RAILROAD COMMISSION OF TEXAS
HEARINGS DIVISION

Oil & Gas Docket No. 8A-0310716

APPLICATION OF KINDER MORGAN PRODUCTION CO LLC TO ADMINISTRATIVELY AMEND ITS FORM H-9 FOR INJECTION AUTHORITY UNDER STATEWIDE RULE 36 FOR THE TALL COTTON PROJECT, KINDER MORGAN BERGEN LEASE AND FUTURE LEASES, TALL COTTON (SAN ANDRES) FIELD, GAINES COUNTY, TEXAS

Oil & Gas Docket No. 8A-0310718

APPLICATION OF KINDER MORGAN PRODUCTION CO LLC TO AMEND FIELD RULES FOR THE TALL COTTON (SAN ANDRES) FIELD, GAINES COUNTY, TEXAS

PROPOSAL FOR DECISION

HEARD BY: Jennifer Cook, Administrative Law Judge
Karl Caldwell, P.E., Technical Examiner

PROCEDURAL HISTORY:

Complaint and Request for Hearing Filed -	April 4, 2018
Notice of Hearing -	May 7, 2018
Hearing Date -	June 15 and 19, 2018
Post Hearing Conference -	October 3, 2018
Record Close -	October 17, 2018
Proposal for Decision Issued -	January 16, 2019

APPEARANCES:

For Applicant Kinder Morgan Production Company LLC -
William B. Hayenga, II
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For Commission Staff -
David Cooney, Special Counsel
Office of General Counsel

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I. Statement of the Case

Kinder Morgan Production Company LLC ("Kinder Morgan" or "Applicant") filed an application requesting a determination that additional leases can be approved administratively for hydrogen sulfide (H_2S) injection for its Tall Cotton Project after an initial hearing without need for additional hearings. Staff maintains because the additional leases have not been approved for H_2S injection and the conditions requiring a hearing have been triggered, the approval of additional leases requires a hearing.

Applicant's Tall Cotton Project is a carbon dioxide (CO_2) flood in the San Andres formation in Gaines County. The injectate contain H_2S because as Kinder Morgan cycles the CO_2, the CO_2 turns from sweet to sour. Reservoir boundaries are usually known when doing a CO_2 flood because there has already been primary and secondary recovery. In this case there has been no primary recovery.

Kinder Morgan originally requested authorization for H_2S injection on its Bergen Lease, Lease No. 70250, ("Lease") in the Tall Cotton (San Andres) Field ("Field"). After hearing ("Prior Hearing"), the Commission issued an order authorizing H_2S injection on the Lease.

Kinder Morgan now seeks to expand the Tall Cotton Project into additional sections in the area. The expansion requires the addition of leases to the project. Kinder Morgan discussed with Staff its request for administrative approval to add leases to the authority granted by the Commission for the Lease. Staff notified Kinder Morgan that additional leases may only be approved after a hearing if conditions exist triggering the hearing requirement.

Applicant claims the Prior Hearing was sufficient to apply to the proposed expansion of the Tall Cotton Project under Statewide Rule 36[1] (or "Rule"). Kinder Morgan rejects Staff's interpretation and implementation of Statewide Rule 36 that expansion of a project involving additional leases that have not previously been approved require a hearing for approval (if conditions exist triggering the hearing requirement).

Staff maintains Statewide Rule 36 provides for H_2S injection approval on a lease-by-lease (or unit-by-unit) basis. Staff asserts it has been Commission practice to require a hearing for injection on a lease that has not been previously approved for H_2S injection.

The Administrative Law Judge and Technical Examiner (collectively "Examiners") respectfully submit this Proposal for Decision ("PFD") and recommend the Railroad Commission ("Commission" or "RRC") deny Applicant's request to require Staff to administratively approve its project expansion. The Examiners recommend the Commission find that Statewide Rule 36 is silent as to whether hearings are required on a lease-by-lease basis, such that the Commission has discretion to require hearings on a lease-by-lease basis in implementing Statewide Rule 36. The Examiners further recommend the Commission find the Commission's current implementation is legally

[1] 16 Tex. Admin. Code § 3.36.

sufficient and reasonable. The Examiners also recommend denial of Applicant's request for a field rule amendment.

II. Jurisdiction and Notice[2]

Sections 81.051 and 81.052 of the Texas Natural Resources Code provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas, and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

On May 7, 2018, the Hearings Division of the Commission sent a Notice of Hearing ("Notice") to Kinder Morgan and Staff setting a hearing date of June 15, 2018.[3] Consequently, the parties received more than 10 days' notice. The Notice contains (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters asserted.[4] The hearing was held on June 15, 2018, as noticed. Applicant and Staff appeared at the hearing. The hearing was not completed on June 15, so the parties agreed to resume the hearing on June 19. The parties were also provided notice of and appeared at a post-hearing conference on October 3, 2018.

III. Applicable Legal Authority

Applicant and Staff dispute whether Statewide Rule 36 requires a separate hearing for each Commission designated lease or unit. Staff maintains it does. Applicant maintains that after an initial hearing regarding a project, Statewide Rule 36 does allow the project to be expanded to include additional leases without need of additional hearings. The provision in Statewide Rule 36 requiring a hearing states:

> (10) Injection provision.
>
> > (A) Injection of fluids containing hydrogen sulfide shall not be allowed under the conditions specified in this provision unless first approved by the commission after public hearing:
> >
> > > (i) where injection fluid is a gaseous mixture, or would be a gaseous mixture in the event of a release to the atmosphere, and where the 100 ppm radius of exposure is in excess of 50 feet and includes any part of a public area except a public road; or, if the 500 ppm radius of exposure is in excess of 50 feet and includes any part of a public road; or if the 100 ppm radius of exposure is 3,000 feet or greater;
> > >
> > > (ii) where the hydrogen sulfide content of the gas or gaseous mixture

[2] The hearing transcript in this case is referred to as "Tr. Vol. [number] at [page(s)]." Applicant's exhibits are referred to as "Applicant Ex. [exhibit no.]." Staff's exhibits are referred to as "Staff Ex. [exhibit no.]."
[3] Applicant Ex. A, B.
[4] *See* Tex. Gov't Code §§ 2001.051, 052; 16 Tex. Admin. Code §§ 1.42, 1.45.

to be injected has been increased by a processing plant operation.

> (B) Each project involving the injection of gas or gaseous mixtures containing hydrogen sulfide which does not require a public hearing prior to receiving commission approval specified in this provision shall nevertheless be subject to the other provisions of this section to the extent that such provisions are applicable to such project.[5]

Kinder Morgan asserts it already had a hearing regarding its project and currently requests to expand the project to include additional leases. Staff disagrees and asserts that Rule 36 requires a hearing on a lease-by-lease or unit-by-unit basis.

IV. Discussion of Evidence

The facts are not in dispute. The parties mainly dispute the interpretation and implementation of Statewide Rule 36.

A. Summary of Facts

This case involves H_2S authorization for Kinder Morgan's Tall Cotton Project in the Field. Kinder Morgan discovered the Field and is the only operator in the Field.[6] The Field was discovered in 2015 and Kinder Morgan developed it as a CO_2 project.[7] The project is in Gaines County.[8] Production is from the San Andres formation. The project is currently contained within a one square mile section (Section 427), on the Bergen Lease, Lease No. 70250, ("Lease") in the Tall Cotton (San Andres) Field ("Field"). Kinder Morgan wants to initially expand to the section contiguous and directly north (Section 426). Kinder Morgan eventually anticipates expanding into 12-14 additional sections.[9]

The Tall Cotton Project is a CO_2 flood in the San Andres formation. Kinder Morgan asserts this project is unique in that there was no prior primary or secondary production, only dry holes. The location of the Tall Cotton Project is along County Roads 208 and 231, in a relatively remote area; the land is mainly used as farmland. The project is targeting a residual oil zone ("ROZ") with CO_2; the CO_2 moves the hydrocarbons that otherwise would not produce.[10]

When the project began, the CO_2 became gradually sour due to Kinder Morgan cycling the CO_2 with gas from the Field. Originally, Kinder Morgan sought authority for 13 injection wells on the Lease. When Kinder Morgan started the project, it injected pure pipeline CO_2 and over time the produced gas stream from the reservoir was commingled with the CO_2, introducing H_2S gas into the injection stream. At first, the levels of H_2S were

[5] 16 Tex. Admin. Code § 3.36(c)(10).
[6] Applicant Ex. 3A, 3B; Tr. Vol. 1 at 78-82.
[7] Staff. Ex. 2, Tab 3 at 2.
[8] Applicant Ex. 1.
[9] Applicant Ex. 2; Tr. Vol. 1 at 74-76, 128.
[10] Tr. Vol. 1 at 91-100; Applicant Ex. 5, 6.

low and did not trigger a need for a hearing. As the project continued, the levels of H_2S increased, requiring a hearing.[11]

Generally, the process for obtaining H_2S injection authority is:

1. The operator submits a Form H-9 (*Certificate of Compliance Statewide Rule 36*), contingency plan and radius of exposure ("ROE") maps for proposed injection, which are reviewed by the district office.

2. There is an onsite inspection. Then the district H_2S Coordinator will send a letter recommending approval/denial and whether or not a hearing is required.

3. For amendments, any additional stand-alone wells or additional leases are required to go through the hearing process. If only additional wells are added, then a hearing is not required because injection on the subject lease would have already been granted.[12]

In 2017, there was a Rule 36 H_2S injection public hearing for Kinder Morgan's Tall Cotton Project ("Prior Hearing"). In the Prior Hearing, the Form H-9 and the contingency plan only cover wells on the Lease and the area of the Lease. In a letter dated March 8, 2017, Staff notified Kinder Morgan that the district office has no objection but because the injection project encompasses public roads and the ROE is in excess of 3,000 feet, a hearing is required. The approved Form H-9 was signed March 7, 2017.[13] In the Affidavit of Publication for the Prior Hearing, it describes the scope and location of the project as follows:

> The applicant proposed to inject fluid into the Sand Andres Formation, Kinder Morgan Bergen Lease, Wells Number I 11, I 12, I 13, I 14, I 21, I 22, I 23, I 24, I 31, I 32, I 33, I 34 and I 43. The proposed wells are located 14.4 miles northwest of Seminole, Texas, in the Tall Cotton (San Andres field in Gaines County.[14]

There are no structures in the original radius of exposure; the area is uninhabited and mainly used as farmland.[15] After the Prior Hearing, the Commission issued an order ("Prior Order") approving H_2S injection on the Lease.[16]

The Tall Cotton Project has been successful and Kinder Morgan now seeks to expand into additional sections in the area. Thus far, the project in Section 427 has produced over 1,403,490 barrels of oil and 1,294,731 thousand cubic feet of casinghead gas.[17] The Form H-9 has a place for Commission identification numbers.[18] Kinder Morgan

[11] Tr. Vol. 1 at 84-91, 121-124; Applicant Ex. 4C, 4D.
[12] Staff Ex. 2, Tab 2; Tr. Vol. 1 at 23-24.
[13] Applicant Ex. 8.
[14] Applicant Ex. 7A at 49.
[15] *See, e.g.,* Tr. Vol. 1 at 109-110.
[16] Staff Ex. 2, Tab 3; Tr. Vol. 1 at 24.
[17] Applicant Ex. 3A, 3B; Tr. Vol. 1 at 78-82.
[18] *See, e.g.,* Applicant Ex. 7B at 1.

seeks to amend the Form H-9 to add additional identification numbers as it expands by adding new leases.[19] Kinder Morgan is ready to expand into Section 426. Kinder Morgan's total expected project size is less than 10,000 acres, approximately 9,800 acres.

Via emails and then at a February 8, 2018 meeting, Kinder Morgan discussed with Staff its request for administrative approval to add leases to the authority granted by the Commission in the Prior Order. Via an email on January 26, 2018, Staff notified Kinder Morgan that it is Field Operations' practice that each lease must be approved after a hearing if conditions exist triggering the hearing requirement.[20] In the email it states, "each lease must be approved at a hearing before H_2S injection can take place on that lease."[21] There were also discussions with Staff and a follow up meeting on February 8.[22] In a letter dated February 20, 2018, Staff advised Kinder Morgan that a hearing would be necessary. It further stated that "Staff does not consider itself authorized to administratively approve sour gas injection beyond leases that have already been approved at hearing."[23]

In response to this letter, Kinder Morgan sent a letter to Staff dated March 12, 2018, requesting a hearing on the matter and the subject cases were created.[24]

Staff acknowledges if an order providing H_2S approval specifies wells on a lease and additional H_2S wells are drilled on the lease, they are added to the H_2S administratively, without need for additional hearings.[25]

Staff acknowledges that if the sections comprised one large lease, Staff would administratively approve the expansion since there would have already been a hearing regarding the lease at issue. Applicant expects to expand to add 12-14 contiguous sections, each being a Commission designated lease. That could mean 12-14 additional hearings.

At a post-hearing conference, the Examiners requested examples of when requests for expansion had been denied or granted in the past. According to the parties, this issue does not arise often, and as far as Staff can recall, this is the first time an operator has requested Staff to administratively approve Form H-9 amendments for leases that do not exist, or have not otherwise been approved after a hearing.[26] Staff does administratively approve additional wells on approved leases even if the ROE becomes bigger (for example, if another section of the lease is drilled or wells are drilled closer to the boundary). According to Staff, they have always done this on a lease-by-lease basis.[27]

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[19] Tr. Vol. 1 at 106-108; Applicant Ex. 7B.
[20] Staff Ex. 1; Tr. Vol. 1 at 22-23.
[21] Applicant Ex. 9.
[22] *Id.*; Tr. Vol. 1 at 114-115.
[23] Applicant Ex. 10.
[24] *Id.*
[25] Tr. Vol. 2 at 90-93.
[26] Tr. Vol. 3 at 40-41.
[27] Tr. Vol. 3 at 42-43.

At the post-hearing conference, Kinder Morgan provided a ROE of the project with the second section added.[28] According to Kinder Morgan, there are no additional persons that need to be provided notice. The same two public roads are involved and there are no offset operators or persons within the ROE. It did provide notice to surrounding adjacent land owners (of the original section) in the Prior Hearing.[29]

Kinder Morgan also provided a map containing approximately 40 sections in the area that it considers to encompass the entire ROE for the anticipated project; Kinder Morgan did not provide any ROE calculations for this or provide a list of persons who would be entitled to notice. There are several small structures on this map.[30]

B. Summary of Kinder Morgan's Argument

Kinder Morgan's position is that the Rule provides a project-based approach and requires one hearing per project and a project can include more than one Commission lease. Kinder Morgan asks that the Prior Hearing be considered sufficient to cover the entire project.

Kinder Morgan claims numerous duplicative hearings will cause delay and expense leading to premature abandonment of the project. Kinder Morgan expects its expansion would involve 12-14 more sections. Kinder Morgan claims that to require a hearing per lease deviates from the language of the Rule and amounts to improper informal rule-making. Kinder Morgan claims it had the hearing for this project in 2017, and an additional one is not needed to amend the Form H-9 to add leases.

Kinder Morgan claims there should be no distinction between unit/lease expansion and project expansion. Kinder Morgan maintains this is a case of first impression since there is no prior production defining boundary, only dry holes. Typically, there are established boundaries based on primary and secondary recovery. According to Kinder Morgan, when units or lease boundaries change, no new hearing is required, and its project should be treated the same way. Kinder Morgan asks for administrative approval of its amended Form H-9 without the requirement of an additional hearing.

Alternatively, Kinder Morgan requests a field rule amendment to allow administrative approval of such H_2S projects. Kinder Morgan argues the remote location of the project, the unique greenfield flood operations, administrative efficiency, prevention of waste, protection of correlative rights and no negative impact to public safety justify its rule request.

Kinder Morgan's first witness was Mr. Kenneth Robert Michie, the Director of Engineering for Kinder Morgan. He testified as an expert witness. Mr. Michie testified that the project area's ROZ is fairly expansive and covers almost the entire section of West

[28] Applicant Ex. 27; Tr. Vol. 3 at 67-69.
[29] Tr. Vol. 3 at 68-69.
[30] Applicant Ex. 28A; Tr. Vol. 3 at 69-77.

Texas. He stated it is not a pure structure play and that until Kinder Morgan drills wells in adjacent sections it is unknown what the oil saturation levels are. He notes there are multiple dry holes in the area and there is no Commission lease identifier because this area has not been developed. Kinder Morgan decides where to expand section by section based on information it discovers as it progresses. He thinks Kinder Morgan may potentially want to develop 12 to 14 additional sections in this area. However, Kinder Morgan does not currently have the 12 to 14 sections leased.[31]

Mr. Michie testified that if Kinder Morgan is unable to obtain administrative approval of expansions then it will cause significant additional costs and delays. He stated the additional costs and delay are substantial such that they could prevent expansion, causing waste.[32]

Mr. Michie testified in his experience, it would be beneficial to have one Form H-9 and one contingency plan for the entire project. He expects breaking the project into several pieces with multiple contingency plans could cause confusion; for example, if different contingency plans notify different people. In his opinion, it is best practices to have one stream-lined contingency plan instead of multiple—which can cause confusion and exacerbate an emergency situation.[33]

Kinder Morgan noted that in the Prior Hearing, there was a project number assigned and utilized by Staff to track the project.[34]

Kinder Morgan's second witness was Thomas H. Richter. He is a petroleum engineer. He has worked for the Commission in the past including being the Assistant District Director in the Kilgore Commission district office for four years. He was also a Commission hearings examiner for about 20 years. His experience at the Commission included being familiar with and working with H_2S regulations. He was involved in developing the Rule language and teaching outreach seminars to educate industry about H_2S and the H_2S regulations. Mr. Richter noted that the language in the current Rule is the same as it was when he was at the Commission.[35]

Mr. Richter opined that the Rule was not intended to be confined to single leases when written, based on his experience. He notes that the Rule states a certificate of compliance may cover a single operation or multiple operations located in an area, a field or a group of fields within a Commission district.[36] He maintains the subject project is in the same area, the same field and within the same Commission district. He testified a lease boundary does not limit the radius of exposure. He stated that it makes more sense to utilize radius of exposure boundaries than lease boundaries, since lease line boundaries are not always easily discernible. Moreover, he asserts there is no boundary

[31] Tr. Vol. 1 at 74-78; Applicant Ex. 1, 2.
[32] Tr. Vol. 1 at 78-82, 134-136.
[33] Tr. Vol. 1 at 110-112, 117-118.
[34] Applicant Ex. 7A; Tr. Vol. 1 at 100-101.
[35] Tr. Vol. 2 at 7-14; Applicant Ex. 12, 13.
[36] Tr. Vol. 2 at 18-19; Applicant Ex. 14A at 14.

limitation in the Rule.[37] Mr. Richter notes an original publication of the Rule by the Commission states that the Rule "requires public hearing before the Commission approves injection projects . . . ."[38] Mr. Richter testified the instructions for completing the Form H-9, the Form H-9 itself and Commission guidance on H_2S also demonstrate that there is no limitation that a project be within one lease. He testified that the use of the word "project" in the Rule, guidance and other records supports his opinion that a project does not need to be confined to a lease.[39]

Mr. Richter testified that requiring a hearing for each added lease will add months of delay per hearing to obtain a permit, which will lead to waste and fails to protect correlative rights. He estimates that obtaining the authorization without a hearing takes approximately three months while if a hearing were required, he estimates an authorization would take approximately nine months.[40]

Mr. Richter references a prior approved project. In it, there was a Commission lease encompassing approximately 22,000 acres. The operator proposed a tertiary water-alternating-gas ("WAG") H_2S CO_2 project. The project had six phases planned. Phase I was to consist of 192 injection wells. Notice was published for four consecutive weeks, and was provided to all affected persons (all persons within the 100 ppm ROE, and all primary responders). In addition, a town hall dinner meeting was held; the 100 ppm ROE includes approximately 70% of the City of Wickett. He referenced this as a project that was able to be expanded because it had a lease number. He asserted that the operator did not have to have a hearing on the wells in the remaining phases because it had one lease number. From the Proposal for Decision in that case it is unclear whether the 100 ppm ROE was calculated based on the current 57 injection wells, the 192 planned wells in Phase I or all the wells in the six phases. [41]

Mr. Richter argues that the district office already reviews and monitors the drilling of these wells. He maintains that before any well is drilled, it will have to be given a lease number. He claims the district office has all it needs to be able to transition to what he refers to as a "project based" approach.[42] He stated the district office approves the contingency plan and Form H-9 before the hearing, and as a hearing examiner he relied on the district's review. He said that district office staff sees more Form H-9s and contingency plans than a hearings examiner.[43]

Mr. Richter argues that lease and unit boundaries can change by agreement and when that occurs, no hearing requirement is triggered. He claims the same should be true for Kinder Morgan's project. Mr. Richter provided an example in which a unit was expanded and no new H_2S authorization was required.[44]

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[37] Tr. Vol. 2 at 14-22; Applicant Ex. 14A.
[38] Applicant Ex. 15 at 6; Tr. Vol. 2 at 24-25.
[39] Tr. Vol. 2 at 26-30; Applicant Ex. 16, 17.
[40] Tr. Vol. 2 at 30-34; Applicant Ex. 18A.
[41] Tr. Vol. 2 at 36-38, 42-43; Applicant Ex. 18B.
[42] Tr. Vol. 2 at 42-47, 56-58; Applicant Ex. 20.
[43] Tr. Vol. 2 at 85.
[44] Tr. Vol. 2 at 47-55; Applicant Ex. 21, 22.

Mr. Richter testified that the Commission can adopt a special rule related to Kinder Morgan's project and that there is sufficient evidence to warrant one.[45]

Kinder Morgan points out that this is a unique situation. It argues most waterfloods occur after primary production so the boundary of the field is known. Here, the waterflood is the primary ("greenfield") production so the boundary is not known and is discovered as wells are drilled.[46]

C. Summary of Staff's Argument

Staff asserts the Lease is a defined area and Staff cannot administratively approve injection in a new area without a hearing. Staff has implemented this practice by approving injection on a lease-by-lease basis (or unit-by-unit). Staff asserts this is the requirement in the Rule. Staff acknowledges that usually in these situations, the field is already defined and a waterflood is a reworking of a mature field. However, a lease number is not given until the first well on the lease is completed. Staff acknowledged for a sour injection well, Staff allows permit numbers because Staff understands that an operator would not want to drill the well if it does not know it will be able to use it.[47]

Staff asserts the Rule requires each new lease/unit to be approved by a hearing. Staff also asserts that the original notice of hearing did not identify the multiple leases to be included in the project.

Staff acknowledges that it will administratively approve additional wells on a lease without need of a hearing. Staff refers to prior H_2S cases that address specific leases/units/wells.

Staff maintains it is the Commission's well-established practice to require a hearing for H_2S authorization on a new lease. According to Staff, Kinder Morgan is proposing a change in policy, which is not in Staff's purview since it is the Commission who makes policy.

Staff argues that known boundary limits is one of the good reasons for requiring identified leases be authorized after a hearing. Staff asserts H_2S is dangerous and justifies utmost care and attention. According to Staff, having approvals with unknown boundary limits will be more difficult to monitor and regulate.

Staff also claims the notice for the Prior Hearing was insufficient in that it only included one lease. Staff argues allowing one hearing per project is a departure from practice and current implementation of Rule. According to Staff, basing approvals on leases and units work because they have clear boundaries and are identifiable.

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[45] Tr. Vol. 2 at 58.
[46] Tr. Vol. 2 at 108-109.
[47] Tr. Vol. 3 at 83-90.

Staff submitted examples of where Form H-9 amendments were administratively approved when additional wells were added to a lease that was already authorized.[48] Staff provided testimony that if wells are added on an approved lease or unit, the additional wells can be approved administratively. If a proposed well is not located on an approved lease or unit, then a hearing is required for approval if conditions triggering a hearing are met.[49] Operators are required to provide the same data whether there is a hearing or administrative approval.[50] According to testimony and prior examples, for a project that is planned to be implemented in stages (and is wholly contained on one lease or unit), operators have used the initial stage one wells when determining the ROE used at the hearing.[51]

Staff expressed concern about the Commission's ability to do as good of a job without the ability to track approval on a lease or unit basis. Staff's position is that there would be too many ways to expand and no parameters. For example, an operator could propose one well on one lease for public hearing purposes and then seek practically limitless administrative approvals as expansions.[52]

Staff acknowledged a unit or lease can be expanded but claims it is rare and an example could not be provided. Staff did provide testimony that because the issue is dealing with a deadly gas, Staff would take the more conservative route and require a hearing if it is not clear whether there should be one, such as in the case of a lease size expansion.[53]

Staff acknowledged that expansions can be administratively approved when the ROE expands if the expansion is within an approved lease or unit.[54]

V. Examiners' Analysis

The Examiners recommend the Applicant's request for relief be denied. The Examiners agree with Kinder Morgan that the Commission is not required by the Rule to approve projects lease-by-lease. However, the Examiners find there is no legal deficiency in Staff's current implementation of the Rule and find it is reasonable. Staff is responsible for and most familiar with the day-to-day implementation of this Rule. The Examiners find there was insufficient evidence that Statewide Rule 36 requires administrative approval of the remainder of Kinder Morgan's Tall Cotton Project. The Examiners find there was insufficient evidence that the Field's field rules should be amended to allow administrative approval of projects that would otherwise require hearings under Statewide Rule 36.

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[48] Staff Ex. 2, Tab 3 (behind blue page), 3.
[49] *See, e.g.,* Tr. Vol. 1 at 65.
[50] Tr. Vol. 1 at 46-49.
[51] Tr. Vol. 1 at 55-56.
[52] Tr. Vol. 1 at 58-60.
[53] Tr. Vol. 1 at 61-68.
[54] Tr. Vol. 1 at 69-72.

A. The Examiners recommend the Commission find the Rule does not require the Commission to conduct hearings on a lease-by-lease basis.

Kinder Morgan contends that Statewide Rule 36 does not require authorizations on a lease-by-lease basis and that the Rule allows expansion of projects beyond the original approved lease to be authorized administratively.

The Rule requires a hearing when the following conditions apply:

1. where the 100 ppm ROE is in excess of 50 feet and includes any part of a public area except a public road;

2. if the 500 ppm ROE is in excess of 50 feet and includes any part of a public road;

3. if the 100 ppm ROE is 3,000 feet or greater; or

4. where the hydrogen sulfide content of the gas or gaseous mixture to be injected has been increased by a processing plant operation.[55]

The Rule is silent as to whether expansions into new leases trigger a requirement of another public hearing. In describing the scope of activity authorized, the Rule uses more general language such as "operations" or "project." There is no express language that each lease is required to have a public hearing.[56] The order adopting the Rule and the guidance for the Rule also use the term "project" and do not expressly require lease-by-lease authorization.[57] Moreover, the Rule states a certificate of compliance can cover multiple operations. The Examiners do not recommend that the Commission find that the Rule necessitates hearings on a lease-by-lease bases because the Rule is silent on that particular issue.

B. The Commission has discretion to implement the Rule on a lease-by-lease basis and the Examiners find Staff's current implementation legally sufficient and reasonable; the Examiners recommend the Commission deny Applicant's request to require administrative approval of its project expansion.

While the Examiners find the Rule does not require hearings be on a lease-by-lease basis, the Examiners recommend that the Commission find it does have discretion to implement the Rule on a lease-by-lease basis.

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[55] 16 Tex. Admin. Code § 3.36(c)(10).
[56] *See, e.g.,* 16 Tex. Admin. Code § 3.36(a)(1)-(2), (b)(1)-(2), (b)(8)-(9), (c)(1)-(2), (c)(3)(A), (c)(3)(E), (c)(6)(iv), (c)(10)(A)(ii), (c)(13)(A) (refers to the authorization of a "project," "system" and/or "operations" as opposed to using narrower more specific language requiring authorization by lease or unit). However, each well is required to have a certificate of compliance and the rule does refer to a "certificated lease." 16 Tex. Admin. Code § 3.36(c)(12)(G).
[57] *See* Applicant Ex. 17; Staff Ex. 5 at 47.

The Commission has discretion in the performance of its duties, including implementation of its rules. As Staff explained, the lease-by-lease approach has been effective thus far, and lease and unit identifiers have been an effective method to track the authorizations and perform regulatory responsibilities. Staff expressed concern that if the process is altered to change the type of identifiers and descriptions of the projects, there could be regulatory challenges to managing and tracking. Staff urges that caution should be used in changing a process dealing with H_2S.

The Examiners find the current implementation is not contrary or inconsistent with the Rule; it is legally sufficient. Moreover, it is reasonable. There was insufficient evidence that Staff should be required to change its implementation of Statewide Rule 36. For these reasons, the Examiners find no change in implementation is required. However, if the Commission wants to change how it implements this Rule or reconsider how implementation for these types of projects could work, that is within its discretion. The Examiners recommend denial of the application to require administrative approval of the proposed expansion of Kinder Morgan's project.

C. The Examiners recommend the Commission deny Applicant's request for a field rule amendment.

In the alternative, Kinder Morgan requests that the Field's field rules be amended to allow administrative approval. Kinder Morgan requests the following rule:

> Rule 5: Operators of Enhanced Recovery Operations may administratively amend Form H-9 and contingency plans without the need for additional public hearings after an initial public hearing. Notice of the amended H-9 must be provided to persons within an H_2S radius of exposure. District Staff must approve the H-9 before the amended or expanded operations may commence.

There was very limited discussion about the appropriateness of a rule amendment and no precedent for Rule 36 exceptions via field rule was provided. There is no evidence of how it would be applied, and it is not limited to Kinder Morgan or Kinder Morgan's Tall Cotton Project. Additionally, Statewide Rule 36(e) already contains a procedure for obtaining an exception to the requirements in the Rule. The Examiners find there is insufficient evidence to merit a field rule amendment and recommend denial of Kinder Morgan's request for one.

For these reasons, the Examiners recommend Applicant's request to have Staff administratively approve its project expansion be denied and also recommend denial of Applicant's request for a field rule amendment.

VI. Recommendation, Proposed Findings of Fact and Proposed Conclusions of Law

Based on the record and evidence presented, the Examiners recommend the Commission deny Applicant's request to have Staff administratively approve its project expansion. The Examiners recommend the Commission find Statewide Rule 36 does not require a hearing on a lease-by-lease basis, the Commission has discretion to require hearings on a lease-by-lease basis in implementing Statewide Rule 36, and the Commission's current implementation is legally sufficient and reasonable. The Examiners also recommend denial of Applicant's request for a field rule amendment.

Findings of Fact

1. Kinder Morgan Production Company LLC ("Kinder Morgan" or "Applicant") filed an application requesting a determination that additional leases can be added administratively to its Tall Cotton Project after an initial hearing without need for additional hearings. Commission Staff ("Staff") maintains that Statewide Rule 36 requires a hearing to add additional leases or unit.

2. Applicant's Tall Cotton Project is a carbon dioxide (CO_2) flood in the Sand Andres formation in Gaines County. The injections contain hydrogen sulfide (H_2S) because as Kinder Morgan cycles the CO_2, the CO_2 turns from sweet to sour.

3. When the project began, the CO_2 became gradually sour due to Kinder Morgan cycling the CO_2 with gas from the Field. When Kinder Morgan started the project, it injected pure pipeline CO_2 and over time the produced gas stream from the reservoir was commingled with the CO_2, introducing H_2S gas into the injection stream. At first, the levels of H_2S were low and did not trigger a need for a hearing. As the project continued, the levels of H_2S increased, requiring a hearing.

4. Kinder Morgan originally requested authorization for H_2S injection on its Bergen Lease, Lease No. 70250, ("Lease") in the Tall Cotton (San Andres) Field ("Field"). In 2017, there was a Rule 36 H_2S injection public hearing for Kinder Morgan's Tall Cotton Project ("Prior Hearing"). In the Prior Hearing, the Form H-9 and the contingency plan only cover wells on the Lease and the area of the Lease. In a letter dated March 8, 2017, Staff notified Kinder Morgan that the district office has no objection and because the injection project encompasses public roads and the ROE is in excess of 3,000 feet, a hearing is required. The approved Form H-9 was signed March 7, 2017. After the Prior Hearing, the Commission issued an order ("Prior Order") approving H_2S injection on the Lease.

5. Kinder Morgan now seeks to expand the Tall Cotton Project into additional sections in the area. Thus far, the project (contained within Section 427) has produced over 1,403,490 barrels of oil and 1294731 thousand cubic feet of casinghead gas. Kinder Morgan is ready to expand into Section 426. Kinder Morgan anticipates the

project could be expanded into 12-14 additional sections. Kinder Morgan's total expected project size is approximately 9,800 acres.

6. Kinder Morgan discussed with Staff its request for administrative approval to add leases to the authority granted by the Commission in the Prior Order. Staff notified Kinder Morgan that additional leases must be approved after a hearing if conditions exist triggering the hearing requirement.

7. Kinder Morgan sent a letter to Staff dated March 12, 2018, requesting a hearing on Staff's determination that additional hearings are required.

8. On May 7, 2018, the Hearings Division of the Commission sent a Notice of Hearing ("Notice") to Kinder Morgan and Staff setting a hearing date of June 15, 2018. Consequently, the parties received more than 10 days' notice. The Notice contains (1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters asserted. The hearing was held on June 15, 2018, as noticed. Applicant and Staff appeared at the hearing. The hearing was not completed on June 15, so the parties agreed to resume the hearing on June 19. The parties were also provided notice of and appeared at a post-hearing conference on October 3, 2018.

9. Applicant claims the Prior Hearing was sufficient to apply to the proposed expansion of the Tall Cotton Project under Statewide Rule 36. Kinder Morgan rejects Staff's interpretation and implementation of Statewide Rule 36 that expansions involving additional leases that have not previously been approved require a hearing for approval (if conditions exist triggering the hearing requirement).

10. Staff maintains Statewide Rule 36 provides for H_2S injection approval on a lease-by-lease (or unit-by-unit) basis. Staff asserts it has been Commission practice to require a hearing for injection on a lease that has not been previously approved for H_2S injection.

Conclusions of Law

1. Proper notice of hearing was timely issued to persons entitled to notice. *See, e.g.,* Tex. Gov't Code §§ 2001.051, 052; 16 Tex. Admin. Code §§ 1.42, 1.45.

2. The Commission has jurisdiction in this case. *See, e.g.,* Tex. Nat. Res. Code § 81.051.

3. Statewide Rule 36 is silent regarding whether a separate hearing is required for for each Commission lease, such that a project on one lease cannot expand beyond that lease without another public hearing.

4. The Commission has discretion to implement Statewide Rule 36 such that if a project expands beyond the identified Commission lease that was approved, a hearing is required to add the new lease.

5. The Commission's current implementation of Statewide Rule 36 is legally sufficient and reasonable.

6. Applicant's request to require change in the implementation of Statewide Rule 36 should be denied.

7. Applicant's request for a field rule allowing H_2S projects to be administratively approved, even when conditions in Rule 36 require a hearing, should be denied.

Recommendations

The Examiners recommend Applicant's request to have Staff administratively approve its project expansion be denied, the Commission find Statewide Rule 36 does not require a hearing on a lease-by-lease basis, the Commission has discretion to require hearings on a lease-by-lease basis in implementing Statewide Rule 36, and the Commission's current implementation is legally sufficient and reasonable. The Examiners also recommend denial of Applicant's request for a field rule amendment.

Respectfully,

Jennifer Cook
Administrative Law Judge

Karl Caldwell, P.E.
Technical Examiner