records show that Baxter filed his initial Commission Form P-5 (Organization Report) with the Commission on August 8, 1995. The most recent Organization Report renewal for Baxter was approved on October 4, 2004. Baxter is identified as owner of the company. Commission records show that as of February 22, 2005 Baxter is recognized as the operator of 96 wells with a total depth of 398,985 feet. Baxter submitted a \$50,000 letter of credit as his financial assurance with his last Organization Report filing.
3. Baxter was recognized as the operator of the Pipkins, Lillian (10436) Lease, Well No. 1, Forest Hill (Harris Sand) Field, (“subject lease” and/or “subject well”) after filing a Commission Form P-4 (Certificate of Compliance and Transportation Authority) which was approved by the Commission on February 11, 2002.
4. An unpermitted discharge of oil occurred on the subject lease which has not been fully remediated by respondent.
 - a. A Commission inspection on September 4, 2003 found an area within the tank battery on the subject lease covered by standing water with oil floating on the surface.
 - b. An inspection on October 23, 2003 found that the leaking pipe which had caused the initial discharge in the tank battery had been repaired, but no attempt had been made to remediate the areas affected by the spill.
 - c. An inspection on November 6, 2003 observed that the standing fluids had been removed, and fresh dirt spread over the affected areas, but that the oil-impregnated soil had not been removed, allowing the oil to resurface.
 - d. Commission inspections on December 1, 2003, January 5, 2004, and February 17, 2004 observed oil-impregnated soil within the tank battery firewall.
 - e. A Commission inspection on March 11, 2004, observed further discharges of water and oil in the tank battery area due to an overflowing tank.
 - f. An inspection on May 17, 2004, observed attempts to remediate the oil-affected areas within the tank battery, but found oil seeping through fresh dirt that had been spread over the old spills.
 - g. Inspections on December 28 and 29, 2004 documented the use of a vacuum truck to once again remove free standing fluids from the accumulation of rainwater in the area within the tank battery firewall. Additionally, a backhoe and dump truck were used to remove oil-impregnated soil.
 - h. An inspection on January 18, 2005, observed rainwater with approximately 2 gallons of oil floating on the surface within the tank battery firewall.

4. Well No.1 on the subject lease is currently inactive and has been inactive for more than 12 months.
 - a. Commission inspections on September 4, 2003, October 9, 2003, October 23, 2003, November 6, 2003, December 1, 2003, January 5, 2004, February 17, 2004, March 11, 2004, May 17, 2004, October 6, 2004, December 28, 2004, December 29, 2004 and January 18, 2005, observed that the well is inactive.
 - b. Commission records show that a plugging extension for the subject well was approved with Baxter's Organization Report filing in August 2003. The plugging extension was originally scheduled to expire on July 2004, however, due to the ongoing violation of Statewide Rule 8(d)(1), the plugging extension was canceled December 9, 2003.
 - c. The plugging extension for the subject well based on Baxter's Organization Report renewal in October 2004, was denied due to the failure to fully resolve the pollution violation on the subject lease.
 - d. Commission records report no production from Well No. 1 after November 2001.
5. Usable quality groundwater in the area may be contaminated by migrations or discharges of saltwater and other oil and gas wastes from unplugged wellbores. Unplugged wellbores constitute a cognizable threat to the public health and safety because of the probability of pollution.
7. Respondent admitted that the lease has expired for the subject well and that he no longer possessed the right to operate the subject well.
8. The estimated cost to plug the subject well is \$11,300.00.

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. Baxter is the operator of the Pipkins, Lillian (10436) Lease, Well No. 1 as defined by Statewide Rule 14 and §89.002 of the Texas Natural Resources Code.
4. Baxter has the primary responsibility for complying with Rules 8 and 14, and Chapter 89 of the Texas Natural Resources Code as well as other applicable statutes and Commission rules relating to the Pipkins, Lillian (10436) Lease, Well No. 1.
5. The Pipkins, Lillian (10436) Lease is not in compliance with Commission Statewide Rule 8(d)(1) or Chapters 85, 89 and 91 of the Texas Natural Resources Code.

6. The Pipkins, Lillian (10436) Lease has been out of compliance with Commission Statewide Rule 8(d)(1) from on or before September 4, 2003 to the present.
7. Well No. 1 on the Pipkins, Lillian (10436) Lease is not in compliance with Commission Statewide Rule 14(b)(2) or Chapters 85, 89 and 91 of the Texas Natural Resources Code.
8. Well No. 1 on the Pipkins, Lillian (10436) Lease has been out of compliance with Commission Statewide Rule 14(b)(2) from on or before December 9, 2003 to the present.
9. Kelly H. Baxter is identified in Commission filings as holding a position of ownership, as defined by Texas Natural Resources Code § 91.114, during the time period of the violations of Commission rules committed by respondent.
10. The violations of Commission rules committed by respondent are related to safety and the control of pollution.
11. As an owner at the time of the violations Commission rules related to safety and the control of pollution, Kelly H. Baxter and any other organization in which he may hold a position of ownership or control, shall be subject to the restrictions of Texas Natural Resources Code §91.114(a)(2) for a period of no more than seven years from the date the order entered in this matter becomes final, or sooner, if the conditions that constituted the violations herein are corrected or are being corrected in accordance with a schedule to which the Commission and the organization have agreed; and all administrative, civil, and criminal penalties and all cleanup and plugging costs incurred by the State relating to those conditions are paid or are being paid in accordance with a schedule to which the Commission and the organization have agreed.
12. The documented violations committed by respondent are a hazard to the public health and demonstrate a lack of good faith pursuant to Texas Natural Resources Code §81.0531(c).

RECOMMENDATION

The examiner recommends that the above findings and conclusions be adopted and the attached order approved, requiring Kelly H. Baxter, sole proprietor, doing business as Kelly H. Baxter Oil and Gas Co., within 30 days of the entry of a Final Order in this matter; 1) to plug Well No. 1 on the Pipkins, Lillian (10436) Lease, Forest Hill (Harris Sand) Field; 2) to bring the Pipkins, Lillian (10436) Lease, Forest Hill (Harris Sand) Field into compliance with Commission Rules; and 3) to pay an administrative penalty of \$2,600.00.

Respectfully submitted,

Mark Helmueller
Hearings Examiner