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ATTORNEY GENERAL OPINION NO. 81-245

The Honorable Charlie L. Angell
State Senator
Thirty-Eighth District
102 Erie
Plains, Kansas 67899

Re: Oil and Gas -- Abandonment of Wells -- Liability of an
Owner or Operator for Pollution Caused Due to Improper
Plugging

Synopsis: The primary responsibility for plugging an abandoned oil or gas well is placed by Kansas statute upon the owner or operator of the well, in that he is also liable for any damage that is done to surrounding property by seepage of salt water from such well. K.A.R. 82-2-301 et seq. provide procedures which are to be followed when such a well is plugged, including a requirement (at K.A.R. 82-2-304) that the owner or operator file an affidavit with the Kansas Corporation Commission (KCC) upon completion of the operation. While this affidavit is required to be verified by an agent of the KCC, by means of a second affidavit, neither the filing of this verification nor the affidavit relieve an owner or operator of civil liability should damage result to surrounding land, but at most provide a presumption that accepted procedures for plugging such wells were followed. Cited herein: K.S.A. 55-121, K.S.A. 55-122, K.S.A. 1980 Supp. 55-128, 55-128a, K.S.A. 55-139, 55-140, 55-142, K.A.R. 82-2-302, 82-2-303, 82-2-304, 82-2-312, 82-2-313.

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Dear Senator Angell:

As Chairman of the Senate Committee on Energy and Natural Resources you request our opinion on three interrelated questions, each of which concerns the liability of the owner or operator of an oil or gas well for groundwater pollution which occurs as a result of his operations. Specifically, your Committee is looking into the problem of brine or salt water pollution which results from a well which, though abandoned, has been improperly plugged.

Background information concerning your request may be summarized as follows. Pursuant to Kansas statute and to administrative regulations authorized thereby, the Kansas Corporation Commission (KCC) is empowered to supervise the plugging of all oil and gas wells which, for whatever reason, are to be abandoned. Primary responsibility for such plugging is placed on the owner or operator by K.S.A. 1980 Supp. 55-128(d), which states in pertinent part:

"It shall be the duty of the owner or operator of any well which is now drilling or drilled or that may hereafter be drilled for the purpose of discovery of oil and gas, before abandoning same, to shut off and exclude all water from entering oil-bearing or gas-bearing sand, strata or formation encountered in the well and to use every effort and endeavor to protect any usable underground or surface water from infiltration or addition of any detrimental substances, in accordance with methods, rules and regulations of the state corporation commission and under its direction. Before any work is commenced to abandon any well, the owner or operator thereof shall give written notice to the state corporation commission or the agent of the commission as hereinafter designated, of such operator's intention to abandon such well; the date upon which the work of abandonment shall begin, and that such operator will plug the well in accordance with the rules and regulations as prescribed by the commission."

Failure to comply with these procedures can, in the event of a finding by the KCC that the well is polluting or is likely to pollute, result in the loss of the license required by K.S.A. 1980 Supp. 55-128a for persons engaged in the business of plugging such wells. K.S.A. 55-128b.

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In addition to these statutes, you note that the KCC has promulgated administrative regulations which govern the specific details of plugging abandoned wells. Of particular interest to you is K.A.R. 82-2-304, which states:

"Within thirty (30) days after the plugging of any well drilled for discovery of oil or gas, disposal of salt water, or injection wells for repressuring projects has been accomplished, the owner or operator thereof shall file an affidavit with the commission setting forth in detail the date of drilling, location of the well, the method used in plugging the well, and all other information required by the commission. Such affidavit shall be made on a form prescribed by the commission and shall be verified, either on the same form or by a separate report, by a duly authorized representative of the commission. The required plugging fee shall be attached to such affidavit. Copies of well-plugging records and affidavits will be furnished to any person requesting same on the payment of two dollars per copy."

In addition, other regulations specify the methods by which wells must be plugged (K.A.R. 82-2-303), the notice which must be given prior to any such action (K.A.R. 82-2-302); and the grounds upon which a licensed well plugger may have his license revoked (K.A.R. 82-2-312, 82-2-313).

With regard to K.A.R. 82-2-304, you inform us that the KCC has prescribed the two different forms which are referred to therein. The first, which is completed by the owner or operator, is referred to as a CP-4 form, and is in the form of an affidavit. Among the items of information requested are the times plugging was commenced and completed, the name of the KCC agent who supervised the plugging and a detailed account of the manner in which the job was done. A second form, designated as CP-3, is completed by the agent, and contains some, but not all, of the information found on the former. In addition, the CP-3 form is not in the form of an affidavit, and contains a line which indicates that the agent may have attended only some or even none of the plugging operations, a situation which you inform us is made inevitable by manpower limitations.

Given the preceding legal basis, you request our opinion on three separate questions:

- (1) By verifying the plugging operation on form CP-3, does the KCC relieve an owner or operator of all future liability?
- (2) By verifying the plugging operation on form CP-3, even when the agent does not supervise the plugging, does the KCC relieve an owner or operator of liability, even when the job is improperly done?
- (3) Are the CP-3 and CP-4 forms proper as to legality, given the applicable regulations?

For purposes of this opinion, we believe that your first two inquiries may be considered together, for they both concern the effect of Form CP-3 on the liability of an owner or operator. Initially, it may be noted that the common law has long recognized the liability of a person who brings harmful substances to the surface of the ground and then permits them to escape onto the land of another. Helms v. Oil Co., 102 Kan. 164 (1917). This general principle has been extended to the specific harm caused by salt water produced by drilling operations. Gilmore v. Salt Co., 84 Kan. 729 (1911); Berry v. Shell Petroleum Co., 140 Kan. 94 (1934). The duty to control such discharges was codified in 1921 in what now appears as K.S.A. 55-121, which states:

"It shall be unlawful for any person, having possession or control of any well drilled, or being drilled for oil or gas, either as contractor, owner, lessee, agent or manager, or in any other capacity, to permit salt water, oil or refuse from any such well, to escape by overflow, seepage or otherwise from the vicinity of such well, and it shall be the duty of any such person to keep such salt water, oil or refuse safely confined in tanks, pipe lines or ponds, so as to prevent the escape thereof: Provided, however, That this act shall not be construed to apply to the escape of salt water, oil or refuse because of circumstances beyond the control of the person in the possession or control of such well and under circumstances which could not have been reasonably anticipated and guarded against."

While a violation of this statute carries with it criminal penalties (at K.S.A. 55-122), civil liability has been established by the common law and exists regardless of statute, as the court in Berry noted. 140 Kan. at 101.

Specific procedures for the control of salt water seepage from abandoned wells have, as noted above, been adopted by Kansas statutes and administrative regulations. Liability for damages resulting from improperly plugged wells is not made a matter of statute, perhaps because such enactments would be superfluous in light of existing common law. However, the statutes do provide detailed procedures for holding persons responsible when they are so liable, beginning with K.S.A. 55-139, which empowers the KCC to receive complaints that an abandoned well "is causing or is likely to cause the pollution of any fresh water strata or supply by reason of the fact that the well has not been plugged, was improperly plugged or that the plugging is no longer effective." K.S.A. 55-140 provides for KCC investigations of such complaints, and, if warranted, hearings at which the "person, firm or corporation" that is legally responsible for the care of the particular well may be made to show cause why they should not be also held responsible for any pollution which has resulted. Finally, K.S.A. 55-142 states that these provisions should not be construed as impairing, repealing or affecting any existing law, but instead are to be supplemental thereto.

From the preceding, it is clear that it has long been the law of this state, whether expressed by the courts or by the legislature, to hold persons responsible for the seepage of salt water from oil and gas wells that have been improperly plugged. With this in mind, it may be observed that the duties imposed by K.S.A. 1980 Supp. 55-128 et seq. are of a different sort than the civil liability imposed by common law. At K.S.A. 1980 Supp. 55-128b, we note that only a "licensee" may be made the subject of a hearing by the KCC, as opposed to K.S.A. 55-139 et seq. cited above. "Licensee" is more narrow than owner or operator, and refers only to those persons who drill seismic or core holes, or who engage in the business of plugging wells. K.S.A. 1980 Supp. 55-128a(a). As a result, if any licensee fails to file a CP-4 affidavit or willfully and intentionally makes a false statement thereon, the KCC may act to revoke his license, with no provisions for enforcing civil liability against the owner or operator. Such latter mechanisms are provided by the common law and by K.S.A. 55-139, neither of which rely upon or are affected by the forms required by an administrative regulation enacted pursuant to a separate act. Accordingly, the filing of forms CP-3 and CP-4 in no way diminishes the underlying, pre-existing liability of an owner or operator for damages which may result from an improperly plugged oil or gas well.

Your third inquiry concerns the format of the two forms in question. K.A.R. 82-2-304, which was quoted in full above, merely requires that the affidavit made by the owner or operator be made on a form prescribed by the commission, and provide the date of drilling, the location of the well and the method used in plugging the well. All of this information is in fact requested by the CP-4 form, along with other information not specifically set forth by the regulation. Accordingly, we believe this form is in compliance with the authorizing regulation.

However, in our opinion the same cannot be said of the CP-3 form which is filed by the agent of the KCC who supervises the plugging operation. K.A.R. 82-2-304 requires that the report made by the owner or operator "be verified, either on the same form or by a separate report, by a duly authorized representative of the commission." (Emphasis added.) Under Kansas law, a verification is "an affidavit attached to a statement to the truth of the matters therein set forth." D.J. Fair Lumber Co. v. Karlin, 199 Kan. 366, 369 (1967). On the CP-3 form currently in use by the KCC, no such affidavit appears. Rather, without being duly sworn, the agent merely "certifies" that the well was plugged as stated therein. Legally, there is a clear distinction between such a certification and a verification, which must be made under oath before a person authorized to administer oaths (e.g., a notary public). Accordingly, Form CP-3 does not comply with K.A.R. 82-2-304 as it is currently written.

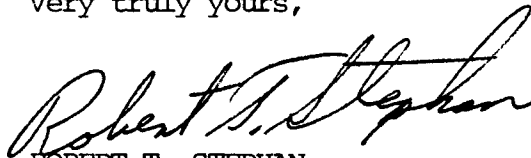
Furthermore, it would appear from the information you provided that, as many plugging operations are not personally supervised by a KCC agent, statements concerning such could not be sworn to by an agent as a matter of his or her personal knowledge. In our opinion, the intent of K.A.R. 82-2-304 was to provide an independent verification that the work described by the owner or operator in the CP-4 form has in fact been properly done. While such personal knowledge would not be required if the CP-3 form was only for the purpose of insuring that the CP-4 form was correctly filled out, we are not prepared to reach such a conclusion in light of the regulation's plain language which requires the form to be verified (i.e., made under oath), and general intent, which is to safeguard against shoddy workmanship in the plugging of abandoned wells.

In conclusion, the primary responsibility for plugging an abandoned oil or gas well is placed by Kansas statute upon the owner or operator of the well, in that he is also liable for any damage that is done to

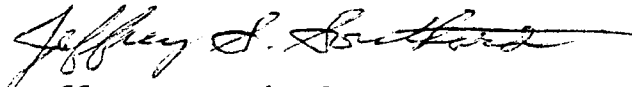
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surrounding property by seepage of salt water from such well. K.A.R. 82-2-301 et seq. provide procedures which are to be followed when such a well is plugged, including a requirement (at K.A.R. 82-2-304) that the owner or operator file an affidavit with the Kansas Corporation Commission upon completion of the operation. While the affidavit is required to be verified by an agent of the KCC by means of a second affidavit, neither the filing of this verification nor the affidavit relieve an owner or operator of civil liability should damage result to surrounding land, but at most provide a presumption that accepted procedures for plugging such wells were followed.

Very truly yours,



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