

ENFORCEMENT ACTION AGAINST JOHN ALLEN REESE D/B/A A J A COMPANIES (OPERATOR NO. 000351) FOR VIOLATIONS OF STATEWIDE RULES ON THE BEN LAIRD (06471) LEASE, EAST TEXAS FIELD, GREGG COUNTY, TEXAS; LLOYD HEIRS (07443) LEASE, EAST TEXAS FIELD, GREGG COUNTY, TEXAS; AND JNO. LLOYD (07106) LEASE, EAST TEXAS FIELD, GREGG COUNTY, TEXAS

APPEARANCES:

FOR MOVANT:

Reese B. Copeland
Staff Attorney

MOVANT:

Enforcement Section
of the Railroad Commission

FOR RESPONDENT:

J. Allen Reese
Sole Proprietor

RESPONDENT:

John Allen Reese
D/B/A A J A Companies

PROPOSAL FOR DECISION

PROCEDURAL HISTORY

DATE OF REQUEST FOR ACTION:

February 6, 2002

DATE CASE HEARD:

May 13, 2002

HEARD BY:

James M. Doherty, Hearings
Examiner

RECORD CLOSED:

May 28, 2002

PFD CIRCULATION DATE:

July 24, 2002

CURRENT STATUS:

Protested

STATEMENT OF THE CASE

1. Whether the respondent John Allen Reese D/B/A A J A Companies ("A J A") has violated provisions of Statewide Rules 3(a), 8(b), and/or 8(d)(1) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §§3.3(a), 3.8(b), and/or 3.8(d)(1)] on the Ben Laird (06471) Lease, East Texas Field, Gregg County, Texas ("Laird Lease"); the Lloyd Heirs (07443) Lease, East Texas Field, Gregg County, Texas ("Lloyd Heirs Lease"); and the Jno. Lloyd (07106) Lease, East Texas Field, Gregg County, Texas ("Jno. Lloyd Lease") and should be required to place the leases in compliance with Commission Statewide Rules;
2. Whether the respondent 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 or laws pertaining to safety or prevention or control of pollution by failing to maintain the subject leases in compliance with Statewide Rules 3(a), 8(b) and 8(d)(1);

3. Whether the respondent should be assessed administrative penalties of not more than \$10,000.00 per day for each offense committed regarding the subject leases;
4. Whether any violations of Statewide Rules 3(a), 8(b) and 8(d)(1) by the respondent 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).

Respondent appeared through its representative J. Allen Reese, sole proprietor, who presented testimony at the hearing. Reese B. Copeland, Staff Attorney, appeared representing the Railroad Commission of Texas, Enforcement Section.

A Notice of Opportunity for Hearing, including a copy of the Original Complaint, was forwarded to respondent on February 6, 2002, at the addresses given on his then most recently filed Form P-5 Organization Report, by certified mail and regular mail. One certified envelope was returned, marked "Unclaimed" and no green card was returned. Enforcement represented that none of the regular mail envelopes were returned. Respondent did not answer or file a request for hearing in response to the Notice of Opportunity for Hearing, and the matter went to a default hearing on March 18, 2002.

On March 20, 2002, Enforcement filed a motion seeking permission to submit certain late-filed exhibits, and served a copy on respondent at the same addresses which had been used for the purpose of the Notice of Opportunity for Hearing. On April 10, 2002, respondent corresponded with Scott Petry, the hearing examiner who had presided at the default hearing, requesting a hearing in this docket and two other dockets. On April 23, 2002, Enforcement corresponded with examiner Petry, with a copy to respondent, stating that since a final default order had not issued, notices of hearing would issue the same day scheduling a hearing for May 13, 2002. A Notice of Hearing was served on respondent on April 23, 2002.

On May 8, 2002, respondent filed a motion for continuance of the May 13, 2002, hearing, based on a representation that respondent had not had sufficient time to prepare for the hearing. This motion was opposed by Enforcement. On May 9, 2002, the undersigned examiner forwarded a letter to respondent and counsel for Enforcement via facsimile transmission and regular mail denying the requested continuance.

At the hearing on May 13, 2002, respondent again requested that this docket be continued, on this occasion basing the request on the representation that respondent needed more time to employ an attorney. This request was denied because the request was not timely under 16 TEX. ADMIN. CODE §1.124, respondent's previous written request for continuance had said nothing about respondent's intent or need to employ an attorney, and regardless of whether respondent had

received Enforcement's settlement offer and Notice of Opportunity for Hearing sent to respondent in January and February 2002, respondent had notice of the complaint and that a hearing would be held at least by early April 2002, as evidenced by respondent's letter dated April 10, 2002, requesting that a hearing be scheduled.

At the May 13, 2002, hearing, the Enforcement Section's hearing file for this docket was admitted into evidence, and respondent gave testimony. With the agreement of the parties, the record was held open until May 28, 2002, to permit the parties to file written closing statements on the issue of what penalty, if any, should be assessed in the event respondent were found to have committed the violations alleged in the complaint. Enforcement filed the requested written closing statement, but respondent did not.

Enforcement staff recommends that a \$38,750.00 penalty, including enhancements, be assessed against respondent. The examiner recommends that a \$40,750.00 penalty, including enhancements, be assessed and that respondent be ordered to place the subject leases into compliance with Statewide Rules 3, 8, and 91.

BACKGROUND

Statewide Rule 3(a) provides that each property that produces oil, gas, or geothermal resources and each oil, gas, or geothermal resource well and tank shall at all times be clearly identified as follows:

(1) A sign shall be posted at the principal entrance to each such property which shall show the name by which the property is commonly known and is carried on the records of the Commission, the name of the operator, and the number of acres in the property.

(2) A sign shall be posted at each well site which shall show the name of the property, the name of the operator, and the well number.

(3) A sign shall be posted at or painted on each oil stock tank and on each remotely located satellite tank showing the information provided for in paragraph (1) and certain additional information not relevant here.

Statewide Rule 8(b) provides that no person conducting activities subject to regulation by the Commission may cause or allow pollution of surface or subsurface water in the state. Surface or subsurface water is defined by Statewide Rule 8(a) as groundwater, percolating or otherwise, and lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

With certain exceptions not relevant here, Statewide 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 Position and Evidence

Form P-5 records presented by Enforcement reflect that respondent A J A is a sole proprietorship, and that John Allen Reese ("Reese") is proprietor. The examiner has officially noticed that A J A first filed a Form P-5 Organization Report on February 22, 2001, and A J A's Organization Report is now delinquent. Form P-4 records showed that A J A was designated operator of the subject leases by filing of Forms P-4 which were approved February 22, 2001, effective February 20, 2001. The Form P-4 records presented by Enforcement show that the previous operator of the subject leases was 5R Oil Company. The examiner has officially noticed from Commission P-5 records that 5R Oil Company is a sole proprietorship, of which Linda Ball Reese is proprietor.

Rule 3(a)

Enforcement presented District Office inspection reports dated June 11 and 15, 2001, and February 21, 2002, reflecting that the identification signs posted at Well Nos. 8, 10, and 16, and at the tank battery and lease entrance on the Laird Lease were incorrect in that they did not show the name of A J A as operator.

Enforcement also presented District Office inspection reports dated June 15 and 25, 2001, and February 20, 2002, reflecting identical sign deficiencies at Well Nos. 1, 2, 3, and 4, and at the tank battery and lease entrance on the Jno. Lloyd Lease.

Enforcement asserts 11 violations of Statewide Rule 3(a), and recommends a penalty of \$250.00 for each such violation. The total penalty recommended by Enforcement for the alleged Rule 3(a) violations is \$2,750.00.

Rule 8(b)

(a) Laird Lease

Enforcement presented District Office inspection reports dated January 18, February 26, and June 15, 2001, and February 21, 2002, pertaining to an oil spill at and around Well No. 10 on the Laird Lease. Live oil on the ground at or near Well No. 10 was first reported in the inspection report dated January 18, 2001, and according to subsequent inspection reports, live oil remained there through at least June 15, 2001. The June 15, 2001, inspection report stated that about four gallons of live oil remained around the wellhead of Well No. 10 and that there was a 45' x 3' area of oil stained/saturated dirt "away" from Well No. 10. This inspection report was accompanied by photographs taken by a Commission field inspector, and the report described Photo -Q- as depicting "oil sat (sic) soil down from Well #10 towards wetland". A June 28, 2001, Legal Enforcement Pollution Summary Sheet prepared by District Office personnel, and forwarded to the Commission's Assistant Director - Compliance along with a memorandum recommending penalty action for violation of Statewide Rule 8, as pertinent, stated that: (1) ". . . Most recent inspection indicates and (sic) area of 45 ft x 3 ft of oil saturated soil remains near well #10 and the adjacent wetland area;" (2) "No flowing waterways or surface drainageways affected . . . Oil and oil saturated soil were also observed immediately adjacent to a wetlands area near well #10."

With respect to this spill, Enforcement alleges a violation of Statewide Rule 8(b) and recommends a penalty of \$1,000.00, with an enhancement of \$2,500.00 based on asserted pollution of a minor freshwater source.

(b) Lloyd Heirs Lease

Enforcement presented a District Office inspection report dated October 4, 2000, stating that a 20' x 30' area of live oil and oil saturated dirt existed around Well No. 2 on the Lloyd Heirs Lease. This report stated that the source of the live oil could not be determined, but the same sort of conditions had been observed before. A further inspection report dated October 30, 2000, stated that the live oil had been cleaned up and that the area had been disced and tilled, although more discing was needed. Subsequent inspection reports dated January 9 and February 20, 2001, reported oil stained dirt around Well No. 2 that needed remediation, but no live oil was reported.

An inspection report dated June 5, 2001, reported oil stained dirt and about five gallons of live oil at and around Well No. 2, covering an area 40' x 40' about 30' from the well. A further inspection report dated June 15, 2001, was accompanied by photographs taken by a Commission field inspector. According to this report, Photo - B - and Photo - C - depict "spill area north of well - wetland." A Legal Enforcement Pollution Summary Sheet dated June 28, 2001, prepared by District Office personnel and forwarded to the Commission's Assistant Director - Compliance along with a memorandum recommending penalty action for violation of Statewide Rule 8, asserted a violation consisting of "Failure to clean up/remediate oil and oil saturated soil affecting a wetlands area around Well No. 2" and stated that while no creeks or surface drainageways were affected, ". . . oil and oil saturated soil were observed in a wetlands area adjacent to well #2."

For this spill, Enforcement alleges a violation of Statewide Rule 8(b) and recommends a penalty of \$1,000.00, with an enhancement of \$2,500.00 based on pollution of a minor freshwater

source.

(c) Jno. Lloyd Lease

Enforcement presented 20 District Office inspection reports dated from February 22, 2001, through February 20, 2002, pertaining to a discharge of oil on the Jno. Lloyd Lease, resulting from a leak in a poly line at the tank battery. The District Office inspection report dated February 22, 2001, stated that 10-20 barrels of oil had run out of the firewall into a culvert extending under FM 1252 and running about 150 yards down a wet weather branch. It appeared to the inspector that the oil had discharged through a break in the firewall, and about 5 barrels of oil remained inside the firewall.

Four separate inspection reports dated February 23, 2001, reported that: (1) about 5 barrels of oil remained inside the firewall; (2) about two barrels of oil existed in a 90' x 30' area outside the firewall on both sides of the culvert and about 50' down a draw; and (3) some oil had run across a lease road into a ditch leading to a pond and traces of oil had made it to the mouth of the pond. These same inspection reports stated that Commission field inspectors had met with "Reese" to discuss clean up and that some tilling and dozer work had been done and some oil picked up.

According to subsequent inspection reports, patches and spots of live oil remained on the lease through at least June 15, 2001, and live oil remained inside the firewall through at least June 25, 2001. Oil stained/saturated soil outside the firewall reportedly persisted through at least February 20, 2001.

A Legal Enforcement Pollution Summary Sheet dated June 28, 2001, prepared by District Office personnel and forwarded to the Commission's Assistant Director - Compliance with a memorandum recommending penalty action for violation of Statewide Rule 8, stated that as a result of this spill, "oil discharged from the firewall traveled for approximately 1500 ft., entering a surface drainageway and one-half (1/2) acre pond."

Enforcement asserts that this spill resulted in two violations of Statewide Rule 8(b), one when oil flowed out of the firewall into a wet weather branch (surface drainageway), and another when the oil reached the pond. For the alleged discharge to the wet weather branch, Enforcement recommends a penalty of \$1,000.00, with an enhancement of \$2,500.00 based on pollution of a minor freshwater source. By reason of the fact that the oil assertedly flowed down the wet weather branch and entered the pond, Enforcement recommends a penalty of \$1,000.00 with an enhancement of \$2,500.00 based on pollution of a minor freshwater source.

Rule 8(d)(1)

(a) Laird Lease

Enforcement presented a District Office inspection report dated February 26, 2001, which

reported a recent spill of oil at the tank battery on the Laird Lease. This report stated that about one barrel of live oil was standing inside the firewall, and oil had been discharged from the firewall. Live oil was observed below the firewall about 150'-200'. Some oil stained leaves and vegetation were observed outside the firewall, and reportedly, a dozer had leveled and covered up the spill area.

Enforcement presented six additional inspection reports which pertained to this discharge, dating from April 3, 2001, through February 21, 2002. According to these inspection reports, live oil remained inside the firewall through at least February 21, 2002, and live oil remained in places outside the firewall at least through June 15, 2001. Oil saturated dirt was reportedly remaining on the lease through at least February 21, 2002.

With respect to this spill, Enforcement alleges two violations of Statewide Rule 8(d)(1), one when oil spilled inside the firewall, and another when oil flowed outside the firewall. Enforcement recommends a penalty of \$3,000.00 each for these alleged violations.

(b) Jno. Lloyd Lease

Enforcement asserts a Statewide Rule 8(d)(1) violation for the spill on the Jno. Lloyd Lease which resulted from the poly line leak at the tank battery, first reported in the District Office inspection report dated February 22, 2001. This is the same spill made the basis of Enforcement's allegation of a Statewide Rule 8(b) violation on this lease (i.e., because the oil that was spilled entered a wet weather branch and pond). The evidence pertaining to the nature and duration of the effects of this spill has been discussed previously.

In addition, Enforcement asserts a Statewide Rule 8(d)(1) violation on this lease pertaining to a discharge of oil from the firewall at the tank battery, first reported in a District Office inspection report dated June 5, 2001. This inspection report stated that oil had washed out of two cuts in the firewall, one of which was a "washed out" area. As of June 25, 2001, it was reported that the firewall contained about 1/4 barrel of live oil, but the amount of oil washed out of the firewall was not reported.

For the alleged Rule 8(d)(1) violation pertaining to the poly line leak, Enforcement recommends a penalty of \$6,000.00. For the alleged Rule 8(d)(1) violation pertaining to the discharge through cuts in the firewall, Enforcement recommends a penalty of \$6000.00, with an enhancement of \$4,000.00 based on alleged intentional conduct of the operator.

Affidavits and Certification

Enforcement submitted as evidence the affidavit of Ramon Fernandez, Jr., P.E., Staff Engineer, which stated that: (1) in the event of a pollution or safety violation or other emergency, the lack of legible signs and identification displaying correct information may cause confusion as to the responsible operator to be contacted and the actual location of the violation or emergency; (2)

such confusion will cause delays in containing and remediating the violation or emergency, which is serious and may threaten the public health and safety; (3) discharge or disposal of oil, saltwater, or other oil and gas waste will cause pollution if allowed to come into contact with zones of fresh or usable quality surface or subsurface waters; and (4) 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 water if not remediated to prevent seepage and runoff.

Enforcement also submitted a certification from the Commission's Secretary to the effect that Commission records reveal that no permit was issued to respondent to discharge oil and/or gas wastes from or onto the subject leases.

Respondent's Position and Evidence

J. Allen Reese, A J A's sole proprietor, asserted that all the discharges and pollution complained of by Enforcement had been cleaned up and remediated by A J A. With respect to the discharge on the Jno. Lloyd Lease consisting of oil washing out through cuts in the firewall, first reported in the District Office inspection report dated June 5, 2001, Mr. Reese testified that a saltwater disposal line plugged up and caused fluid to fill the firewall. He stated that oil flowing over the top of the firewall created the "cuts". In addition, with respect to the discharge on the Jno. Lloyd Lease resulting from the poly line leak at the tank battery, Mr. Reese disputed Enforcement's allegation that the discharge reached a pond on the lease. Mr. Reese conceded the Statewide Rule 3(a) violations alleged by Enforcement.

EXAMINER'S OPINION

Except for the alleged Rule 8(b) violation on the Jno. Lloyd Lease, consisting of oil entering a pond, A J A did not dispute that the violations alleged by Enforcement occurred, and did not challenge Enforcement's assertion that A J A is the operator responsible for the violations.

The District Office inspection reports presented by Enforcement prove 11 violations of the identification sign requirements of Statewide Rule 3(a), 5 on the Laird Lease (Well Nos, 8, 10, and 16, lease entrance and tank battery) and 6 on the Jno. Lloyd Lease (Well Nos. 1, 2, 3, and 4, lease entrance and tank battery). The penalty recommended by Enforcement, \$250.00 per violation, is the standard penalty provided by the recommended standard penalty schedule for enforcement cases ("penalty schedule") and is reasonable and appropriate in the circumstances of this case. The examiner recommends a total penalty of \$2,750.00 for the 11 violations of Rule 3(a) shown to have been committed by A J A.

The evidence shows that discharges on the subject leases described in Enforcement's evidence occurred and that all of the discharges violated Statewide Rule 8(d)(1), which prohibits the discharge of oil and gas wastes without a permit issued by the Commission authorizing such discharge. In this case, it is undisputed that A J A had no permit for the discharges from or onto the subject leases.

The evidence also shows that the discharge on the Laird Lease at Well No. 10 which caused pollution of a wetlands area, the discharge on the Lloyd Heirs Lease from the Well No. 2 area which resulted in the flow of oil into a wetland, and the discharge on the Jno. Lloyd Lease resulting from the poly line leak at the tank battery, which caused oil to enter a wet weather branch and pond, violated Statewide Rule 8(b) which prohibits pollution of surface water in this state.

The remaining issue concerns the amount of the penalties, if any, which should be assessed for the Rule 8(b) and Rule 8(d)(1) violations which are proved by the evidence. 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 and safety of the public, and the demonstrated good faith of the respondent. *See* TEX. NAT. RES. CODE ANN. §81.0531.

(a) Laird Lease Rules 8(b) and 8(d)(1) Penalty Recommendation

Enforcement contends that A J A committed one violation of Rule 8(b) on the Laird Lease when a discharge at Well No. 10 caused oil to pollute a wetlands area. This violation is proved by a June 15, 2001, inspection report relating to the discharge at Well No. 10, accompanied by a photograph of the wetlands pollution, and by a June 28, 2001, Legal Enforcement Pollution Summary Sheet, prepared by District Office personnel, to the effect that oil and oil saturated soil were observed immediately adjacent to the wetlands area.

The penalty schedule provides a standard penalty for Rule 8(b) violations of \$1,000.00. For the one Rule 8(b) violation on the Laird Lease, the examiner recommends a penalty of \$1,000.00, with an enhancement of \$5,000.00. The recommended enhancement is based on penalty schedule enhancement guidelines relating to actual or threatened pollution of a minor freshwater source (\$2,500.00 to \$7,500.00). Actual, rather than merely threatened, pollution of a wetlands area occurred. Live oil and oil saturated soil had been permitted to exist around Well No. 10, near the wetlands area, for more than five months prior to the June 15, 2001, inspection report of wetlands pollution.

Enforcement contends that A J A committed two violations of Rule 8(d)(1) on the Laird Lease when, on or before February 26, 2001, oil discharged at the tank battery inside the firewall and then flowed over the firewall. Enforcement says that one violation was committed when the oil hit the ground inside the firewall, and another was committed when the oil flowed to the ground outside the firewall. This suggests that Enforcement believes that it is permissible and appropriate to find a distinct violation for each incremental advance of oil flow resulting from a tank battery discharge.

Whether Enforcement is correct in this need not be decided here, because the penalty schedule and enhancement guidelines provide an appropriate remedy without regard to whether one or two violations occurred.

The penalty schedule provides a standard penalty range of \$1,000.00 to \$6,000.00 for violations of Rule 8(d)(1). For the tank battery discharge on the Laird Lease, the examiner

recommends a penalty of \$6,000.00, with an enhancement of \$4,000.00 based on one violation of Rule 8(d)(1). The maximum penalty provided by the penalty schedule is recommended because the violation was serious. Live oil flowed outside the firewall and reached an area 150'-200' below the firewall, saturating the soil and staining leaves and vegetation. The evidence shows that discharge of oil is a potential source of pollution of surface and subsurface water if not remediated to prevent seepage and runoff. A J A did not demonstrate good faith by timely and effectively cleaning up this discharge and remediating its effects. Live oil was permitted to remain standing inside the firewall through at least February 21, 2002, almost one year after the initial discharge. Live oil remained in places outside the firewall at least through June 15, 2001, and oil saturated dirt remained outside the firewall at least as of February 21, 2002. The enhancement recommended by the examiner is based on enhancement guidelines in the penalty schedule permitting enhancements of \$100.00 to \$2,000.00 per month for time out of compliance.

(b) Lloyd Heirs Lease Rule 8(b) Penalty Recommendation

Enforcement contends that A J A committed one violation of Rule 8(b) on the Lloyd Heirs Lease when, on or before June 15, 2001, oil spilled at Well No. 2 flowed downhill into a wetland. This violation is proved by a June 15, 2001, District Office inspection report and accompanying photographs, and a Legal Enforcement Pollution Summary Sheet dated June 28, 2001, which, taken together, establish that oil entered and polluted the wetland. For the one Rule 8(b) violation on the Lloyd Heirs Lease, the examiner recommends a penalty of \$1,000.00, the standard penalty provided by the penalty schedule, with an enhancement of \$5,000.00. The recommended enhancement is based on penalty schedule enhancement guidelines relating to actual or threatened pollution of a minor freshwater source (\$2,500.00 to \$7,500.00). Actual, rather than merely threatened, pollution of the wetland occurred, and there is evidence to show more effective steps could have been taken to prevent the pollution. An earlier inspection report dated October 4, 2000, reported live oil and oil saturated dirt around Well No. 2. This report stated that the inspector was unsure where the oil was coming from, but the same sort of pollution had happened before. By the time of a subsequent inspection report dated October 30, 2000, the live oil had been cleaned up, but according to inspection reports for January 9 and February 20, 2001, an area of oil stained dirt remained around Well No. 2. These earlier inspection reports evidence a history that should have put a prudent operator on notice of a problem at Well No. 2 in need of resolution.

(c) Jno. Lloyd Lease Rules 8(b) and 8(d)(1) Penalty Recommendation

Enforcement contends that A J A committed two Rule 8(b) violations and two Rule 8(d)(1) violations on the Jno. Lloyd Lease. The evidence proves that on or before February 22, 2001, a poly line leak at the tank battery resulted in a discharge of 10-20 barrels of oil over the firewall and into a wet weather branch and pond. Enforcement says that one Rule 8(b) violation occurred when the oil polluted the wet weather branch, and another occurred when the oil reached the pond. In addition, Enforcement says that this same discharge violated Rule 8(d)(1). Enforcement recommends a penalty with enhancements for two distinct violations of Rule 8(b) and the maximum penalty provided by the penalty schedule for one violation of Rule 8(d)(1).

The examiner agrees with Enforcement's position that the poly line leak on the Jno. Lloyd Lease violated both Rule 8(b) and Rule 8(d)(1). Rule 8(b) was violated because surface water was polluted, and Rule 8(d)(1) was violated because oil was discharged without a permit authorizing the discharge. However, the fact that Rule 8(d)(1), independently of Rule 8(b), prohibits an unpermitted discharge of oil and gas waste that enters and pollutes surface water raises a question about the propriety of penalizing a single leak or discharge under penalty schedule provisions related to *both* Rule 8(b) and Rule 8(d)(1). Arguably at least, the penalty provided in the penalty schedule for the Rule 8(d)(1) violation subsumes the penalty provided for the Rule 8(b) violation, where an unpermitted discharge has the effect of polluting surface or subsurface water, particularly since there is no apparent reason why the penalty schedule enhancement guideline relating to actual pollution of major and minor freshwater sources cannot be applied to Rule 8(d)(1) penalty determinations.

In this case, it is not necessary to decide if it is permissible and appropriate to assess two distinct penalties for violations of Rule 8(b) and Rule 8(d)(1) relating to a single unpermitted discharge that had the effect of polluting surface water. Penalty schedule provisions relating to Rule 8(d)(1) violations, without reference to Rule 8(b) penalties, provide an adequate remedy for the poly line leak on the Jno. Lloyd Lease. For the same reason, it is not necessary to decide whether Enforcement is correct in its contention that pollution of two bodies of surface water by a single leak resulted in two distinct violations of Rule 8(b).

For the discharge of oil that resulted from the poly line leak at the tank battery on the Jno. Lloyd Lease, the examiner recommends a penalty of \$6,000.00, with an enhancement of \$4,000.00 based on one violation of Rule 8(d)(1). The maximum penalty of \$6,000.00 provided by the penalty schedule for Rule 8(d)(1) violations is recommended because of the seriousness of the violation. The poly line leak caused a major discharge, consisting of 10-20 barrels of oil which flowed over the firewall at the tank battery. The oil flowed into a culvert extending under a public road, 150 yards down a wet weather branch, and into a pond. Actual pollution of surface water occurred. Furthermore, A J A did not demonstrate good faith by timely and effectively cleaning up and remediating the effects of the discharge. Although the poly line leak occurred on or before February 22, 2001, live oil was permitted to stand inside the firewall at least through June 25, 2001. Patches and spots of live oil remained on the lease through June 15, 2001, and oil stained or saturated soil outside the firewall remained through at least February 20, 2002. The enhancement recommended by the examiner is based on penalty schedule enhancement guidelines relating to actual pollution of a minor freshwater source and time out of compliance.

Enforcement contends that A J A committed a further violation of Rule 8(d)(1) on the Jno. Lloyd Lease when, on or before June 5, 2001, oil at the tank battery washed out through two cuts in the firewall. For this violation of Rule 8(d)(1), the examiner recommends a penalty of \$6,000.00. By the time of this discharge, the original discharge resulting from the poly line leak had been contained, but A J A permitted live oil to stand inside the firewall for four months. A new discharge resulted when oil washed out of the firewall through two cuts. The examiner declines to recommend the \$4,000.00 enhancement contended for by Enforcement. The amount of oil washed out of the firewall and the effects of this discharge are not disclosed by the evidence. Although Enforcement

contends that its recommended enhancement is justified by intentional conduct of A J A, the evidence does not establish conclusively that the firewall cuts were intentionally made. Mr. Reese testified that a saltwater disposal line plugged up causing fluid to back up and oil to overflow the firewall creating the cuts. The evidence does not firmly establish the contrary, and the District Office inspection report dated June 5, 2001, stated that at least one of the “cuts” was a “washed out” area.

(d) Total Penalty Recommendation

The total penalty, with enhancements, recommended by the examiner for violations of Statewide Rules 3(a), 8(b), and 8(d)(1) on the subject leases is \$40,750.00. In addition, the examiner recommends that A J A be ordered to place the subject leases in compliance with Statewide Rules 3, 8, and 91.

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. John Allen Reese D/B/A A J A Companies (“A J A”) was given at least 10 days notice of this proceeding by certified mail, addressed to his most recent Form P-5 (Organization Report) address. In addition, John Allen Reese (“Reese”) appeared and participated at the hearing.
2. A J A is a sole proprietorship, of which Reese is the sole proprietor. A J A’s P-5 Organization Report is delinquent, A J A having last filed a Form P-5 on February 22, 2001.
3. A J A designated itself to the Commission as the operator of the Ben Laird (06471) Lease, East Texas Field, Gregg County, Texas (“Laird Lease”); the Lloyd Heirs (07443) Lease, East Texas Field, Gregg County, Texas (“Lloyd Heirs Lease”); and the Jno. Lloyd (07106) Lease, East Texas Field, Gregg County, Texas (“Jno. Lloyd Lease”) by filing Forms P-4 (Producer’s Transportation Authority and Certificate of Compliance) with the Commission, effective February 20, 2001.
4. The previous operator of the subject leases was 5R Oil Company, of which Linda Ball Reese is sole proprietor.
5. As of June 11 and 15, 2001, and February 20, 2002, identification signs posted at Well Nos. 8, 10, and 16, and at the tank battery and lease entrance, on the Laird Lease were incorrect in that they did not show the name of A J A as operator.
6. As of June 15 and 25, 2002, and February 20, 2002, identification signs posted at Well Nos. 1, 2, 3, and 4, and at the tank battery and lease entrance, on the Jno. Lloyd Lease were

incorrect in that they did not show the name of A J A as operator.

7. On or before June 15, 2001, oil was discharged at or near Well No. 10 on the Laird Lease. This discharge caused live oil to enter and pollute a wetlands area near Well No. 10. Live oil and oil saturated soil had existed at or near Well No. 10 since January 18, 2001.
8. On or before June 5, 2001, oil was discharged at a location at or near Well No. 2 on the Lloyd Heirs Lease. This discharge caused live oil and/or oil stained dirt to cover a 40' x 40' area around Well No. 2. On or before June 15, 2001, this discharge of oil entered and polluted a wetlands area adjacent to Well No. 2.
9. On or before February 22, 2001, oil was discharged as the result of a poly line leak at the tank battery on the Jno. Lloyd Lease. Oil flowed to the ground inside the firewall, and 10-20 barrels of oil were discharged through a firewall break to an area outside the firewall. The oil flowed into a culvert extending under FM 1252 and about 150 yards down a wet weather branch, polluting this minor freshwater source. The oil also flowed into and polluted a pond on the lease.
10. As a result of the discharge caused by the poly line leak at the tank battery on the Jno. Lloyd Lease, live oil remained standing inside the firewall through at least June 25, 2001. Live oil remained in places outside the firewall through at least June 15, 2001. Oil saturated dirt remained on the lease through at least February 20, 2002.
11. On or before June 5, 2001, oil standing inside the firewall at the tank battery on the Jno. Lloyd Lease was discharged outside the firewall by washing out through two firewall cuts.
12. On or before February 26, 2001, oil was discharged to the ground inside the firewall at the tank battery on the Ben Laird Lease and flowed over the firewall to an area on the lease extending about 150'-200' below the firewall. This discharge caused oil saturation or oil staining of soil and vegetation.
13. As a result of the discharge at the tank battery on the Ben Laird Lease, live oil remained standing inside the firewall through at least February 21, 2002. Live oil remained at places outside the firewall through at least June 15, 2001. Oil saturated dirt remained on the lease through at least February 21, 2002.
14. No permit was issued by the Commission to A J A to discharge oil and gas wastes from or onto the subject leases.
15. Failure to properly identify the subject leases, wells, and tank batteries by the posting of identification signs required by Statewide Rule 3(a) has the potential for causing confusion and delay in remedying a violation or emergency and poses a threat to the public health and safety.

16. Discharge or disposal of oil, saltwater, or other oil and gas waste will cause pollution if allowed to come into contact with zones of fresh or usable quality surface or subsurface waters. 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 runoff. Such unauthorized discharges and/or pollution of surface and subsurface waters pose a threat to the public health and safety.
17. A J A first filed a Form P-5 Organization Report on February 22, 2001, and has no history of previous orders issued against it for violations of Commission rules.
18. A J A has not demonstrated good faith in that A J A failed timely or adequately to cure the effects of the unauthorized discharges of oil and gas wastes on the subject leases after being put on notice of the need to do so.

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. John Allen Reese D/B/A A J A Companies is the operator of the Ben Laird (06471) Lease, East Texas Field, Gregg County, Texas (“Laird Lease”); the Lloyd Heirs (07443) Lease, East Texas Field, Gregg County, Texas (“Lloyd Heirs Lease”); and the Jno. Lloyd (07106) Lease, East Texas Field, Gregg County, Texas (“Jno. Lloyd Lease”), as defined by Commission Statewide Rules 58 and 79 [Tex. R.R. Comm’n, 16 TEX. ADMIN. CODE §§3.58 and 3.69] and Chapter 85 of the Texas Natural Resources Code.
4. As operator, John Allen Reese D/B/A A J A Companies has the primary responsibility for complying with Statewide Rules 3(a), 8(b), 8(d)(1), and 91 [Tex. R.R. Comm’n, 16 TEX. ADMIN. CODE §§3.3(a), 3.8(b), 3.8(d)(1), and 3.91], Chapter 91 of the Texas Natural Resources Code, and other applicable statutes and Commission rules, respecting the subject leases.
5. By failing to post, at all times, an identification sign correctly identifying the name of the operator at the lease entrance, wells, and tank batteries on the Laird and Jno. Lloyd Leases, John Allen Reese D/B/A A J A Companies violated Statewide Rule 3(a) [Tex. R.R. Comm’n, 16 TEX. ADMIN. CODE §3.3(a)].

6. By causing or allowing the unpermitted discharge or disposal of oil and/or gas wastes on the Laird and Jno. Lloyd Leases, John Allen Reese D/B/A A J A Companies violated Statewide Rule 8(d)(1) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.8(d)(1)], and Chapter 91 of the Texas Natural Resources Code. John Allen Reese D/B/A A J A Companies was out of compliance with Statewide Rule 8(d)(1) on the Laird Lease from at least February 26, 2001, through at least February 21, 2002, and on the Jno. Lloyd Lease from at least February 22, 2001, through at least February 20, 2002.
7. By causing or allowing the pollution of surface or subsurface water in this state, John Allen Reese D/B/A A J A Companies violated Statewide Rule 8(b) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §3.8(b)] and Chapter 91 of the Texas Natural Resources Code. John Allen Reese D/B/A A J A Companies was out of compliance with Statewide Rule 8(b) on the Laird Lease at least as of June 15, 2001, on the Lloyd Heirs Lease at least as of June 15, 2001, and on the Jno. Lloyd Lease at least as of February 22-23, 2001.
8. The documented violations committed by John Allen Reese D/B/A A J A Companies 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 order approved, requiring the operator John Allen Reese D/B/A A J A Companies to:

1. Clean up and place in compliance with Statewide Rules 3, 8, and 91 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §§3.3, 3.8, and 3.91] the Ben Laird (06471) Lease, East Texas Field, Gregg County, Texas; the Lloyd Heirs (07443) Lease, East Texas Field, Gregg County, Texas; and the Jno. Lloyd (07106) Lease, East Texas Field, Gregg County, Texas; and
2. Pay an administrative penalty in the amount of FORTY THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$40,750.00).

Respectfully submitted,

James M. Doherty
Hearings Examiner