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## Missouri

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# ONE J

*Oil and Gas, Natural Resources, and Energy Journal*

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## MISSOURI



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### *Introduction*

While there were no substantive changes in Missouri legislation related to the oil and gas industry, there were new regulations enacted by the Missouri Department of Natural Resources (“DNR”). There was a notable

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judicial development related to whether a genuine issue of material fact existed as to whether an oil and gas lease was terminated pursuant to the lease's habendum clause. Missouri saw a decrease in oil and gas production in 2019.

### *Enacted Regulations*

#### *A. Regulation 543944*

Missouri Regulation 543944,<sup>1</sup> proposed on January 15, 2020, enacted on June 1, 2020, and effective on July 30, 2020, amended 20 CSR 4240-40.030, pertains to the transportation of gas by pipeline. In relevant part, the change *modified the rule to address amendments of 49 CFR part 192 promulgated between October 2017 and December 2018.*<sup>2</sup> Among other things, the regulation is amending sections (1), (2), (3), (4), (6), (7), (8), (9), (10), (12), (13).<sup>3</sup>

In section one, the regulation amended several definitions and added a new one. The regulation added a definition for the term “weak link.”<sup>4</sup> “Weak link means a device or method used when pulling polyethylene pipe, typically through methods such as horizontal directional drilling, to ensure that damage will not occur to the pipeline by exceeding the maximum tensile stresses allowed.”<sup>5</sup> Also, the regulation expanded the definition of “transportation of gas” to include not only in-state activities, but also activities “in or affecting intrastate, interstate, or foreign commerce.”<sup>6</sup>

In section two, the regulation imposed an additional requirement regarding the quality of plastic pipes.<sup>7</sup> Under the new regulation, a new polyethylene pipe is qualified for use only if it is free of visual defects.<sup>8</sup> The regulation added a list of additional standards that all plastic pipes and components must meet.<sup>9</sup> These requirements include:

- A. All markings on plastic pipe prescribed in the listed specification and the requirements of subparagraph (2)(E)5.B. must be repeated at intervals not exceeding two (2) feet;

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1. Mo. Code Regs. Ann. tit. 20, § 4240-40.030 (2020).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

B. Plastic pipe and components manufactured after December 31, 2019, must be marked in accordance with the listed specification; and

C. All physical markings on plastic pipelines prescribed in the listed specification and subparagraph (2)(E)5.B. must be legible until the time of installation.<sup>10</sup>

Further, the regulation established that “each operator must have and follow written procedures for the storage and handling of plastic pipe and associated components that meet the applicable listed specifications.”<sup>11</sup>

In section three, the regulation established the design formula for plastic pipes and updated general requirements for plastic pipes and components.<sup>12</sup>

In section four, the regulation added a new sub-section to the general requirements for pipeline components’ design.<sup>13</sup> The subsection established that “[e]xcept for excess flow valves, each plastic pipeline component installed after April 22, 2019, must be able to withstand operating pressures and other anticipated loads in accordance with a listed specification.”<sup>14</sup> Also, the regulation established the specifications for plastic fittings installed after April 22, 2019.<sup>15</sup> These specifications include:

1. Riser designs must be tested to ensure safe performance under anticipated external and internal loads acting on the assembly;
2. Factory assembled anodeless risers must be designed and tested in accordance with ASTM F1973-13 (incorporated by reference in 49 CFR 192.7 and adopted in subsection (1)(D)); and
3. All risers used to connect regulator stations to plastic mains must be rigid and designed to provide adequate support and resist lateral movement. Anodeless risers used in accordance with this paragraph must have a rigid riser casing.<sup>16</sup>

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

In section six, the regulation requires that solvent cement joints may not be heated or cooled to accelerate the setting of the cement.<sup>17</sup> Additionally, the regulation established that each heat-fusion joint on a “pipe or component, except for electrofusion joints, must comply with ASTM F2620-12 (incorporated by reference in 49 CFR 192.7 and adopted in subsection (1)(D)).”<sup>18</sup> Moreover, a butt heat-fusion joint must hold the pipe in proper alignment in accordance with the appropriate procedure qualified under 20 CSR 4240-40.030(6)(G).<sup>19</sup> The device used to join a socket heat-fusion joint must be the same device specified in the operator’s joining procedure for socket fusion.<sup>20</sup> The device used to test an electrofusion joint must meet or exceed the requirements of the fitting manufacturer.<sup>21</sup>

Each compression-type mechanical joint on plastic piping must comply with two new requirements:

1. All mechanical fittings must meet a listed specification based upon the applicable material; and
2. All mechanical joints or fittings installed after April 22, 2019, must be Category 1 as defined by a listed specification for the applicable material, providing a seal plus resistance to a force on the pipe joint equal to or greater than that which will cause no less than 25% elongation of pipe, or the pipe fails outside the joint area if tested in accordance with the applicable standard.<sup>22</sup>

The regulation also included additional requirements regarding testing of the heat fusion, solvent cement, and adhesive joints.<sup>23</sup> Each joint must be made in accordance with written procedures that have been proved, and the procedure must be qualified by subjecting specimen joints to the applicable test requirements;. “[i]n the case of thermoplastic pipe, based on the pipe material, the Sustained Pressure Test or the Minimum Hydrostatic Burst Test per the listed specification requirements. Additionally, for electrofusion joints, based on the pipe material, the Tensile Strength Test or the Joint Integrity Test per the listed specification.”<sup>24</sup>

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

The regulation omitted specific requirements regarding mechanical joints' qualification procedure.<sup>25</sup> Instead, it established that “[b]efore any written procedure established under paragraph (6)(B)2. is used for making mechanical plastic pipe joints, the procedure must be qualified in accordance with a listed specification based upon the pipe material.”<sup>26</sup> Also, “the polyethylene heat fusion joints (except for electrofusion joints) must be visually inspected and tested in accordance with ASTM F2620-12 . . . applicable to the type of joint and material being tested.”<sup>27</sup>

In section seven, the regulation added that “[a]n operator may not install plastic pipe with a bend radius that is less than the minimum bend radius specified by the manufacturer for the diameter of the pipe being installed.”<sup>28</sup> Regarding the installation of plastic pipe, the regulation established two new requirements.<sup>29</sup> First, the encased plastic pipes must be protected from damage at all entrance and exit points of the casing.<sup>30</sup> Second, plastic mains may terminate above-ground level provided they comply with the following:

- A. The above-ground level part of the plastic main is protected against deterioration and external damage;
- B. The plastic main is not used to support external loads; and
- C. Installations of risers at regulator stations must meet the design requirements of (4)(AA).<sup>31</sup>

The regulation incorporated subsection (P) section (7) of the 20 CSR 4240-40.030. Under the new subsection, plastic pipelines installed by trenchless excavation must comply with the following:

1. Each operator must take practicable steps to provide sufficient clearance for installation and maintenance activities from other underground utilities and/or structures at the time of installation; and
2. For each pipeline section, plastic pipe and components that are pulled through the ground must use a weak link, as defined in

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

subsection (1)(B), to ensure the pipeline will not be damaged by any excessive forces during the pulling process.<sup>32</sup>

In section eight, the regulation added new requirements for compression-type service line to main connections:

[i]f used on pipelines comprised of plastic, be a Category 1 connection as defined by a listed specification for the applicable material, providing a seal plus resistance to a force on the pipe joint equal to or greater than that which will cause no less than 25% elongation of pipe, or the pipe fails outside the joint area if tested in accordance with the applicable standard.<sup>33</sup>

Also, the regulation incorporated subsection (R) section 20 CSR 4240-40.030, requiring plastic service lines installed by trenchless excavation to comply with the following:

1. Each operator shall take practicable steps to provide sufficient clearance for installation and maintenance activities from other underground utilities and structures at the time of installation; and
2. For each pipeline section, plastic pipe and components that are pulled through the ground must use a weak link, as defined in subsection (1)(B), to ensure the pipeline will not be damaged by any excessive forces during the pulling process.<sup>34</sup>

In section nine, the regulation requires that “[e]lectrically isolated metal alloy fittings installed after April 22, 2019, that do not meet the requirements of paragraph (9)(D)5, must be cathodically protected and must be maintained in accordance with the operator’s integrity management plan.”<sup>35</sup>

In section ten, the regulation changed the test pressure for plastic pipelines.<sup>36</sup> Under new requirements, the maximum test pressure may not be more than two and one half (2.5) times the pressure determined under subsection (3)(I), at a temperature not less than the pipe temperature during the test.<sup>37</sup>

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

In section twelve, the regulation established that “[n]o person may operate a pipeline at a pressure that results in hoop stress greater than seventy-two percent (72%) of [specified minimum yield strength].”<sup>38</sup>

In section thirteen, the regulation established that “[e]ach operator must maintain equipment used in joining plastic pipe in accordance with the manufacturer’s recommended practices or with written procedures that have been proven by test and experience to produce acceptable joints.”<sup>39</sup>

### *B. Regulation 530850*

Missouri Regulation 530850,<sup>40</sup> proposed on August 15, 2019, enacted on December 2, 2019, and effective on January 30, 2020, adopts 2 CSR 90-10.019, clarifies Mo. Ann. Stat. § 323.030. Section 323.030 pertaining to the question of who may sell, fill, refill, deliver or permit to be delivered, or use in any manner liquefied petroleum gas containers.<sup>41</sup> The regulation expanded the statutory language and explained what it means to “sell, fill, refill, deliver or permit to be delivered, or use” liquefied petroleum gas containers.<sup>42</sup> In particular, the regulation added that no person, except the owner or persons authorized by the owner, shall “evacuate a marked liquefied petroleum gas container” or “deface, erase, cover up, remove, or conceal any name, mark, or other ownership identification on a marked liquefied petroleum gas container.”<sup>43</sup> These requirements only apply to petroleum gas cylinders of one hundred pounds or more.<sup>44</sup> The regulation established that the owner’s authorization to perform any actions with petroleum containers must be done in writing.<sup>45</sup> Also, the regulation requires that “any liquefied petroleum gas container moved at a consumer’s location and not connected for use shall meet the National Fire Protection Association’s (NFPA) fifty-eight (58) location and safety requirements, be placed on a firm foundation, and openings shall be capped or plugged.”<sup>46</sup>

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38. *Id.*

39. *Id.*

40. Mo. Code Regs. Ann. tit. 9, § 90-10.019 (2019).

41. MO. ANN. STAT. § 323.030 (West 1947).

42. Mo. Code Regs. Ann. tit. 9, § 90-10.019 (2019).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*



*Judicial Developments**A. Appellate Activity*

JTC Oil Company, Inc. (“JTC”) and Jerry Kerr (“Kerr”) appealed the judgment of the Circuit Court of Jackson County, granting summary judgment in favor of Respondent City of Grandview (“the City”).<sup>47</sup> The issue on appeal is whether the City’s denial of JTC’s application to install oil wells on land constituted inverse condemnation when JTC had an oil and gas lease for that land.<sup>48</sup>

The trial court granted the City’s motion for summary judgment, finding that JTC and Kerr did not have any “valuable property right” that could be taken by the City because their oil and gas lease had terminated prior to the City’s refusal to grant a permit for drilling.<sup>49</sup> The City successfully argued that the lease terminated according to the lease’s “habendum clause” because there were several periods when the lessee failed to produce oil for over one year.<sup>50</sup>

On appeal, JTC and Kerr argued that the City did not have the standing to challenge the lease because the City was a stranger to the lease. Further, the appellants argued that the trial court erred in issuing a summary judgment because there was a genuine issue of material facts as to whether the lease was terminated.<sup>51</sup> The Missouri Court of Appeals held that the City could challenge the plaintiffs’ property rights because it is an element of the condemnation claim.<sup>52</sup> Moreover, the court held that Missouri law does not require a city to be a party to the lease to challenge its validity.<sup>53</sup>

However, the court agreed with JTC and Kerr that a genuine issue of material facts existed as to whether the lease was terminated.<sup>54</sup> As an issue of first impression, the court held that “upon a finding that periods of non-production occurred, the inquiry then becomes whether the non-production constituted an abandonment of the Lease.”<sup>55</sup> Abandonment of the lease occurs when “the lessee intentionally and actually abandon[s] the premises and relinquish possession thereof, or [when] the non-production excusable

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47. *JTC Oil Co., Inc. v. City of Grandview*, 604 S.W.3d 806 (Mo. Ct. App. 2020).

48. *Id.* at 1.

49. *Id.*

50. *Id.*

51. *Id.* at 4.

52. *Id.* at 5.

53. *Id.*

54. *Id.* at 6.

55. *Id.* at 8.

under the temporary cessation of production doctrine.”<sup>56</sup> The trial court erred in granting the City’s summary judgment because it failed to determine whether the lease was abandoned.<sup>57</sup> The appellate court reversed the decision of the trial court and remanded the case for further proceedings.<sup>58</sup>

#### *Oil and Gas Activities*

According to the 2019-2020 Annual Report on Oil and Gas Activities, which was released on July 15, 2020, by the Missouri DNR State Oil and Gas Council, there were 441 active oil wells in Missouri in 2019, which produced 84,802 barrels of oil.<sup>59</sup> This contrasts with the 446 active oil wells in 2018 and the 443 active oil wells in 2017.<sup>60</sup> There were 14 active gas wells in 2018, which contrasts with 14 in 2018 and 1 in 2017.<sup>61</sup> In 2019, those 14 gas wells produced 596 MCF of gas.<sup>62</sup> In 2018, 950 MCF of gas was produced, and in 2017, 820 MCF of gas was produced.<sup>63</sup> The average price per barrel for Missouri oil was down 18% in 2019, with an average price per barrel of \$48.16, dropping from the average price per barrel of \$56.85 in 2018 .<sup>64</sup>

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56. *Id.*

57. *Id.*

58. *Id.*

59. Aaron Szapa, Missouri Geological Survey, *2019-2020 Annual Report on Oil and Gas Activities*, (July 15, 2020), <https://dnr.mo.gov/geology/geosrv/ogc/documents/2019-2020-annual-oil-gas-activities-report.pdf>.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*