

**ENFORCEMENT ACTION AGAINST JOHN ALLEN REESE D/B/A A J A COMPANIES
(OPERATOR NO. 000351) FOR VIOLATIONS OF STATEWIDE RULES ON THE
MCGREDE "A" (06745) 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

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

1. Whether the respondent John Allen Reese D/B/A A J A Companies ("A J A") has violated provisions of Statewide Rules 8(b) and 8(d)(1) [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §§3.8(b) and 3.8(d)(1)] on the McGrede "A" (06745) Lease, East Texas Field, Gregg County, Texas ("subject lease") and should be required to place the lease 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 lease in compliance with Statewide Rules 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 lease;
4. Whether any violations of Statewide Rules 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 \$67,500.00 penalty, including enhancements, be assessed against respondent. The examiner recommends that a \$60,000.00 penalty, including enhancements, be assessed and that respondent be ordered to place the subject lease into compliance with Statewide Rules 8 and 91.

BACKGROUND

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 lease by filing of a Form P-4 which was approved March 21, 2001, effective February 20, 2001. The Form P-4 records presented by Enforcement show that the previous operator of the subject lease 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.

Spill No. 6-436

District Office inspection reports presented by Enforcement show that on February 6, 2001, an oil spill on the subject lease was sighted by aircraft and reported to the District Office. The District Office assigned Spill No. 6-436 to this spill.

A District Office inspection report dated February 6, 2001, reported that upon inspection, the field inspector found about 3 barrels of live oil on top of rainwater in the firewall at the tank battery on the subject lease. The inspection report stated that oil had been discharged through a break in the firewall and had run down a ditch about 20 yards into a creek. According to the inspection report, oil had run down the creek about 100 yards where it was contained by a natural dam in the creek. It was estimated that about two barrels of live oil had entered the creek. The inspection report stated that Reese had been contacted to start clean up.

The Enforcement Section's hearing file contained 26 additional District Office inspection reports relating, in whole or in part, to Spill No. 6-436, dating from February 7, 2001, through June 25, 2001. A February 7, 2001, inspection report stated that a tank truck and two men were at the location working on clean up and that the inspector met with Reese to discuss the spill. However, subsequent inspection reports dated February 8, 9, 12, 13, 14, 20, and 22 show that oil remained in the creek at least through February 22, 2001. Oil stained soil and vegetation remained along the creek banks through February 26, 2001, and live oil and oil saturated dirt remained inside the firewall through the date of the last inspection report on June 25, 2001.

Spill No. 6-454

A District Office inspection report dated March 8, 2001, reported a further oil discharge on the subject lease. This spill was assigned No. 6-454 by the District Office. It was reported that a leak had occurred at a location where a 2" flowline tied into a 4" gathering line causing about 3 barrels of oil and an undetermined amount of saltwater to enter a running creek. A small patch of oil was observed in a bar ditch along Gregg-Tex Road. This inspection report stated that Reese was contacted and was trying to locate a truck to work on the spill. A subsequent inspection report, also

dated March 8, stated that Reese was at the location applying absorbent material onto oil in the creek and bar ditch.

The Enforcement Section's hearing file contained 3 additional inspection reports pertaining to this spill, dating from March 9, 2001, through March 26, 2001. According to these inspection reports, oil remained in the creek and bar ditch through at least March 9, 2001. Also, by March 9, 2001, there was evidence that the oil had migrated from the smaller creek and bar ditch to Hawkins Creek, where oil stains and a small pool of oil caught in brush were observed. An inspection report dated March 26, 2001, stated that rains in the area had washed the oil away, and no live oil was observed.

Spill No. 6-475

Another oil discharge on the subject lease was reported in a District Office inspection report dated April 9, 2001. The District Office assigned this discharge Spill No. 6-475. The April 9 inspection report stated that a clamp had come off a 4" line causing about 5-10 barrels of oil, and an unknown amount of saltwater, to enter a creek. Chlorides above the site of the leak were measured at 300 ppm. In the creek along Gregg-Tex road, chlorides were measured at 15,000 ppm. The inspection report shows that Reese was advised to install a dam and booms in the creek to stop the oil. A separate inspection report, also dated April 9, stated that oil had run 200'-300' down a draw and that traces of oil were observed in a bar ditch.

The Enforcement Section's hearing file contained 15 additional inspection reports relating to this spill, dating from April 10, 2001, through June 15, 2001. Two inspection reports dated April 10 stated that Reese was on the location and that Reese stated that the creek had been washed down and saltwater removed from the bar ditch on April 9. One of these reports stated that two sock booms had been placed in the draw near the bar ditch at Gregg-Tex Road. Reese was advised by a Commission field inspector that the oil needed to be picked up before it rained. A further inspection report dated April 11 stated that men were working on the spill and that trucks were being used to wash and pick up oil in the bar ditch. However, according to the inspection reports, live oil remained in the creek and bar ditch through at least May 3, 2001. Oil stained creek banks and vegetation persisted as of the date of an inspection report dated June 15, 2001, and on that date an oil sheen was observed in the creek, which the inspector stated was probably the result of oil stained creek banks.

Hose Discharge

A District Office inspection report dated May 3, 2001, stated that about 2 barrels of live oil remained inside the firewall at the tank battery on the subject lease. This report stated further that the operator had hooked a hose to a drain in the firewall and had drained about 1 barrel of oil onto the ground and 25'-30' into a draw. The inspection report stated that rains would wash the oil to a creek. An inspection report dated May 4, 2001, stated that no effort had been made to clean up this discharge and oil had run further down the draw. A subsequent inspection report dated May 7, 2001,

stated that oil had washed down the draw into the creek. Patches of oil were observed in the draw and in the creek, and oil stains were observed on the banks of the draw.

An inspection report dated May 9, 2001, reported that some absorbent material had been placed on oil stains, but live oil remained in the wet weather draw and oil stained vegetation remained on the banks of the draw. The same conditions were reported in an inspection report dated May 14, 2001. An inspection report dated May 23, 2001, stated that live oil had been washed away by recent rains, but a subsequent inspection report dated June 8, 2001, reported that about one gallon of live oil was observed at the drain where the hose was connected, and oil stained banks and oil saturated or oil stained soil persisted. An inspection report dated June 15, 2001, reported that the hose had been removed from the drain, but about one gallon of oil remained at and below the drain.

Firewall Cut

Enforcement presented a District Office inspection report dated June 15, 2001, stating that a further discharge had occurred on the subject lease. According to this inspection report, there was evidence that the firewall had been cut on the east beside a drainage ditch with running water. The field inspector reported observation of fresh dirt piled up beside the cut. It was reported that oil from the firewall was being discharged into the drainage ditch that ran to a creek. The inspector stated that he observed small patches of live oil in the ditch and a rainbow of oil in the ditch and creek, where water was running at a fast pace. The inspection report stated that 2-3 barrels of oil remained inside the firewall.

Open Drain

Enforcement presented a District Office inspection report dated June 25, 2001, reporting a further discharge on the subject lease. The inspection report stated that a drain valve had been opened at the northwest end of the firewall, allowing oil and water to discharge to a draw that ran to a creek. It was reported that fluid within the firewall had been reduced and that live oil at the drain had been covered with pine straw and dirt. The inspector reported his observation of a small amount of oil at the mouth of the draw leading to the creek. It appeared to the inspector that oil had entered the creek, although no live oil was observed there, and the inspector could not tell whether the indications of oil in the creek were fresh due to the several spills which had occurred on the lease.

Affidavits and Certification

Enforcement submitted as evidence the affidavit of Ramon Fernandez, Jr., P. E., which stated that: (1) 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 (2) any unauthorized discharge or disposal of oil, saltwater, basic sediment or other oil and gas waste is a potential source of pollution to surface and subsurface waters if not remediated to prevent seepage and runoff.

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

Enforcement's Penalty Recommendation

With respect to Spill No. 6-436, Enforcement alleged three violations of Statewide Rule 8(b). Enforcement contends that the three separate violations are as follows: (1) when oil discharged from the break in the firewall entered the draw; (2) when the oil migrated from the draw to a small creek; and (3) when the oil migrated from the small creek to Hawkins Creek. For each of these alleged violations, Enforcement recommended a penalty of \$1,000.00 and an enhancement of \$2,500.00, for a total penalty respecting Spill No. 6-436 of \$10,500.00.

With respect to Spill No. 6-454, Enforcement alleged two separate violations of Statewide Rule 8(b) and one violation of Statewide Rule 8(d)(1). The two separate violations of Statewide Rule 8(b) alleged by Enforcement are: (1) when the oil discharged by the leak at the flowline/gathering line connection entered a running creek; and (2) when the oil migrated from the running creek to a drainage ditch which emptied to Hawkins Creek. For each of these two alleged violations of Statewide Rule 8(b), Enforcement recommended a penalty of \$1,000.00 with an enhancement of \$2,500.00. For the alleged violation of Statewide Rule 8(d)(1), Enforcement recommended a penalty of \$3,000.00. The total penalty recommended by Enforcement for Spill No. 6-454 is \$10,000.00.

With respect to Spill No. 6-475, Enforcement alleged one violation of Statewide Rule 8(b) and one violation of Statewide Rule 8(d)(1). For the alleged Statewide Rule 8(b) violation, Enforcement recommended a penalty of \$1,000.00 with an enhancement of \$2,500.00. For the alleged violation of Statewide Rule 8(d)(1), Enforcement recommended a penalty of \$3,000.00. The total penalty recommended by Enforcement for Spill No. 6-475 is \$6,500.00.

With respect to the hose discharge first reported in the District Office inspection report dated May 3, 2001, Enforcement alleged a violation of Statewide Rule 8(d)(1), for which Enforcement recommended a penalty of \$6,000.00 and an enhancement of \$4,000.00. The total penalty recommended by Enforcement for the hose discharge is \$10,000.00.

With respect to the firewall cut discharge first reported in the District Office inspection report dated June 15, 2001, Enforcement alleged two violations of Statewide Rule 8(b) and one violation of Statewide Rule 8(d)(1). The two separate violations of Statewide Rule 8(b) alleged by Enforcement are: (1) when oil discharged through the cut in the firewall entered the drainage ditch; and (2) when the oil migrated from the drainage ditch to the creek. For each of these alleged violations of Statewide Rule 8(b), Enforcement recommended a penalty of \$1,000.00 with an enhancement of \$2,500.00. For the alleged violation of Statewide Rule 8(d)(1), Enforcement recommended a penalty of \$6,000.00 with an enhancement of \$4,000.00. The total penalty recommended by Enforcement for the firewall cut discharge is \$17,000.00.

With respect to the open drain discharge first reported in the District Office inspection report dated June 25, 2001, Enforcement alleged one violation of Statewide Rule 8(b) and one violation of Statewide Rule 8(d)(1). For the alleged violation of Statewide Rule 8(b), Enforcement recommended a penalty of \$1,000.00 with an enhancement of \$2,500.00. For the alleged violation of Statewide Rule 8(d)(1), Enforcement recommended a penalty of \$6,000.00 with an enhancement of \$4,000.00. The total penalty recommended by Enforcement for the open drain discharge is \$13,500.00.

The total penalty, including enhancements, recommended by Enforcement for all alleged violations in this docket is \$67,500.00.

Respondent's Position and Evidence

With respect to the hose discharge on the subject lease, first reported in the District Office inspection report dated May 3, 2001, J. Allen Reese, A J A's sole proprietor, testified that the firewall on the lease collects rainwater, and a drain is necessary to release the rainwater from the firewall. He asserted that over the years the drain became "covered up," so that it was necessary to connect a hose to the drain in order to release rainwater through the drain from the firewall. Reese stated that it was his intent only to drain rainwater through the drain and hose, although if there was a sheen of oil on the rainwater, the oil also could have drained "unintentionally". Reese believes this is what happened.

With respect to Spill No. 6-454 and Spill No. 6-475, Reese testified that these were two events that occurred at the same location. With respect to Spill No. 6-454, Reese stated that a clamp failed, and oil and saltwater were discharged into a small creek. Reese asserted that he cleaned up this spill, and replaced the failed clamp. With respect to Spill No. 6-475, Reese stated that the new clamp he had put into place to resolve the cause of Spill No. 6-454 also failed. Reese asserted that to address the pollution that resulted from this second discharge, he washed down the creek and pulled saltwater out of the creek for 2-3 days. He stated that A J A has now gotten away from using a clamp at the flowline/gathering line connection.

Reese testified that he contests the penalties recommended by Enforcement as not reasonable or necessary.

EXAMINER'S OPINION

The discharges on the subject lease of oil and gas wastes alleged by Enforcement are not disputed by respondent. Respondent has not challenged Enforcement's assertion that A J A is the operator responsible for the discharges and resulting violations of Statewide Rules 8(b) and 8(d)(1), and respondent has made no claim that he held a permit issued by the Commission for the discharges or that the discharges did not pollute surface water.

The District Office inspection reports presented by Enforcement prove that the alleged discharges occurred, pollution of surface and subsurface water was threatened, and actual pollution of surface water resulted from the discharges. The evidence also proves that A J A did not have a permit issued by the Commission authorizing the discharges, and A J A is the operator with primary responsibility for the discharges and clean up. A J A clearly violated Statewide Rules 8(b) and 8(d)(1). The only remaining issues concern the number of violations proved by the evidence and the penalties, if any, which should be assessed.

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. Enforcement asserts that this rule was violated by A J A because discharges of oil and/or saltwater entered and caused pollution of draws, drainage ditches and creeks, all of which contain surface water either permanently, seasonally, or during periods of wet weather.

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. Enforcement asserts that this rule was violated by A J A because oil and gas wastes were discharged, and A J A had no permit.

An unpermitted discharge of oil and gas wastes which pollutes surface or subsurface water in this state violates *both* Statewide Rule 8(b) and Statewide Rule 8(d)(1). Whether it is necessary or appropriate, however, to find, for a single discharge event, violations of both of these rules, and to assess *separate* penalties and enhancements for each, presents a more difficult question. This is particularly true in this case, since Statewide Rule 8(d)(1), independently of Statewide Rule 8(b), plainly prohibits an unpermitted discharge of waste oil and saltwater which pollutes surface water in a draw, drainage ditch or creek, and the recommended standard penalty schedule for enforcement cases (“penalty schedule”), as it relates to Statewide Rule 8(d)(1) violations, provides a range of penalties and enhancement guidelines which appear to be adequate and appropriate to the circumstances of the prohibited discharges in this case.

The piling on of Statewide Rule 8(b) penalties on top of Statewide Rule 8(d)(1) penalties for a *single* discharge event is, at the very least, a course that should be followed with the greatest of caution, since, *assuming* two separate violations, the statutory penalty cap provided by §81.0531 of the Texas Natural Resources Code becomes \$20,000.00 per day rather than \$10,000.00.

With respect to Spill No. 6-436, Enforcement alleged, and seeks a penalty for, a Statewide Rule 8(b) violation *only*, notwithstanding the fact that this spill involved an unpermitted discharge of oil and gas wastes prohibited by Statewide Rule 8(d)(1). With respect to the hose discharge first reported in the District Office inspection report dated May 3, 2001, Enforcement alleged, and seeks a penalty for, a Statewide Rule 8(d)(1) violation *only*, notwithstanding the fact that the oil that was discharged washed down a draw and into a creek, against the prohibition of Statewide Rule 8(b). With respect to Spill No. 6-454, Spill No. 6-475, the firewall cut discharge reported in the District Office inspection report dated June 15, 2001, and the open drain discharge reported in the District

Office inspection report dated June 25, 2001, Enforcement alleged, and seeks penalties for, violations of *both* Statewide Rule 8(b) and Statewide Rule 8(d)(1). The rationale for this disparate treatment of these several discharges is not made clear in the complaint, in the evidence, or in Enforcement's post hearing submission on the penalty issue.

A further issue is presented as to the number of Statewide Rule 8(b) violations alleged by Enforcement. With respect to Spill No. 6-436, Enforcement alleged *three* separate violations of Statewide Rule 8(b), and seeks three separate penalties with enhancements, as a result of a single discharge event, i.e., discharge of oil through a firewall break: one violation when the oil reached a draw, another violation when the oil flowed down the draw to a small creek, and a third violation when the oil flowed down the small creek to Hawkins Creek. A similar approach was taken with respect to Spill No. 6-454, a leak from a flowline/gathering line connection, where Enforcement alleged, and seeks penalties with enhancements, for two separate Statewide Rule 8(b) violations, and the firewall cut discharge where Enforcement also alleged, and seeks penalties with enhancements, for two separate Statewide Rule 8(b) violations. This contrasts with the hose discharge event, first reported in the District Office inspection report dated May 3, 2001, with respect to which Enforcement alleged *no* Statewide Rule 8(b) violation, notwithstanding the fact that oil discharged through the hose first entered a draw and then flowed down the draw and into a creek.

The examiner agrees with Enforcement's assertion that Spill No. 6-454, Spill No. 6-475, the firewall cut discharge reported in the District Office inspection report dated June 15, 2001, and the open drain discharge reported in the District Office inspection report dated June 25, 2001, violated both Statewide Rule 8(b) and Statewide Rule 8(d)(1). It is not necessary to decide, however, whether it is permissible and appropriate to assess two separate penalties for these violations as a result of a single discharge event. Neither is it necessary to decide whether it is permissible and appropriate, as a result of a single discharge event, to find several distinct Statewide Rule 8(b) violations, and to assess separate penalties for each, relating to the incremental movement of discharged oil over an indefinite period of time, for example, from point of discharge to draw, from draw to drainage ditch, and from drainage ditch to creek.

Where both Statewide Rule 8(b) and Statewide Rule 8(d)(1) violations are proved by the evidence, the range of penalties and enhancement guidelines provided for Statewide Rule 8(d)(1) violations by the penalty schedule are appropriate to the circumstances of this case, without reference to provisions of the penalty schedule relating to Statewide Rule 8(b). Where only Statewide Rule 8(b) violations are alleged by Enforcement's complaint, as in the case of Spill No. 6-436, the penalty schedule provides a standard penalty and enhancement guidelines similarly appropriate to the circumstances of this case, without reference to whether one or several Statewide Rule 8(b) violations are deemed to have been committed.

In determining the amount of the penalties which should be assessed against A J A, the Commission must consider A J A'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 A J A. *See* TEX. NAT. RES. CODE ANN. §81.0531.

Enforcement's complaint states that A J A has no history of previous violations, and there is no evidence of previous orders issued against A J A for violations of Commission rules. However, the weight that can be afforded to this factor is affected by the fact that A J A first filed a P-5 Organization Report on February 22, 2001, and thus has limited history as a P-5 operator.

A J A cannot be said to have demonstrated good faith. Three of the discharges which are the subject of this case evidence intentional conduct: (1) the hooking up of a hose to a firewall drain and the draining of oil from inside the firewall to a draw leading to a creek; (2) the cutting of the firewall on the east, permitting the discharge of oil to a drainage ditch leading to a creek; and (3) the opening of a drain at the northwest end of the firewall, permitting the discharge of oil and water to a draw leading to a creek. In addition, A J A failed timely and adequately to clean up the pollution resulting from the discharges which are the subject of this case, after being put on notice by Commission personnel of the need to do so.

(a) Spill No. 6-436 Penalty Recommendation

With respect to Spill No. 6-436, where oil was discharged through a break in the firewall on the subject lease, and oil entered and polluted a draw and creek, the examiner concludes that Statewide Rule 8(b) was violated. Since Enforcement's complaint does not allege a Statewide Rule 8(d)(1) violation with respect to this spill, reference to provisions of the penalty schedule relating only to Statewide Rule 8(b) is required. For violations of Statewide Rule 8(b), the penalty schedule provides a standard penalty of \$1,000.00. Penalty schedule enhancement guidelines permit enhancements of \$2,500.00 to \$7,500.00 for threatened or actual pollution of a minor freshwater source (minor aquifer, seasonal watercourse) and \$5,000.00 to \$25,000.00 for threatened or actual pollution of a major freshwater source (major aquifer, creeks, rivers, lakes and reservoirs).

With respect to Spill No. 6-436, the examiner recommends a penalty of \$1,000.00 with an enhancement of \$9,000.00, for one violation of Statewide Rule 8(b). The enhancement is based on the penalty schedule guideline relating to pollution of a creek, the seriousness of the violation, and the lack of respondent's good faith evidenced by failure timely and effectively to remediate the effects of the spill. Actual, rather than merely threatened, pollution of two creeks occurred, and notwithstanding some effort made by respondent to clean up the spill, oil remained in a creek for at least 17 days, and oil stained soil and vegetation persisted along creek banks for at least 21 days. The source of the spill, i.e., oil inside the firewall, remained there at least through June 25, 2001, more than four months after the discharge through the firewall break. A J A's failure timely and effectively to clean up the effects of the spill occurred notwithstanding 27 inspections of the lease by Commission field inspectors and repeated requests by Commission personnel for clean up.

(b) Spill No. 6-454 Penalty Recommendation

Spill No. 6-454 violated both Statewide Rule 8(b) and Statewide Rule 8(d)(1). Oil and saltwater were discharged, without a permit, as a result of a leak at a flowline/gathering line connection, and entered and polluted a small running creek, bar ditch, and Hawkins Creek. The

penalty schedule provides a range of standard penalties for violations of Statewide Rule 8(d)(1) of \$1,000.00 to \$6,000.00. For this spill, the examiner recommends a penalty of \$6,000.00 with an enhancement of \$4,000.00, based on one violation of Statewide Rule 8(d)(1). The recommended penalty is based on the seriousness of the violation. The enhancement is based on pollution of a major freshwater source. Actual, rather than merely threatened, pollution occurred, and oil remained in the creek for at least two days.

(c) Spill No. 6-475 Penalty Recommendation

Spill No. 6-475 also violated both Statewide Rule 8(b) and Statewide Rule 8(d)(1) in that a clamp came off a 4" line resulting in an unpermitted discharge of oil and saltwater that entered and polluted a creek. For this spill, the examiner recommends a penalty of \$6,000.00 with an enhancement of \$4,000.00, based on one violation of Statewide Rule 8(d)(1). The recommended penalty is based on the seriousness of the violation and respondent's lack of good faith evidenced by his failure timely and effectively to clean up the effects of the spill. The recommended enhancement is based on pollution of a minor freshwater source. Actual, rather than merely threatened, pollution of a creek occurred. Notwithstanding some effort by respondent to clean up the spill, live oil remained in the creek for at least for 25 days, and oil stained creek banks and vegetation persisted for more than two months. An oil sheen was still showing in the creek some 10 weeks after the spill. A J A failed timely and effectively to clean up the effects of this spill notwithstanding 16 inspections of the spill by Commission field inspectors and repeated requests to A J A to complete the clean up.

(d) Hose Discharge Penalty Recommendation

With respect to the hose discharge event first reported in the District Office inspection report dated May 3, 2001, Enforcement's complaint alleges a violation of Statewide Rule 8(d)(1) only. This discharge violated Statewide Rule 8(d)(1) in that oil was discharged through a hose hooked up to a firewall drain, and respondent held no permit for the discharge. The oil that was discharged entered a draw and washed down to a creek. For this discharge, the examiner recommends a penalty of \$6,000.00 with an enhancement of \$4,000.00, based on one violation of Statewide Rule 8(d)(1). The maximum standard penalty provided in the penalty schedule for Statewide Rule 8(d)(1) violations is recommended based on intentional conduct of A J A. Reese's explanation that his only intent was to drain rainwater from the firewall, and that any discharge of oil was unintentional, is implausible. The evidence showed that as of May 3, 2001, about 2 barrels of live oil remained inside the firewall. If this oil was mixed with rainwater, as asserted by Reese, it should have been apparent to any prudent operator that a discharge through the hose hooked up to the firewall drain would include oil as well as rainwater. The evidence shows that oil had been standing inside the firewall since at least February 6, 2001.

The recommended enhancement is based on actual, rather than merely threatened, pollution of a wet weather draw and creek and A J A's lack of good faith as evidenced not only by its intentional conduct, but also by its failure timely and effectively to clean up the effects of the spill.

Live oil remained in the wet weather draw for at least 12 days, until it was washed away by rains. More than one month after the discharge, oil remained on the ground at and below the firewall drain where the hose had been connected.

(e) Firewall Cut Penalty Recommendation

The discharge of oil through the firewall cut, reported in the District Office inspection report dated June 15, 2001, violated both Statewide Rule 8(b) and Statewide Rule 8(d)(1). A J A had no permit for this discharge, and the discharge resulted in pollution of a drainage ditch with running water and caused a rainbow of oil in a creek. For this discharge, the examiner recommends a penalty of \$6,000.00 with an enhancement of \$4,000.00, based on one violation of Statewide Rule 8(d)(1). The maximum standard penalty provided by the penalty schedule for violations of Statewide Rule 8(d)(1) is recommended because of A J A's intentional conduct. The evidence shows that this discharge was through a new cut on the east side of the firewall. The field inspector reported observation of fresh dirt piled up beside the cut, and at the time of the discharge 2-3 barrels of oil were standing inside the firewall. The recommended enhancement is based not only on A J A's intentional conduct, but also on the fact that actual pollution of a seasonal watercourse and creek resulted from the discharge.

(f) Open Drain Penalty Recommendation

The open drain discharge of oil, reported in the District Office inspection report dated June 25, 2001, violated both Statewide Rule 8(b) and Statewide Rule 8(d)(1). The discharge was not permitted, and resulted in pollution of a draw leading to a creek. For this discharge, the examiner recommends a penalty of \$6,000.00 with an enhancement of \$4,000.00, based on one violation of Statewide Rule 8(d)(1). The maximum standard penalty provided by the penalty schedule for violations of Statewide Rule 8(d)(1) is recommended because of A J A's intentional conduct. The evidence showed that a drain valve had been opened at the northwest end of the firewall, allowing oil to discharge. On the occasion of a June 15, 2001, inspection, there were 2-3 barrels of oil standing inside the firewall. When the open drain discharge was discovered during an inspection on June 25, 2001, fluid inside the firewall had been reduced greatly, so that at that time about one barrel of oil remained there. The recommended enhancement is based not only on A J A's intentional conduct, but also on the seriousness of the violation. Oil was discharged to a draw leading to a creek. Actual and threatened pollution of a seasonal watercourses resulted.

(g) Total Penalty Recommendation

The total penalty recommended by the examiner for respondent's violations of Statewide Rule 8(b) and Statewide Rule 8(d)(1), including enhancements, is \$60,000.00. The examiner also recommends that respondent be ordered to clean up the subject lease and place it into compliance with Statewide Rules 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 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 McGrede “A” (06745) Lease, East Texas Field, Gregg County, Texas (“subject lease”) by filing a Form P-4 (Producer’s Transportation Authority and Certificate of Compliance) with the Commission, effective February 20, 2001.
4. The previous operator of the subject lease was 5R Oil Company, of which Linda Ball Reese is proprietor.
5. On or before February 6, 2001, oil was discharged through a break in the firewall at the tank battery on the subject lease and ran down a ditch about 20 yards into a creek, thence about 100 yards down the creek where it was contained by a natural dam. Oil remained in the creek through at least February 26, 2001, and live oil and oil saturated dirt remained inside the firewall through at least June 25, 2001.
6. On or before March 8, 2001, oil and saltwater were discharged on the subject lease as a result of a leak at a connection between a 2" flowline and a 4" gathering line. About 3 barrels of oil and an undetermined amount of saltwater entered a running creek and flowed to a bar ditch and Hawkins Creek. Oil remained in the creek as of March 9, 2001, but by March 26, 2001, rains had washed the oil away.
7. On or before April 9, 2001, about 5-10 barrels of oil and an undetermined amount of saltwater were discharged on the subject lease, as a result of a clamp coming off a 4" line, and entered a creek. Live oil remained in the creek and in a bar ditch at least through May 3, 2001. Oil stained creek banks and vegetation remained through at least June 15, 2001, and on that date an oil sheen remained in the creek.
8. On or before May 3, 2001, oil was discharged on the subject lease through a hose hooked up to a firewall drain. About one barrel of oil was discharged on the ground and into a draw. The oil was then washed down the draw and into a creek. Live oil remained in the draw and oil stained vegetation remained on the banks of the draw through at least May 14, 2001. As of May 23, 2001, the live oil in the draw had been washed away by rains, but live oil

remained at or below the drain through at least June 15, 2001.

9. On or before June 15, 2001, oil was discharged on the subject lease as a result of the firewall having been cut on the east side near a drainage ditch containing running water. Oil was discharged through the firewall cut into the drainage ditch, which ran to a creek. Small patches of live oil were deposited into the drainage ditch, and a rainbow of oil was created in the ditch and creek.
10. On or before June 25, 2001, oil was discharged on the subject lease as a result of a drain at the northwest end of the firewall having been opened. Oil and water discharged to a draw than ran to a creek. A small amount of oil was deposited at the mouth of the draw leading to the creek, and live oil was also deposited on the ground at the site of the firewall drain.
11. The May 3, 2001, discharge through the hose hooked to the firewall drain, the June 15, 2001, discharge through the firewall cut, and the June 25, 2001, discharge through the open firewall drain were intentional discharges.
12. No permit was issued by the Commission to A J A to discharge oil and gas wastes from or onto the subject lease.
13. 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.
14. 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.
15. A J A has not demonstrated good faith in that three of the unauthorized discharges on the subject lease were intentional and A J A failed timely or adequately to cure the effects of the unauthorized discharges in response to numerous requests from Commission personnel.

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 McGrede "A" (06745) Lease, East Texas Field, Gregg County, Texas ("subject 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 8(b), 8(d)(1) and 91 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §§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 lease.
5. By causing or allowing the unpermitted discharge or disposal of oil and/or gas wastes on the subject lease, 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) from at least March 8, 2001, through at least June 25, 2001.
6. 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 subject lease from at least February 6, 2001, through at least February 22, 2001, from at least March 8, 2001, through at least March 9, 2001, from at least April 9, 2001, through at least May 3, 2001, from at least May 3, 2001, through at least May 14, 2001, on June 15, 2001, and on June 25, 2001.
7. 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 8 and 91 [Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE §§3.8 and 3.91] the McGrede "A" (06745) Lease, East Texas Field, Gregg County, Texas; and
2. Pay an administrative penalty in the amount of SIXTY THOUSAND DOLLARS (\$60,000.00).

Respectfully submitted,

James M. Doherty
Hearings Examiner