



# RAILROAD COMMISSION OF TEXAS

## HEARINGS DIVISION

### PROPOSAL FOR DECISION

OIL AND GAS DOCKET NO. 05-0299855

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**ENFORCEMENT ACTION AGAINST K & D WATER WORKS, LLC  
(OPERATOR NO. 448763) FOR VIOLATIONS OF STATEWIDE RULES ON THE  
K & D WATER WORKS BUFFALO YARD, WASHOUT PIT, PERMIT NOS.  
011422A AND 011422B, FREEDOM FIELD, LEON COUNTY, TEXAS**

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### APPEARANCES

#### **FOR THE RAILROAD COMMISSION OF TEXAS:**

David Bell, Staff Attorney, Enforcement Section  
Artemis Harbert, Engineering Specialist

#### **FOR K & D WATER WORKS, L.L.C.:**

Rebecca Cousins-Brightwell, Attorney at Law  
Robert Davis, Vice President  
Patricia Davis, Secretary

#### **PROCEDURAL HISTORY:**

Notice of Hearing:	January 9, 2017
Hearing on the merits:	February 23, 2017
Record closed:	April 15, 2017
Proposal for Decision issued:	August 31, 2017
Heard by:	Marshall Enquist, Administrative Law Judge
Prepared by:	Ryan M. Lammert, Administrative Law Judge

## SUMMARY

The Railroad Commission of Texas (“Staff”) alleges K & D Water Works, L.L.C. (Operator No. 448763), (“K&D”), violated Statewide Rule 1(a)<sup>1</sup> and Statewide Rule 8(d)(2)<sup>2</sup> on the K & D Water Works Buffalo Yard, Washout Pit, Permit Nos. 011422A and 011422B, Freedom Field, Leon County, Texas (the “Facility”).

Both Staff and K&D appeared at hearing, but K&D failed to present evidence sufficient to demonstrate that it is not in violation of Commission Rules as alleged. The record evidence supports all violations as alleged by Staff. Staff requests an administrative penalty in the amount of \$8,175, reimbursement in the amount of \$10,557.18, and that the Facility be brought into compliance with all Commission Statewide Rules.

The Administrative Law Judge recommends the Commission assess K&D an administrative penalty in the amount of \$8,175, order K&D to reimburse the Commission in the amount of \$10,557.18 for site remediation costs, and order K&D to bring the Facility into compliance with all Commission Statewide Rules.

## APPLICABLE AUTHORITY

SWR 1(a)(1) and (7), titled *Filing requirements*:

(a) Filing requirements.

- (1) Except as provided under subsection (e) of this section, no organization, including any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the Commission shall perform such operations without having on file with the Commission an approved organization report and financial security as required by Texas Natural Resources Code §§91.103 - 91.1091. Operations within the jurisdiction of the Commission include, but are not limited to, the following:
  - (A) drilling, operating, or producing any oil, gas, geothermal resource, brine mining injection, fluid injection, or oil and gas waste disposal well;
  - (B) transporting, reclaiming, treating, processing, or refining crude oil, gas and products, or geothermal resources and associated minerals;

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<sup>1</sup> 16 TEX. ADMIN. CODE § 3.1(a).

<sup>2</sup> 16 TEX. ADMIN. CODE § 3.8(d)(2).

- (C) discharging, storing, handling, transporting, reclaiming, or disposing of oil and gas waste, including hauling salt water for hire by any method other than pipeline;
- (D) operating gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance or repressurizing plants, or recycling plants;
- (E) recovering skim oil from a salt water disposal site;
- (F) nominating crude oil;
- (G) operating a directional survey company;
- (H) cleaning a reserve pit;
- (I) operating a pipeline;
- (J) operating as a cementer approved for plugging wells, operating as a cementer cementing casing strings or liners, or operating a well service company performing well stimulation activities, including hydraulic fracturing; or
- (K) operating an underground hydrocarbon or natural gas storage facility.

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- (7) An organization shall refile an organization report annually according to the schedule assigned by the Commission. Prior to the filing date, the Commission shall mail notification and information to each organization for update of the organization report file. An organization shall file an amended organization report within 15 days after a change in any information required to be reported in the organization report. Only address changes may be made by letter.<sup>3</sup>

SWR 8(d)(2), titled *Prohibited pits*:

- (2) Prohibited pits. No person may maintain or use any pit for storage of oil or oil products. Except as authorized by this subsection, no person may maintain or use any pit for storage of oil field fluids, or for storage or disposal of oil and gas wastes, without obtaining a permit to maintain or use the pit. A person is not required to have a permit to use a pit if a receiver has such permit, if the person complies with the terms of such permit while using the pit, and if the person has permission of the receiver to use the pit. The pits required by this paragraph to be permitted include, but are not limited to, the following types of pits: saltwater disposal pits;

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<sup>3</sup> 16 TEX. ADMIN. CODE § 3.1(a)(1) and (7).

emergency saltwater disposal pits; collecting pits; skimming pits; brine pits; brine mining pits; drilling fluid storage pits (other than mud circulation pits); drilling fluid disposal pits (other than reserve pits or slush pits); washout pits; and gas plant evaporation/retention pits. If a person maintains or uses a pit for storage of oil field fluids, or for storage of disposal of oil and gas wastes, and the use or maintenance of the pit is neither authorized by this subsection nor permitted, then the person maintaining or using the pit shall backfill and compact the pit in the time and manner required by the director. Prior to backfilling the pit, the person maintaining or using the pit shall, in a permitted manner or in a manner authorized by paragraph (3) of this subsection, dispose of all oil and gas wastes which are in the pit.<sup>4</sup>

Texas Natural Resources Code § 91.142 requires:

(a) A person, firm, partnership, joint stock association, corporation, or other domestic or foreign organization operating wholly or partially in this state and acting as principal or agent for another for the purpose of performing operations which are within the jurisdiction of the commission shall file immediately with the commission:

- (1) the name of the company or organization;
- (2) the post-office address of the company or organization;
- (3) the plan under which the company or organization was organized;
- (4) the names and post-office addresses of the trustee or trustees of the company or organization;
- (5) the names, unique identifying numbers such as driver's license numbers, and post-office addresses of the officers and directors; and
- (6) if required by Subsection (b) of this section, the name and address of the resident agent.

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(f) If an entity described by Subsection (a) does not maintain on file with the commission an organization report and financial security as required by this chapter:

- (1) the entity may not perform operations under the jurisdiction of the commission except as necessary to remedy a violation of law or commission rules and as authorized by the commission; and

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<sup>4</sup> 16 TEX. ADMIN. CODE § 3.8(d)(2).

(2) the commission, on written notice, may suspend:

(A) any permits held by the entity; or

(B) any certificates of compliance approved under Subchapter P.<sup>5</sup>

### EVIDENCE PRESENTED

#### STAFF

Staff offered into evidence a printout copy of K&D's most recent Form P-5 *Organization Report* on file with the Commission.<sup>6</sup> The Form P-5 demonstrates K&D is assigned Operator No. 448763, and lists as K&D's officers: Jimmy Marvin Kersh, President/Owner; Robert Neil Davis, Vice President; and Patricia Ann Davis, Secretary.<sup>7</sup> The evidence demonstrates K&D's Form P-5 was first approved October 23, 2007, but became inactive October 31, 2013.<sup>8</sup> Staff maintains K&D has not had an active Form P-5 since October 31, 2013.<sup>9</sup>

Staff introduced two Commission-issued permits authorizing K&D to maintain and use pits.<sup>10</sup> K&D's *Permit to Maintain and Use a Pit* (Permit No. P011422A), ("Permit A"), and *Permit to Maintain and Use a Pit* (Permit No. P011422B), ("Permit B"), were both approved and issued on April 10, 2008.<sup>11</sup> Permit A and Permit B each authorize K&D to maintain and operate a washout pit at the K & D Water Works Buffalo Yard—no other pit type was authorized pursuant to either permit.<sup>12</sup>

On March 18, 2014; February 11, 2015; April 7, 2015; and November 4, 2015, Commission District Office 5 conducted inspections of the Facility.<sup>13</sup> Staff's evidence demonstrates—as early as March 18, 2014—K&D constructed, operated, and maintained a 30' x 30' x 3' unpermitted pit for purposes of "dry[ing] out the sludge removed from the washout pit."<sup>14</sup> Subsequent inspections confirmed the unpermitted pit remained at the Facility.<sup>15</sup>

Staff also introduced a letter dated March 4, 2015 from the Commission to K&D instructing K&D "to cease and desist using these permitted pits immediately" because "[K&D's] current

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<sup>5</sup> TEX. NAT. RES. CODE §§ 91.142(a) and (f).

<sup>6</sup> Staff Exh. 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Tr. at 2:45.

<sup>10</sup> Staff Exh. 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Staff Exh. 4; *see* Staff Exh. 3.

<sup>14</sup> Staff Exh., pg. 2.

<sup>15</sup> *Id.* at pg. 5.

P-5 status is 'inactive'.<sup>16</sup> Staff asserts, for the period between October 31, 2013 and March 18, 2014, K&D operated the Facility without an active Form P-5, in violation of Statewide Rule 1.<sup>17</sup>

On November 4, 2015 and April 14, 2016, a Commission-contracted third-party vendor conducted site remediation of the unpermitted pit on the Facility, as evidenced by two *Invoice Review and Voucher Approval* offered by Staff.<sup>18</sup> The invoices indicate the Commission expended \$10,557.18 to remediate pollution related to operation of the unpermitted pit.<sup>19</sup>

As evidenced by a printout copy of the Commission's *Oil and Gas List of Dockets by Operator Name*, K&D had five enforcement dockets for violation of Commission rules within the past seven years.<sup>20</sup>

### K&D

K&D did not offer evidence to rebut the alleged violations. Rather, K&D asserts a series of events absolves Robert Davis and Patricia Davis (K&D's officers) from being held liable for the alleged violations, to wit:

1. an *Assignment of Interest in Limited Liability Companies*, and
2. the death of K&D's President, Mr. Jimmy M. Kersh.

K&D offered an *Assignment of Interest in Limited Liability Companies* dated March 25, 2015 (recorded with the County Clerk of Trinity County October 28, 2016), from Robert N. Davis and Patricia A. Davis to Jimmy M. Kersh (President/Owner of K&D), conveying all of their right, title, and interest in and to K & D Water Works, LLC and Luck of the Draw, LLC.<sup>21</sup> However, in 2016, Mr. Kersh passed away, but K&D did not endeavor to update its Form P-5 with the Commission to reflect either event (assignment and death of officers).

Now, K&D argues Mr. Davis and Ms. Davis should not be held liable for violations of Commission rules because of their lack of control or ownership in K&D—as officers, their roles were minimal while the Facility was operational. K&D states Mr. Davis and Mrs. Davis filed for bankruptcy, prior to the hearing on the merits—rendering each judgment proof. However, supporting documentation was not offered to support that assertion.

K&D's *Closing Statement* summarizes its position:

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<sup>16</sup> Staff Exh. 3.

<sup>17</sup> See Staff's First Amended Original Complaint.

<sup>18</sup> Staff Exh. 5.

<sup>19</sup> *Id.*

<sup>20</sup> Staff Exh. 6; see Staff's First Amended Original Complaint.

<sup>21</sup> K&D Exh. 1.

At the Enforcement Hearing at the Railroad Commission of Texas, evidence was presented by Respondent of an Assignment of Interest which transferred all of the ownership interests, but more importantly, all liabilities of Patricia A. Davis and Robert N. Davis' interest in K & D Water Works, LLC to Jimmy M. Kersh. Therefore, the only remaining member of K & D Water Works, LLC after the Assignment of Interest was Jimmy M. Kersh. Evidence was presented that Jimmy M. Kersh was deceased and he died in Louisiana.

All of the operations of the facility in question went through **K & D Water Works, LLC**. After the transfer of ownership through the Assignment of Interest, the failure to update the P-5 information for **K & D Water Works, LLC**, rests upon the managing member Jimmy M. Kersh. Again, the effect of the Assignment of Interest places all liability upon the managing member, Jimmy M. Kersh for not having a valid P-5 on file with the Commission.

The Assignment of Interest absolves Patricia A. Davis and Robert N. Davis of all liabilities related to the Enforcement Action herein.

It is the opinion of Respondent, that if any violations and penalties are assessed, such judgment will be exclusively against K & D Water Works, LLC. More than likely, a judgment will be recorded and the balance will be unpaid due to the passing of Jimmy M. Kersh. The Enforcement Action has been filed exclusively against **K & D Water Works, LLC** and not any other persons individually. On behalf of **K & D Water Works, LLC**, we kindly request that any violations and penalties with interest be waived in its entirety.

#### ADMINISTRATIVE LAW JUDGE'S OPINION

The Administrative Law Judge (the "ALJ") concludes K&D violated Statewide Rules 1(a) and 8(d)(2) and recommends the Commission assess K&D with an administrative penalty in the amount of \$8,175, order K&D to reimburse the Commission in the amount of \$10,557.18 for site remediation costs, and order K&D to bring the Facility into compliance with all Commission Statewide Rules.

Statewide Rule 1(a) requires "any person . . . corporation . . . operating wholly or partially within this state . . . for the purpose of performing operations within the jurisdiction of the Commission shall perform such operations without having on file with the Commission an approved organization report and financial security as required by Texas Natural Resources Code §§91.103 - 91.1091." It is undisputed K&D's operations are subject to compliance with all Commission rules and regulations—operations related to washout pits are squarely within the Commission's jurisdiction. Therefore, K&D *must* have had on file with the Commission an *active* Form P-5 for all relevant time periods.

K&D did not dispute evidence that its Form P-5 lapsed to inactive status on October 31, 2013. Commission District Office inspections conducted in early 2014 document unpermitted operations at the Facility—evidence K&D did not contradict. K&D is therefore in violation of Statewide Rule 1(a).

Statewide Rule 8(d)(2) prohibits “maintain[ing] or us[ing] any pit for storage of oil field fluids, or for storage or disposal of oil and gas wastes, without obtaining a permit to maintain or use the pit.” Commission District Office inspection reports documented an unpermitted 30’ x 30’ x 3’ pit on the Facility. The undisputed evidence demonstrates only two pits were permitted by the Commission for use on the Facility—washout pits. The unpermitted pit was constructed by K&D to “dry out the sludge removed from the washout pit.” K&D does not assert it obtained a permit for the complained-of pit. Without evidence or argument to the contrary, K&D is in violation of Statewide Rule 8(d)(2).

Pursuant to Tex. Nat. Res. Code Ann. § 91.113, the Commission may seek reimbursement from an operator or individual responsible for causing pollution which requires remediation.<sup>22</sup> The evidence shows the Commission expended more than \$10,000 to remediate pollution caused by K&D on the Facility—K&D could not or would not conduct remediation itself. The Commission is therefore entitled to recoup from K&D those expended funds.

Despite the seriousness of the violations, Mr. Davis and Ms. Davis (K&D’s remaining officers listed on its most recent Form P-5) request of the Commission to “waive” any penalties because they currently do not have ownership or control of K&D. However, the evidence is clear: the Davis’ owned interests in K&D, aided in its operations, and were listed as officers on the Form P-5 at the time the alleged violations occurred. Therefore, despite contractual assignment of interests or other unfortunate events, Mr. Davis and Ms. Davis violated Commission rules.

Statewide Rule 107 provides a penalty guideline for oil and gas violations.<sup>23</sup> Staff requested the following penalty amount:

1. One (1) Statewide Rule 8(d)(2) violation - \$8,175 (penalty guideline range is \$2,500 base penalty plus \$0.75 sq./ft. of affected area); and
2. Penalty enhancement of \$5,000 for prior violations within seven years.

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<sup>22</sup> See TEX. NAT. RES. CODE ANN. § 91.113.

<sup>23</sup> See 16 TEX. ADMIN. CODE § 3.107.



## CONCLUSION

The Administrative Law Judge concludes that K&D is in violation of Statewide Rules 1(a) and 8(d)(2) and recommends the following Findings of Fact and Conclusions of Law:

### FINDINGS OF FACT

1. K & D Water Works, L.L.C. was given at least ten (10) days' notice of the hearing by certified mail sent to its most recent Form P-5 address.
2. K & D Water Works, L.L.C. Form P-5 *Organization Report* Operator No. is 448763.
3. K & D Water Works, L.L.C. appeared at the hearing on the merits through Rebecca Cousins-Brightwell, Attorney at Law; Robert Davis, Vice President; Patricia Davis, Secretary.
4. Commission staff appeared at the hearing on the merits through David Bell, Staff Attorney, Enforcement Section; and Artemis Harbert, Engineering Specialist.
5. No organization, including any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the Commission shall perform such operations without having on file with the Commission an approved Form P-5 *Organization Report*, including operators of washout pits.
6. An organization shall refile an organization report annually according to the schedule assigned by the Commission. Prior to the filing date, the Commission shall mail notification and information to each organization for update of the organization report file. An organization shall file an amended organization report within 15 days after a change in any information required to be reported in the organization report. Only address changes may be made by letter.
7. No person may maintain or use any pit for storage of oil field fluids, or for storage or disposal of oil and gas wastes, without obtaining a permit from the Commission to maintain or use the pit.
8. On October 23, 2007, K & D Water Works, L.L.C. filed with the Commission its first Form P-5 *Organization Report*, which listed as its officers: Jimmy Marvin Kersh, President/Owner; Robert Neil Davis, Vice President; and Patricia Ann Davis, Secretary.
9. On April 10, 2008, the Commission issued to K & D Water Works, L.L.C. a *Permit to Maintain and Use a Pit* (Permit No. P011422A) and a *Permit to Maintain and Use a Pit*

(Permit No. P011422B) authorizing K & D Water Works, L.L.C. to operate and maintain two washout pits at the K & D Water Works Buffalo Yard located in Leon County, Texas.

10. On November 14, 2012, K & D Water Works, L.L.C. filed with the Commission its most recent Form P-5 *Organization Report*, which listed as its officers: Jimmy Marvin Kersh, President/Owner; Robert Neil Davis, Vice President; and Patricia Ann Davis, Secretary.
11. On October 31, 2013, K & D Water Works, L.L.C.'s Form P-5 *Organization Report* lapsed to inactive (or, unapproved) status because K & D Water Works, L.L.C. did not file with the Commission its annual Form P-5 *Organization Report*.
12. Since October 31, 2013, K & D Water Works, L.L.C. has not been authorized to perform oil and gas operations within the jurisdiction of the Commission.
13. Between October 31, 2013 and March 4, 2015, K & D Water Works, L.L.C. operated two washout pits on the K & D Water Works Buffalo Yard located in Leon County, Texas, without an active (or, approved) Form P-5 *Organization Report*.
14. On or before March 18, 2014, K & D Water Works, L.L.C. constructed, maintained, and operated a pit measuring 30' x 30' x 3' on the K & D Water Works Buffalo Yard located in Leon County, Texas, for the purpose of storing of oil and gas wastes, without obtaining a permit from the Commission to maintain or use the pit.
15. Jimmy Marvin Kersh deceased in 2016.
16. Robert Neil Davis, Vice President; and Patricia Ann Davis, Secretary, are the current officers of K & D Water Works, L.L.C., as identified on K & D Water Works, L.L.C.'s most recent Form P-5 *Organization Report*.
17. K & D Water Works, L.L.C. violations of 16 TEX. ADMIN. CODE § 3.8(d)(2), and 16 TEX. ADMIN. CODE § 3.1(a) are serious and a hazard to the public health and safety.
18. For purposes of TEX. NAT. RES. CODE § 91.114, at all times relevant hereto Robert Neil Davis, Vice President; and Patricia Ann Davis, Secretary, were persons who held a position of ownership or control in K & D Water Works, L.L.C.
19. K & D Water Works, L.L.C. acted in bad faith because it failed to correct a Commission rule violation on the K & D Water Works Buffalo Yard, Washout Pit, Permit Nos. 011422A and 011422B, Freedom Field, Leon County, Texas, and failed to adequately explain its inaction to the Commission.

20. The Commission expended \$10,557.18 for site remediation costs on K & D Water Works Buffalo Yard, Washout Pit, Permit Nos. 011422A and 011422B, Freedom Field, Leon County.

#### CONCLUSIONS OF LAW

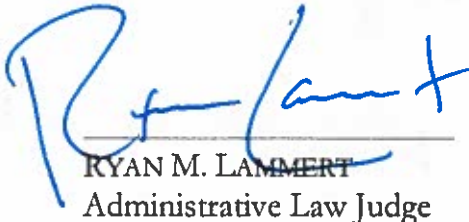
1. Proper notice of hearing was timely issued to the appropriate persons entitled to notice.
2. All things necessary to the Commission attaining jurisdiction have occurred.
3. By performing operations within the jurisdiction of the Commission without having on file with the Commission an approved organization report, K & D Water Works, L.L.C. violated 16 TEX. ADMIN. CODE § 3.1.
4. By maintaining or using a pit for storage of oil field fluids, or for storage of oil and gas wastes, without obtaining a permit from the Commission to maintain or use the pit, K & D Water Works, L.L.C. violated 16 TEX. ADMIN. CODE § 3.8(d)(2).
11. The documented violations committed by K & D Water Works, L.L.C. constitute acts deemed serious and a hazard to the public health and safety within the meaning of Texas Natural Resources Code §81.0531.
12. K & D Water Works, L.L.C. did not demonstrate good faith within the meaning of Texas Natural Resources Code §81.0531.
13. Pursuant to Tex. Nat. Res. Code Ann. § 91.113, the Commission is entitled to seek reimbursement from K & D Water Works, L.L.C. in the amount of \$10,557.18 for costs incurred to remediate pollution caused by K & D Water Works, L.L.C. on the K & D Water Works Buffalo Yard, Washout Pit, Permit Nos. 011422A and 011422B, Freedom Field, Leon County, Texas.

RECOMMENDATIONS

The Administrative Law Judge recommends the Commission assess K & D Water Works, L.L.C. an administrative penalty in the amount of \$8,175, order K&D to reimburse the Commission in the amount of \$10,557.18 for site remediation costs, and order K&D to bring the Facility into compliance with all Commission Statewide Rules.

The Administrative Law Judge also recommends that Robert Neil Davis and Patricia Ann Davis be made subject to the restrictions of TEX. NAT. RES. CODE § 91.114.

RESPECTFULLY SUBMITTED,



RYAN M. LAMMERT  
Administrative Law Judge