

**EXECUTIVE SUMMARY - ENFORCEMENT MATTER**  
**DOCKET NO.: 2006-0322-PST-E TCEQ ID: RN102032901 CASE NO.: 28849**  
**RESPONDENT NAME: DAVID MCBIRNIE DBA LITTLE PAPAS**

<b>ORDER TYPE:</b>		
<input type="checkbox"/> 1660 AGREED ORDER	<input type="checkbox"/> FINDINGS AGREED ORDER	<input type="checkbox"/> FINDINGS ORDER FOLLOWING SOAH HEARING
<input checked="" type="checkbox"/> FINDINGS DEFAULT ORDER	<input checked="" type="checkbox"/> SHUTDOWN ORDER	<input type="checkbox"/> IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER
<input type="checkbox"/> AMENDED ORDER	<input type="checkbox"/> EMERGENCY ORDER	
<b>CASE TYPE:</b>		
<input type="checkbox"/> AIR	<input type="checkbox"/> MULTI-MEDIA (check all that apply)	<input type="checkbox"/> INDUSTRIAL AND HAZARDOUS WASTE
<input type="checkbox"/> PUBLIC WATER SUPPLY	<input checked="" type="checkbox"/> PETROLEUM STORAGE TANKS	<input type="checkbox"/> OCCUPATIONAL CERTIFICATION
<input type="checkbox"/> WATER QUALITY	<input type="checkbox"/> SEWAGE SLUDGE	<input type="checkbox"/> UNDERGROUND INJECTION CONTROL
<input type="checkbox"/> MUNICIPAL SOLID WASTE	<input type="checkbox"/> RADIOACTIVE WASTE	<input type="checkbox"/> DRY CLEANER REGISTRATION
<p><b>SITE WHERE VIOLATION(S) OCCURRED:</b> 400 Van Horn Drive, Van Horn, Culberson County</p> <p><b>TYPE OF OPERATION:</b> Convenience store with retail sales of gasoline</p> <p><b>SMALL BUSINESS:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><b>OTHER SIGNIFICANT MATTERS:</b> There are no complaints. There is no record of additional pending enforcement actions regarding this facility location.</p> <p><b>INTERESTED PARTIES:</b> No one other than the ED and the Respondent has expressed an interest in this matter.</p> <p><b>COMMENTS RECEIVED:</b> The <i>Texas Register</i> comment period expired on January 12, 2009. No comments were received.</p> <p><b>CONTACTS AND MAILING LIST:</b>  <b>TCEQ Attorney:</b> Ms. Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846  Ms. Jennifer Cook, Litigation Division, MC 175, (512) 239-1873  <b>TCEQ Enforcement Coordinator:</b> Mr. Rajesh Acharya, Waste Enforcement Section, MC 128, (512) 239-0577  <b>TCEQ Regional Contact:</b> Mr. Terry McMillan, El Paso Regional Office, MC R-6, (915) 834-4949  <b>Respondent:</b> Mr. David McBirnie, Owner, Little Papas, P.O. Box 697, Van Horn, Texas 79855  <b>Respondent's Attorney:</b> Not represented by counsel on this enforcement matter.</p>		

**VIOLATION SUMMARY CHART:**

VIOLATION INFORMATION	PENALTY CONSIDERATIONS	CORRECTIVE ACTIONS TAKEN/REQUIRED
<p><b>Type of Investigation:</b></p> <p><input type="checkbox"/> Complaint  <input type="checkbox"/> Routine  <input type="checkbox"/> Enforcement Follow-up  <input checked="" type="checkbox"/> Records Review</p> <p><b>Date of Complaint Relating to this Case:</b> None</p> <p><b>Date of Investigation Relating to this Case:</b> March 8, 2006</p> <p><b>Date of NOE Relating to this Case:</b> March 13, 2006</p> <p><b>Background Facts:</b> The case was referred to Litigation on July 6, 2006. The EDPRP was filed on October 10, 2006. The wrapper sent by certified mail was returned "unclaimed." The first class mail has not been returned, indicating that the Respondent received notice of the EDPRP. An EDFARP was filed on August 15, 2007. According to the return receipt "green card," the Respondent received notice of the EDFARP on August 17, 2007. Upon the request by the Respondent, an Agreed Order was mailed on September 17, 2007. The Agreed Order was never signed by the Respondent. An EDSARP was filed on February 19, 2008. The wrapper sent by certified mail was returned "unclaimed." The first class mail has not been returned, indicating that the Respondent received notice of the EDSARP. The Notice of Intent to Shutdown the underground storage tanks was mailed to the Respondent on May 30, 2008. The Respondent signed the certified mail green card on June 2, 2008.</p> <p><b>PST:</b></p> <p>1. Failed to test the line leak detectors at least once per year for performance and operational reliability [30 TEX. ADMIN. CODE § 334.50 (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a)].</p> <p>2. Failed to provide proper spill containment equipment for the UST system [30 TEX. ADMIN. CODE § 334.51(b)(2)(B) and TEX. WATER CODE § 26.3475(c)(2)].</p> <p>3. Failed to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as a motor fuel [30 TEX. ADMIN. CODE § 334.48(c)].</p>	<p><b>Total Assessed:</b> \$6,405</p> <p><b>Total Deferred:</b> \$0</p> <p><input type="checkbox"/> Expedited Settlement  <input type="checkbox"/> Financial Inability to Pay  <input type="checkbox"/> SEP Conditional Offset</p> <p><b>Total Due to General Revenue:</b> \$6,405</p> <p>This is a Default Order. The Respondent has not paid any of the assessed penalty and shall be required to pay the total due under the terms of this proposed Order.</p> <p><b>Site Compliance History Classification</b>  <input checked="" type="checkbox"/> High <input type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p><b>Person Compliance History Classification</b>  <input checked="" type="checkbox"/> High <input type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p><b>Major Source:</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p><b>Applicable Penalty Policy:</b> September 2002</p>	<p><b>Ordering Provisions:</b></p> <p>The Respondents delivery certificate is revoked immediately. The Respondent shall:</p> <ol style="list-style-type: none"> <li>Immediately take the following steps to shut down operations of the non-compliant UST systems at the Facility:                     <ol style="list-style-type: none"> <li>Cease dispensing fuel from the USTs;</li> <li>Cease receiving deliveries of regulated substances into the USTs;</li> <li>Padlock the dispensers;</li> <li>Empty the USTs of all regulated substances; and</li> <li>Temporarily remove the UST system from service.</li> </ol> </li> <li>Within 10 days, send its UST delivery certificate to the TCEQ.</li> <li>Within 15 days, submit to the Executive Director a detailed written report documenting steps it has taken to comply with Ordering Provision 1.</li> <li>If Respondent elects to permanently remove from service any UST systems at the Facility, the Respondent shall submit a written report to TCEQ documenting compliance.</li> <li>Prior to resuming retail sales of gasoline:                     <ol style="list-style-type: none"> <li>Conduct annual testing of the line leak detectors for performance and operational reliability; and</li> <li>Install spill containment equipment for the UST system.</li> </ol> </li> <li>Prior to deliveries of gasoline:                     <ol style="list-style-type: none"> <li>Begin maintaining records pertaining to the UST system at the Facility;</li> <li>Begin conducting effective manual or automatic inventory control procedures for all USTs; and</li> <li>Obtain a new delivery certificate from the TCEQ.</li> </ol> </li> </ol>

**VIOLATION SUMMARY CHART:**

<b>VIOLATION INFORMATION</b>	<b>PENALTY CONSIDERATIONS</b>	<b>CORRECTIVE ACTIONS TAKEN/REQUIRED</b>
<p>4. Failed to maintain UST records and make immediately available for inspection upon request by the TCEQ investigator [30 TEX. ADMIN. CODE § 334.10(b)].</p>		<p>7. Within 10 days of resuming retail sales of gasoline, submit written certification to demonstrate compliance with ordering provisions 5 and 6.</p> <p>8. Upon obtaining new delivery certificate, post the delivery certificate in a location where the document is clearly visible at all times.</p>



# Penalty Calculation Worksheet (PCW)

Policy Revision 2 (September 2002)

PCW Revision May 19, 2005

<b>DATES</b>	Assigned	20-Mar-2006	Screening	24-Mar-2006	EPA Due	
	PCW	12-Sep-2006				

<b>RESPONDENT/FACILITY INFORMATION</b>	
Respondent	David McBirnie dba Little Papas
Reg. Ent. Ref. No.	RN102032901
Facility/Site Region	6-EI Paso
Major/Minor Source	Minor Source

<b>CASE INFORMATION</b>			
Enf./Case ID No.	28849	No. of Violations	4
Docket No.	2006-0322-PST-E	Order Type	Findings
Media Program(s)	Petroleum Storage Tank	Enf. Coordinator	Rajesh Acharya
Multi-Media		EC's Team	Enforcement Team 7
Admin. Penalty \$ Limit Minimum	\$0	Maximum	\$10,000

## Penalty Calculation Section

<b>TOTAL BASE PENALTY (Sum of violation base penalties)</b>	<i>Subtotal 1</i>	\$6,100
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### ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

<b>Compliance History</b>	-5% Enhancement	<i>Subtotals 2, 3, &amp; 7</i>	-\$305
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Notes: Enhancement for one NOV with same or similar violations and reduction for Higher Performer classification.

<b>Culpability</b>	No	0% Enhancement	<i>Subtotal 4</i>	\$0
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Notes: The respondent does not meet the culpability criteria.

<b>Good Faith Effort to Comply</b>	0% Reduction	<i>Subtotal 5</i>	\$0
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	Before NOV	NOV to EDRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	X	(mark with a small x)

Notes: The respondent does not meet the good faith criteria.

<b>Economic Benefit</b>	0% Enhancement*	<i>Subtotal 6</i>	\$0
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Total EB Amounts	\$558	*Capped at the Total EB \$ Amount
Approx. Cost of Compliance	\$1,200	

<b>SUM OF SUBTOTALS 1-7</b>	<i>Final Subtotal</i>	\$5,795
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<b>OTHER FACTORS AS JUSTICE MAY REQUIRE</b>	11% Enhancement	<i>Adjustment</i>	\$610
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Reduces or enhances the Final Subtotal by the indicated percentage. (Enter number only; e.g. -30 for -30%.)

Notes: Because this is a Default Order, the Executive Director recommends an upward adjustment to offset the reduction for compliance history.

<b>Final Penalty Amount</b>	\$6,405
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<b>STATUTORY LIMIT ADJUSTMENT</b>	<i>Final Assessed Penalty</i>	\$6,405
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<b>DEFERRAL</b>		<i>Reduction</i>	<i>Adjustment</i>	\$0
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Reduces the Final Assessed Penalty by the indicated percentage. (Enter number only; e.g. 20 for 20% reduction.)

Notes: This is not an expedited case.

<b>PAYABLE PENALTY</b>	\$6,405
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Screening Date 24-Mar-2006

Docket No. 2006-0322-PST-E

PCW

Respondent David McBirnie dba Little Papas

Policy Revision 2 (September 2002)

Case ID No. 28849

PCW Revision May 19, 2005

Reg. Ent. Reference No. RN102032901

Media [Statute] Petroleum Storage Tank

Enf. Coordinator Rajesh Acharya

## Compliance History Worksheet

## &gt;&gt; Compliance History Site Enhancement (Subtotal 2)

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written NOVs with same or similar violations as those in the current enforcement action ( <i>number of NOVs meeting criteria</i> )	1	5%
	Other written NOVs	0	0%
Orders	Any agreed final enforcement orders containing a denial of liability ( <i>number of orders meeting criteria</i> )	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government ( <i>number of judgements or consent decrees meeting criteria</i> )	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government ( <i>number of counts</i> )	0	0%
Emissions	Chronic excessive emissions events ( <i>number of events</i> )	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 ( <i>number of audits for which notices were</i>	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 ( <i>number of audits for which violations were disclosed</i> )	0	0%
<i>Please Enter Yes or No</i>			
Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 5%

## &gt;&gt; Repeat Violator (Subtotal 3)

No

Adjustment Percentage (Subtotal 3) 0%

## &gt;&gt; Compliance History Person Classification (Subtotal 7)

High Performer

Adjustment Percentage (Subtotal 7) -10%

## &gt;&gt; Compliance History Summary

Compliance History Notes Enhancement for one NOV with same or similar violations and reduction for Higher Performer classification.

Total Adjustment Percentage (Subtotals 2, 3, &amp; 7) -5%

<b>Screening Date</b>	24-Mar-2006	<b>Docket No.</b>	2006-0322-PST-E	<b>PCW</b>
<b>Respondent</b>	David McBirnie dba Little Papas		<i>Policy Revision 2 (September 2002)</i>	
<b>Case ID No.</b>	28849		<i>PCW Revision May 19, 2005</i>	
<b>Reg. Ent. Reference No.</b>	RN102032901			
<b>Media [Statute]</b>	Petroleum Storage Tank			
<b>Enf. Coordinator</b>	Rajesh Acharya			
<b>Violation Number</b>	1			
<b>Primary Rule Cite(s)</b>	30 Tex. Admin. Code § 334.50(b)(2)(A)(i)(III)			
<b>Secondary Rule Cite(s)</b>	Tex. Water Code § 26.3475(a)			
<b>Violation Description</b>	Failed to test the line leak detectors at least once per year for performance and operational reliability. Specifically, the respondent did not test the line leak detectors annually.			
<b>Base Penalty</b>	\$10,000			

>> **Environmental, Property and Human Health Matrix**

OR	<b>Harm</b>			Percent <input type="text" value="25%"/>	
	<b>Release</b>	Major	Moderate		Minor
	Actual	<input type="text"/>	<input type="text"/>		<input type="text"/>
	Potential	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

>> **Programmatic Matrix**

	<b>Falsification</b>	Major	Moderate	Minor	Percent <input type="text"/>
	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	
<b>Matrix Notes</b>	Human health or the environment will or could be exposed to pollutants which would exceed levels that are protective of human health or environmental receptors as a result of the violation.				

**Adjustment**

**Base Penalty Subtotal**

**Violation Events**

Number of Violation Events

<i>mark only one use a small x</i>	daily	<input type="text"/>
	monthly	<input type="text"/>
	quarterly	<input type="text"/>
	semiannual	<input type="text"/>
	annual	<input checked="" type="checkbox"/>
	single event	<input type="text"/>

**Violation Base Penalty**

One annual event is recommended based on the 12-month period preceding the March 8, 2006 investigation.

<b>Economic Benefit (EB) for this violation</b>	<b>Statutory Limit Test</b>
Estimated EB Amount <input type="text" value="\$525"/>	Violation Final Penalty Total <input type="text" value="\$2,625"/>
<b>This violation Final Assessed Penalty (adjusted for limits)</b> <input type="text" value="\$2,625"/>	

### Economic Benefit Worksheet

**Respondent** David McBirnie dba Little Papas  
**Case ID No.** 28849  
**Reg. Ent. Reference No.** RN102032901  
**Media [Statute]** Petroleum Storage Tank  
**Violation No.** 1

<b>Percent Interest</b>	<b>Years of Depreciation</b>
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
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**Delayed Costs**

Equipment				0.0	\$0	\$0	\$0
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System				0.0	\$0	n/a	\$0
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal				0.0	\$0	n/a	\$0
Permit Costs				0.0	\$0	n/a	\$0
Other (as needed)				0.0	\$0	n/a	\$0

Notes for DELAYED costs

**Avoided Costs**

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)	\$500	08-Mar-2005	08-Mar-2006	1.0	\$25	\$500	\$525

Notes for AVOIDED costs

Estimated avoided cost to perform the required tests. Date Required is one year prior to the investigation. Final Date is the date of the investigation.

Approx. Cost of Compliance \$500

**TOTAL** \$525

Screening Date 24-Mar-2006

Docket No. 2006-0322-PST-E

PCW

Respondent David McBirnie dba Little Papas

Policy Revision 2 (September 2002)

Case ID No. 28849

PCW Revision May 19, 2005

Reg. Ent. Reference No. RN102032901

Media [Statute] Petroleum Storage Tank

Enf. Coordinator Rajesh Acharya

Violation Number

Primary Rule Cite(s)

Secondary Rule Cite(s)

Violation Description

Base Penalty

>> Environmental, Property and Human Health Matrix

		Harm			
Release		Major	Moderate	Minor	
OR	Actual	<input type="text"/>	<input type="text"/>	<input type="text"/>	Percent <input type="text" value="10%"/>
	Potential	<input type="text"/>	<input checked="" type="checkbox"/>	<input type="text"/>	

>> Programmatic Matrix

		Falsification	Major	Moderate	Minor	
		<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	Percent <input type="text"/>

Matrix Notes

Adjustment

Base Penalty Subtotal

Violation Events

Number of Violation Events

mark only one use a small x	daily	<input type="text"/>
	monthly	<input type="text"/>
	quarterly	<input checked="" type="checkbox"/>
	semiannual	<input type="text"/>
	annual	<input type="text"/>
	single event	<input type="text"/>

Violation Base Penalty

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount

Violation Final Penalty Total

This violation Final Assessed Penalty (adjusted for limits)

### Economic Benefit Worksheet

**Respondent:** David McBirnie dba Little Papas  
**Case ID No.** 28849  
**Reg. Ent. Reference No.** RN102032901  
**Media [Statute]** Petroleum Storage Tank  
**Violation No.** 2

<b>Percent Interest</b>	<b>Years of Depreciation</b>
5.0	15

Item Description	Item Cost <small>No commas or \$</small>	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
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**Delayed Costs**

Equipment	\$500	08-Mar-2006	08-Dec-2006	0.8	\$1	\$25	\$26
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System				0.0	\$0	n/a	\$0
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal				0.0	\$0	n/a	\$0
Permit Costs				0.0	\$0	n/a	\$0
Other (as needed)				0.0	\$0	n/a	\$0

Notes for DELAYED costs: Estimated cost to equip the UST system with proper spill containment equipment. Date Required is the investigation date. Final Date is the estimated compliance date.

**Avoided Costs**

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance \$500

**TOTAL** \$26

Screening Date 24-Mar-2006

Docket No. 2006-0322-PST-E

PCW

Respondent David McBirnie dba Little Papas

Policy Revision 2 (September 2002)

Case ID No. 28849

PCW Revision May 19, 2005

Reg. Ent. Reference No. RN102032901

Media [Statute] Petroleum Storage Tank

Enf. Coordinator Rajesh Acharya

Violation Number 3

Primary Rule Cite(s) 30 Tex. Admin. Code § 334.48(c)

Secondary Rule Cite(s)

Violation Description Failed to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as a motor fuel.

Base Penalty \$10,000

>> Environmental, Property and Human Health Matrix

		Harm			
Release		Major	Moderate	Minor	
OR	Actual				Percent 25%
	Potential	X			

>> Programmatic Matrix

		Major	Moderate	Minor	
Falsification					Percent
Matrix Notes		Human health or the environment will or could be exposed to pollutants which would exceed levels that are protective of human health or environmental receptors as a result of the violation			

Adjustment -\$7,500

Base Penalty Subtotal \$2,500

Violation Events

Number of Violation Events 1

mark only one use a small x	daily	
	monthly	X
	quarterly	
	semiannual	
	annual	
	single event	

Violation Base Penalty \$2,500

One monthly event is recommended from the March 8, 2006 investigation date to the March 24, 2006 screening date.

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$3

Violation Final Penalty Total \$2,625

This violation Final Assessed Penalty (adjusted for limits) \$2,625

### Economic Benefit Worksheet

Respondent: David McBirnie dba Little Papas  
 Case ID No. 28849  
 Reg. Ent. Reference No. RN102032901  
 Media [Statute] Petroleum Storage Tank  
 Violation No. 3

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
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Delayed Costs							
Equipment				0.0	\$0	\$0	\$0
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System				0.0	\$0	n/a	\$0
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal				0.0	\$0	n/a	\$0
Permit Costs				0.0	\$0	n/a	\$0
Other (as needed)	\$100	08-Mar-2006	08-Nov-2006	0.7	\$3	n/a	\$3

Notes for DELAYED costs: Estimated cost to conduct inventory control for all USTs. Date Required is the investigation date. Final date is the estimated date of compliance.

Avoided Costs							
ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)							
Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0

Notes for AVOIDED costs:

Approx. Cost of Compliance \$100 TOTAL \$3

Screening Date 24-Mar-2006

Docket No. 2006-0322-PST-E

PCW

Respondent David McBirnie dba Little Papas

Policy Revision 2 (September 2002)

Case ID No. 28849

PCW Revision May 19, 2005

Reg. Ent. Reference No. RN102032901

Media [Statute] Petroleum Storage Tank

Enf. Coordinator Rajesh Acharya

Violation Number 4

Primary Rule Cite(s) 30 Tex. Admin. Code § 334.10(b)

Secondary Rule Cite(s)

Violation Description

Failed to maintain UST records and make immediately available for inspection upon request by the TCEQ investigator. Specifically, records for financial assurance and overfill prevention equipment were not available at the time of investigation for review.

Base Penalty \$10,000

>> Environmental, Property and Human Health Matrix

OR	Release	Harm			Percent
		Major	Moderate	Minor	
	Actual				
	Potential				

>> Programmatic Matrix

Falsification	Major	Moderate	Minor	Percent
			X	1%

Matrix Notes Less than 30% of the rule requirement was not met.

Adjustment -\$9,900

Base Penalty Subtotal \$100

Violation Events

Number of Violation Events 1

mark only one use a small x	daily	
	monthly	
	quarterly	
	semiannual	
	annual	
	single event	X

Violation Base Penalty \$100

One single event is recommended based on the investigation date of March 8, 2006.

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$3

Violation Final Penalty Total \$105

This violation Final Assessed Penalty (adjusted for limits) \$105

### Economic Benefit Worksheet

Respondent David McBirnie dba Little Papas  
 Case ID No. 28849  
 Reg. Ent. Reference No. RN102032901  
 Media [Statute] Petroleum Storage Tank  
 Violation No. 4

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost <small>No commas or \$</small>	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
------------------	---	---------------	------------	-----	----------------	---------------	-----------

Delayed Costs							
Equipment				0.0	\$0	\$0	\$0
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System	\$100	08-Mar-2006	08-Nov-2006	0.7	\$3	n/a	\$3
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal				0.0	\$0	n/a	\$0
Permit Costs				0.0	\$0	n/a	\$0
Other (as needed)				0.0	\$0	n/a	\$0

Notes for DELAYED costs: Estimated cost to establish a record keeping system to maintain UST records. Date Required is the investigation date. Final Date is the estimated date of compliance.

Avoided Costs	ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)						
Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance \$100

**TOTAL** \$3

# Compliance History

Customer/Respondent/Owner-Operator:	CN602959678	MCBIRNIE, DAVID	Classification: HIGH	Rating: 0.00
Regulated Entity:	RN102032901	LITTLE PAPAS	Classification: HIGH	Site Rating: 0.00
ID Number(s):	PETROLEUM STORAGE TANK REGISTRATION		REGISTRATION	69084
Location:	400 VAN HORN DRIVE, VAN HORN, TX, 79855		Rating Date: 9/1/2005	Repeat Violator: NO
TCEQ Region:	REGION 06 - EL PASO			
Date Compliance History Prepared:	April 5, 2006			
Agency Decision Requiring Compliance History:	Enforcement			
Compliance Period:	March 24, 2001 to March 24, 2006			

TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History

Name: Rajesh Acharya Phone: (512) 239-0577

## Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? Yes
2. Has there been a (known) change in ownership of the site during the compliance period? Yes
3. If Yes, who is the current owner? David McBirnie
4. If Yes, who was/were the prior owner(s)? Lomax Incorporated dba Lomax Oil Co.
5. When did the change(s) in ownership occur? 11/20/2003

## Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.

N/A

- B. Any criminal convictions of the state of Texas and the federal government.

N/A

- C. Chronic excessive emissions events.

N/A

- D. The approval dates of investigations. (CCEDS Inv. Track. No.)

- 1 02/13/2003 (24248)
- 2 01/17/2006 (450086)
- 3 03/13/2006 (458565)

- E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

Date: 01/10/2006 (450086)

Self Report? NO

Classification: Moderate

Citation: 30 TAC Chapter 334, SubChapter C 334.50(b)(2)(A)(i)(III)

Description: Failure to have the line leak detectors receive an annual performance test.

Self Report? NO

Classification: Moderate

Citation: 30 TAC Chapter 334, SubChapter C 334.48(d)

Description: Failure to have the UST system equipped with appropriate spill containment equipment.

Self Report? NO

Classification: Moderate

Citation: 30 TAC Chapter 334, SubChapter C 334.48(c)

Description: Failure to conduct appropriate inventory control for all USTs involved in the retail sale of petroleum substances used as a motor fuel.

Self Report? NO

Classification: Moderate

Citation: 30 TAC Chapter 334, SubChapter A 334.10(b)[G]

Description: Failure to have all records available for the investigation.

- F. Environmental audits.

N/A

- G. Type of environmental management systems (EMSs).

N/A

H. <sup>10</sup> <sup>20</sup> Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



<b>IN THE MATTER OF AN</b>	<b>§</b>	<b>BEFORE THE</b>
<b>ENFORCEMENT ACTION</b>	<b>§</b>	
<b>CONCERNING</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>DAVID MCBIRNIE DBA LITTLE</b>	<b>§</b>	
<b>PAPAS;</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>RN102032901</b>		

**DEFAULT AND SHUTDOWN ORDER**

**DOCKET NO. 2006-0322-PST-E**

At its \_\_\_\_\_ agenda, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered the Executive Director's Second Amended Report and Petition filed pursuant to TEX. WATER CODE chs. 7 and 26 and the rules of the TCEQ, which requests appropriate relief, including the imposition of an administrative penalty, corrective action of the respondent, and revocation of the respondent's fuel delivery certificate. The Commission also considered the Executive Director's Motion requesting entry of an Order requiring the respondent, David McBirnie dba Little Papas ("Mr. McBirnie"), to shutdown or remove from service the Underground Storage Tanks ("USTs") at the Little Papas facility, located at 400 Van Horn Drive in Van Horn, Culberson County, Texas.

The Commission makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Mr. McBirnie owns and operates a convenience store with retail sales of gasoline, located at 400 Van Horn Drive in Van Horn, Culberson County, Texas (the "Facility").
2. The two USTs at the Facility contain regulated substances as defined in the Commission's rules. The USTs are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
3. On March 8, 2006, an investigator from the TCEQ El Paso Regional Office documented that Mr. McBirnie:

- a. Failed to test the line leak detectors at least once per year for performance and operational reliability. Specifically, Mr. McBirnie did not test the line leak detectors annually;
  - b. Failed to provide proper spill containment equipment for the UST system. Specifically, the remote fill tube did not have spill containment;
  - c. Failed to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as a motor fuel; and
  - d. Failed to maintain UST records and make immediately available for inspection upon request by the TCEQ investigator. Specifically, records for financial assurance and overfill prevention equipment were not available at the time of the investigation for review.
4. Mr. McBirnie received notice of the violations on or about March 18, 2006.
  5. By letter dated June 1, 2006, the TCEQ El Paso Regional Office provided Mr. McBirnie with notice of the violations and the TCEQ's authority to shut down and remove from service UST systems not in compliance with release detection, spill and/or overfill prevention, and corrosion protection regulations if the violations were not corrected.
  6. The Executive Director filed the "Executive Director's Preliminary Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against and Requiring Certain Actions of David McBirnie dba Little Papas" (the "EDPRP") in the TCEQ Chief Clerk's office on October 10, 2006.
  7. By letter dated October 10, 2006, sent via certified mail, return receipt requested, and via first class mail, postage prepaid, the Executive Director served Mr. McBirnie with notice of the EDPRP. The United States Postal Service returned the wrapper sent by certified mail as "unclaimed." The first class mail has not been returned, indicating that Mr. McBirnie received notice of the EDPRP.
  8. The Executive Director filed the "Executive Director's First Amended Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against and Requiring Certain Actions of David McBirnie dba Little Papas" (the "EDFARP") in the TCEQ Chief Clerk's office on August 15, 2007.
  9. By letter dated August 15, 2007, sent via certified mail, return receipt requested, and via first class mail, postage prepaid, the Executive Director served Mr. McBirnie with notice of the

- EDFARP. According to the return receipt "green card," Mr. McBirnie received notice of the EDFARP on August 17, 2007, as evidenced by the signature on the card.
10. The Executive Director filed the "Executive Director's Second Amended Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against and Requiring Certain Actions of David McBirnie dba Little Papas" (the "EDSARP") in the TCEQ Chief Clerk's office on February 19, 2008.
  11. By letter dated February 19, 2008, sent via certified mail, return receipt requested, and via first class mail, postage prepaid, the Executive Director served Mr. McBirnie with notice of the EDSARP. The United States Postal Service returned the wrapper sent by certified mail as "unclaimed." The first class mail has not been returned, indicating that Mr. McBirnie received notice of the EDSARP.
  12. More than 20 days have elapsed since Mr. McBirnie received notice of the EDPRP, EDFARP, and EDSARP, provided by the Executive Director. Mr. McBirnie failed to file an answer to the EDPRP, EDFARP, and EDSARP, failed to request a hearing, and failed to schedule a settlement conference.
  13. By letter dated May 30, 2008, TCEQ provided Mr. McBirnie with notice of TCEQ's intent to order the UST systems at the Facility shut down and removed from service if Mr. McBirnie failed to correct the release detection violation within 30 days after Mr. McBirnie's receipt of the notice.
  14. As of the date of entry of this Order, Mr. McBirnie has not corrected the violations noted during the March 8, 2006, investigation.
  15. The UST systems at the Facility do not have line leak detection and spill and overflow protection for tanks as required by 30 TEX. ADMIN. CODE § 334.50 and may be releasing petroleum products to the environment without the knowledge of the tank owner or operator. Therefore, conditions at the Facility constitute an imminent peril to public health, safety, and welfare.

#### CONCLUSIONS OF LAW

1. As evidenced by Findings of Fact 1 and 2, Mr. McBirnie's USTs are subject to the jurisdiction of the TCEQ pursuant to TEX. WATER CODE chs. 7 and 26, and the rules of the Commission.

2. As evidenced by Finding of Fact 3.a., Mr. McBirnie violated 30 TEX. ADMIN. CODE § 334.50 (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability.
3. As evidenced by Finding of Fact 3.b., Mr. McBirnie violated 30 TEX. ADMIN. CODE § 334.51(b)(2)(B) and TEX. WATER CODE § 26.3475(c)(2), by failing to provide proper spill containment equipment for the UST system.
4. As evidenced by Finding of Fact 3.c., Mr. McBirnie violated 30 TEX. ADMIN. CODE § 334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as a motor fuel.
5. As evidenced by Finding of Fact 3.d., Mr. McBirnie violated 30 TEX. ADMIN. CODE § 334.10(b), by failing to maintain UST records and make immediately available for inspection upon request by the TCEQ investigator.
6. As evidenced by Finding of Fact Nos. 6 and 7, the Executive Director has timely served Mr. McBirnie with proper notice of the EDPRP, as required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE § 70.104(c)(2).
7. As evidenced by Finding of Fact Nos. 8 and 9, the Executive Director has timely served Mr. McBirnie with proper notice of the EDFARP, as required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE § 70.104(a).
8. As evidenced by Finding of Fact Nos. 10 and 11, the Executive Director has timely served Mr. McBirnie with proper notice of the EDSARP, as required by TEX. WATER CODE § 7.055 and 30 TEX. ADMIN. CODE § 70.104(c)(2).
9. As evidenced by Finding of Fact No. 12, Mr. McBirnie has failed to file a timely answer to the EDPRP, EDFARP, and EDSARP, as required by TEX. WATER CODE § 7.056 and 30 TEX. ADMIN. CODE § 70.105. Pursuant to TEX. WATER CODE § 7.057 and 30 TEX. ADMIN. CODE § 70.106, the Commission may enter a Default Order against Mr. McBirnie and assess the penalty recommended by the Executive Director.
10. Pursuant to TEX. WATER CODE § 7.051, the Commission has the authority to assess an administrative penalty against Mr. McBirnie for violations of the Texas Water Code within the Commission's jurisdiction, for violations of rules adopted under such statutes, or for violations of orders or permits issued under such statutes.
11. An administrative penalty in the amount of six thousand four hundred five dollars (\$6,405.00) is justified by the facts recited in this Order, and considered in light of the factors set forth in TEX. WATER CODE § 7.053.

12. As evidenced by Finding of Fact No. 14, Mr. McBirnie failed to correct documented violations of Commission requirements within 30 days after Mr. McBirnie received notice of the violations and notice of the Executive Director's intent to shut down the Facility.
13. TEX. WATER CODE § 26.3475(e) authorizes the Commission to order a UST owner or operator to shut down a UST system if, within 30 days after receiving notice of the violations, the owner or operator fails to correct violations of Commission regulatory requirements relating to release detection for tanks and/or piping, spill and overflow protection for tanks, and/or corrosion protection for tanks and piping.
14. TEX. WATER CODE §§ 5.102 and 7.002 authorize the Commission to issue orders and make determinations necessary to effectuate the purposes of the statutes within its jurisdiction.
15. Pursuant to 30 TEX. ADMIN. CODE § 334.8(c)(6), the Commission has authority to revoke Mr. McBirnie's UST delivery certificate if the Commission finds that good cause exists.
16. Good cause for revocation of Mr. McBirnie's UST delivery certificate exists as justified by Findings of Fact Nos. 3 through 14, and Conclusions of Law Nos. 2 through 9, and 12.
17. As evidenced by Finding of Fact Number 15, current conditions at the Facility constitute an imminent peril to public health, safety, and welfare.

### **ORDERING PROVISIONS**

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

1. Immediately upon the effective date of this Order, Mr. McBirnie shall take the following steps to shut down operations of the non-compliant UST systems at the Facility:
  - a. Cease dispensing fuel from the USTs;
  - b. Cease receiving deliveries of regulated substances into the USTs;
  - c. Padlock the dispensers;
  - d. Empty the USTs of all regulated substances in accordance with 30 TEX. ADMIN. CODE § 334.54(d); and
  - e. Temporarily remove the UST system from service in accordance with 30 TEX. ADMIN. CODE § 334.54.

2. Mr. McBirnie's UST delivery certificate is revoked immediately upon the effective date of this Order. Mr. McBirnie may submit an application for a new delivery certificate only after Mr. McBirnie has complied with all of the requirements of this Order.
3. Within 10 days after the effective date of this Order, Mr. McBirnie shall send his UST delivery certificate to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

4. Within 15 days after the effective date of this Order, Mr. McBirnie shall submit to the Executive Director a detailed written report documenting the steps he has taken to comply with Ordering Provision Nos. 1.a. through 1.e. Mr. McBirnie shall submit the report to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

and

Terry McMillan, Waste Section Manager  
El Paso Regional Office  
Texas Commission on Environmental Quality  
401 East Franklin Avenue, Suite 560  
El Paso, Texas 79901-1212

5. If Mr. McBirnie elects to permanently remove from service any UST systems at the Facility, Mr. McBirnie shall permanently remove those UST systems in accordance with 30 TEX. ADMIN. CODE § 334.55, and shall submit to the Commission a written report documenting compliance with 30 TEX. ADMIN. CODE § 334.55. Mr. McBirnie shall submit the written report to:

Petroleum Storage Tank Registration Team, MC 138  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

6. Mr. McBirnie is assessed an administrative penalty in the amount of six thousand four hundred five dollars (\$6,405.00) for violations of state statutes and rules of the TCEQ. The payment of this administrative penalty and Mr. McBirnie's compliance with all the terms and conditions set forth in this Order completely resolve only the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations which are not raised here. All checks submitted to pay the penalty imposed by this Order shall be made out to the "Texas Commission on Environmental Quality." The administrative penalty assessed by this Order shall be paid within 30 days after the effective date of this Order and shall be sent with the notation "Re: David McBirnie dba Little Papas; Docket No. 2006-0322-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

7. Mr. McBirnie's UST systems shall remain out of service, pursuant to TEX. WATER CODE § 26.3475, as directed by Ordering Provision Nos. 1.a. through 1.e. until such time as Mr. McBirnie demonstrates to the satisfaction of the Executive Director that he has corrected the violations noted in Finding of Fact Nos. 3.a. through 3.d. and Conclusion of Law Nos. 2 through 5 as listed herein.
8. Prior to resuming retail sales of gasoline, Mr. McBirnie shall:
  - a. Conduct annual testing of the line leak detectors for performance and operational reliability, in accordance with 30 TEX. ADMIN. CODE § 334.50; and,
  - b. Install spill containment equipment for the UST system, in accordance with 30 TEX. ADMIN. CODE § 334.51.
9. Prior to receiving deliveries of gasoline, Mr. McBirnie shall:
  - a. Begin maintaining records pertaining to the UST system at the Facility, in accordance with 30 TEX. ADMIN. CODE § 334.10;
  - b. Begin conducting effective manual or automatic inventory control procedures for all USTs, in accordance with 30 TEX. ADMIN. CODE § 334.48; and,
  - c. Obtain a new delivery certificate from the TCEQ.

10. Within 10 days of resuming retail sales of gasoline, Mr. McBirnie shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision Nos. 8.a. through 9.c. The written certification shall be notarized by a State of Texas Notary Public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and, that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

and

Terry McMillan, Waste Section Manager  
El Paso Regional Office  
Texas Commission on Environmental Quality  
401 East Franklin Avenue, Suite 560  
El Paso, Texas 79901-1212

11. Upon obtaining a new delivery certificate, Mr. McBirnie shall post the delivery certificate in a location where the document is clearly visible at all times, in accordance with 30 TEX. ADMIN. CODE § 334.8(c)(5)(A)(iii).
12. All relief not expressly granted in this Order is denied.
13. The provisions of this Order shall apply to and be binding upon Mr. McBirnie, and Mr. McBirnie is ordered to give notice of this Order to personnel who maintain day to day control of the UST systems at the Facility.

14. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Mr. McBirnie if the Executive Director determines that Mr. McBirnie is noncompliant with or in violation of any of the terms and conditions set forth in this Order.
15. This Order shall terminate five years from its effective date or when Mr. McBirnie demonstrates to the satisfaction of the Executive Director that it has corrected all of the violations noted herein.
16. The Chief Clerk shall provide a copy of this Order to each of the parties. By law, the effective date of this Order is the date this decision was rendered, pursuant to TEX. GOV'T CODE § 2001.144(a)(3).

**SIGNATURE PAGE**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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For the Commission

**AFFIDAVIT OF JACQUELYN BOUTWELL**

STATE OF TEXAS           §  
  §  
COUNTY OF TRAVIS       §

“My name is Jacquelyn Boutwell. I am of sound mind, capable of making this affidavit, and the facts stated in this affidavit are within my personal knowledge and are true and correct.

On behalf of the Executive Director of the Texas Commission on Environmental Quality, the “Executive Director’s Preliminary Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against and Requiring Certain Actions of David McBirnie dba Little Papas” (the “EDPRP”) was filed with the Office of the Chief Clerk on October 10, 2006.

The EDPRP was mailed to Mr. McBirnie at its last known address on October 10, 2006, via certified mail, return receipt requested, and via first class mail, postage prepaid. The United States Postal Service returned the wrapper sent by certified mail as “unclaimed.” The first class mail has not been returned, indicating that Mr. McBirnie received notice of the EDPRP.

More than 20 days have elapsed since Mr. McBirnie received notice of the EDPRP. Mr. McBirnie failed to file an answer to the EDPRP, failed to request a hearing, and failed to schedule a settlement conference.

On behalf of the Executive Director of the Texas Commission on Environmental Quality, the “Executive Director’s First Amended Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against David McBirnie dba Little Papas” (the “EDFARP”) was filed with the Office of the Chief Clerk on August 15, 2007.

The EDFARP was mailed to Mr. McBirnie at his last known address on August 15, 2007, via certified mail, return receipt requested, and via first class mail, postage prepaid. According to the return receipt “green card,” Mr. McBirnie received notice of the EDFARP on August 17, 2007, as evidenced by the signature on the card.

More than 20 days have elapsed since Mr. McBirnie received notice of the EDFARP. Mr. McBirnie failed to file an answer to the EDFARP, failed to request a hearing, and failed to schedule a settlement conference.”

On behalf of the Executive Director of the Texas Commission on Environmental Quality, the “Executive Director’s Second Amended Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative

Penalty Against David McBirnie dba Little Papas“ (the “EDSARP”) was filed with the Office of the Chief Clerk on February 19, 2008.

The EDSARP was mailed to Mr. McBirnie at his last known address on February 19, 2008, via certified mail, return receipt requested, and via first class mail, postage prepaid. The United States Postal Service returned the wrapper sent by certified mail as “unclaimed.” The first class mail has not been returned, indicating that Mr. McBirnie received notice of the EDSARP.

More than 20 days have elapsed since Mr. McBirnie received notice of the EDSARP. Mr. McBirnie failed to file an answer to the EDSARP, failed to request a hearing, and failed to schedule a settlement conference.”

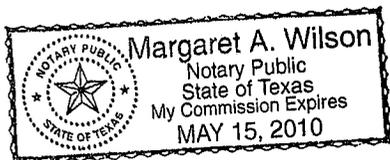
By letter dated May 30, 2008, I provided Mr. McBirnie with notice of the TCEQ’s intent to order the UST systems at the Facility shut down and removed from service if the violations pertaining to line leak detection were not corrected within 30 days of Mr. McBirnie’s receipt of the letter.

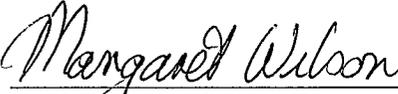
As of the date of this affidavit, I am not aware of any evidence that indicates that Mr. McBirnie has corrected the violations noted during the March 8, 2006, investigation.”

  
\_\_\_\_\_  
Jacquelyn Boutwell, Staff Attorney  
Texas Commission on Environmental Quality

Before me, the undersigned authority, on this day personally appeared Jacquelyn Boutwell, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration herein expressed.

Given under my hand and seal of office this 18<sup>th</sup> day of NOVEMBER, A.D., 2008.



  
\_\_\_\_\_  
Notary Signature