

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 OCT 10 PM 1:06
S.D. CHIEF CLERKS OFFICE

October 10, 2007

Celeste Baker, Acting General Counsel
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-06-2248; TCEQ Docket No. 2004-0555-PST-E; Executive Director of the Texas Commission on Environmental Quality v. Ammar Food, Inc., D/B/A Sunrise Food Mart (RN 02467826)**

Dear Ms. Baker:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than October 30, 2007. Any replies to exceptions or briefs must be filed in the same manner no later than November 9, 2007.

This matter has been designated **TCEQ Docket No. 2004-0555-PST-E; SOAH Docket No. 582-06-2248**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Suzanne Formby Marshall for".

Suzanne Formby Marshall
Administrative Law Judge

SFM/ap

Enclosures

cc: Mailing List

Post Office Box 13025 ♦ 300 West 15th Street, Suite 502 ♦ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: AMMAR FOOG INC / SUNRISE FOOD MART
SOAH DOCKET NUMBER: 582-06-2248
REFERRING AGENCY CASE: 2004-0555-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ SUZANNE FORMBY. MARSHALL

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
OFFICE OF THE PUBLIC INTEREST COUNSEL
MC-103 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)

OFFICE OF PUBLIC ASSISTANCE

JIM SALLANS
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-2053 (PH)
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AKBER ALI
AMMAR FOOD, INC.
2234 OPAL CREEK DRIVE
SAN ANTONIO, TX 78232-5625

SUNSHINE FOOD MART #2

xc: Docket Clerk, State Office of Administrative Hearings

issue a default order against Respondent, assess the penalty requested by the ED, and revoke the delivery certificates of Mr. Ali.

II. PROCEDURAL HISTORY, NOTICE, AND JURISDICTION

The ED's Second Amended Report and Petition (the Petition) was sent to Respondent on March 19, 2007. The ED made a formal request to refer the matter to the State Office of Administrative Hearings (SOAH) on May 10, 2006.¹ Pursuant to proper notice, a public hearing on the ED's petition was convened on August 15, 2007, before ALJ Suzanne Formby Marshall. Respondent did not appear at the hearing and was not represented at the hearing, nor did Respondent provide the ALJ with any prior or subsequent explanations for its absence. Jim Sallans, Staff Attorney, appeared for the ED and moved for a default due to Respondent's unexplained failure to appear at the hearing. The ALJ granted the ED's motion.

III. NOTICE

The recommendation for a default order in this case is made pursuant to SOAH's procedural rule found at 1 TEX. ADMIN. CODE (TAC) § 155.55. The rule specifies that any default granted under this rule shall be issued only upon adequate proof that notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law in the attached Default Order, the ALJ finds that the requisite notice has been provided to Respondent in this proceeding, in accordance with TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TAC § 155.27, and 30 TAC §§ 1.11 and 39.25.

¹ There was an extended amount of time during which attempts were made by the ED to locate and serve Respondent.

IV. VIOLATIONS

Based on the above circumstances and the provision of adequate notice, default is proper against Respondent pursuant to 1 TAC § 155.55. Accordingly, the factual allegations contained in the Petition are deemed admitted against Respondent without need for further proof. Thus, the following facts (which are set out more fully in the attached Default Order) have been established:

1. Ammar Food (Respondent) owned and operated a convenience store (the Facility) with retail sales of gasoline located at 2820 South New Braunfels Avenue, San Antonio, Bexar County, Texas.
2. Respondent's underground storage tanks (USTs) were not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
3. Respondent's USTs contained a regulated petroleum substance as defined in the rules of the Commission.
4. On November 20, 2003, a TCEQ San Antonio Regional Office investigator inspected the Facility and documented the following violations:
 - a. The Facility failed to have a method of release detection that was capable of detecting a release from any portion of the UST system containing a regulated substance and failed to maintain monitoring records and inspection records as required, in violation of TEX. WATER CODE § 26.3475(a) and 30 TEX. ADMIN. CODE (TAC) §§ 334.10(b) and 334.50(a)(1)(A).
 - b. The Facility failed to utilize a gauge stick for inventory control purposes capable of measuring the level of stored petroleum product over the full range of the USTs' height to the nearest one-eighth of an inch and failed to maintain inventory control records. The gauge stick used for inventory control was worn and had no end button, and no inventory control records were made available on request during the investigation, in violation of 30 TAC §§ 334.10(b) and 334.50(d)(1)(B)(iii)(II).
 - c. The Facility failed to have overfill prevention equipment installed on the 6,000 and 8,000 gallon USTs in use at the Facility. The two USTs lacked ball float valves or drop tubes with flap valves, as documented during the investigation, in violation of TEX. WATER CODE § 26.3475(c)(2) and 30 TAC § 334.51(b)(2)(C).

- d. The Facility failed to inspect the rectifier of the impressed current cathodic protection system at least once every 60 days to ensure proper operation and failed to maintain the records of the cathodic protection system inspection, in violation of 30 TAC §§ 334.10(b) and 334.49(c)(2)(C).

V. PENALTY

The evidence indicates that issuance of a default order assessing the requested administrative penalty is warranted on the grounds that Respondent violated the environmental law and regulations as noted above. The evidence indicates that the ED considered the factors set forth in TEX. WATER CODE ANN. §§ 7.053 and 13.4151 and followed the Commission's September 1, 2002, Penalty Policy in calculating the total proposed penalty in the amount of \$31,500.

VI. REVOCATION OF DELIVERY CERTIFICATES

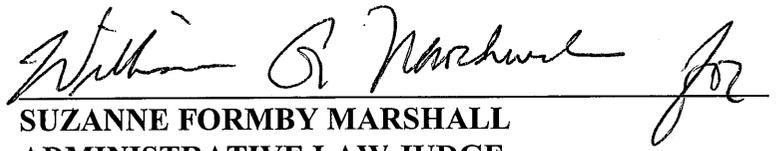
Mr. Akber Ali, vice-president of Respondent, holds delivery certificates that allow him to accept delivery of petroleum and other regulated substances into an underground storage tank. The entry of a default order against Respondent will result in a finding that it violated the environmental laws and regulations noted above. The finding of a violation, the failure of Respondent to answer the ED's Second Amended Report and Petition, and the failure of Respondent to appear at the hearing, despite having received proper notice, constitute good cause for revoking Mr. Ali's UST delivery certificates, pursuant to 30 TEX. ADMIN. CODE § 334.8(c)(6)(A)(iii).

VI. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order concluding that the alleged violations occurred, assess an administrative penalty of \$31,500 against Respondent for the violations alleged and established

in this proceeding, and revoke the UST delivery certificates of Akber Ali, vice-president of Respondent.

SIGNED October 10, 2007.



**SUZANNE FORMBY MARSHALL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties and
Ordering Revocation of Underground Storage Tank
Delivery Certificates Against
AMMAR FOOD, INC. D/B/A SUNRISE FOOD MART
TCEQ Docket No. 2004-0555-PST-E
SOAH Docket No. 582-06-2248

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Second Amended Report and Petition (Petition) recommending that the Commission issue an order assessing administrative penalties against Ammar Food, Inc., d/b/a Sunrise Food Mart (Respondent) and revoking the underground storage tank (UST) delivery certificates of Mr. Akber Ali, vice-president of Respondent. A Proposal for Decision was presented by Suzanne Formby Marshall, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the Petition on August 15, 2007, in Austin, Texas.

The Executive Director, represented by Jim Sallans, Staff Attorney, appeared at the hearing. The Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default order be issued against Respondent. The ALJ agreed with the Executive Director's request.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Ammar Food, Inc. d/b/a Sunrise Food Mart (Respondent) owned and operated a convenience store with retail sales of gasoline at 2820 South New Braunfels Avenue, San Antonio, Bexar County, Texas (the Facility).
2. The Facility's underground storage tanks (USTs) were not exempt or excluded from regulation under the Texas Water code or the rules of the Commission.
3. The Facility's USTs contained a regulated petroleum substance as defined in the rules of the Commission.
4. On November 20, 2003, a TCEQ San Antonio Regional Office investigator inspected the Facility.
5. On March 9, 2005, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, alleging that, based on findings made during the inspection, Respondent violated certain Commission rules and regulations. The Petition recommended that the Commission issue an enforcement order assessing a total administrative penalty of \$31,500 against Respondent and recommending certain corrective actions.
6. On the same date that the EDPRP was filed, the Executive Director sent, by certified mail, return receipt requested, and by regular mail, a copy of the EDPRP to Respondent at

Respondent's last addresses known to the TCEQ: Ahmed R. Lokhandwala, President and Registered Agent, Ammar Food, Inc. d/b/a Sunrise Food Mart, 2820 South New Braunfels Avenue, San Antonio, TX 78210-5267.

7. On March 28, 2005, Respondent, through Akber Ali, Vice-President of Ammar Food, Inc., d/b/a Sunrise Food, filed an answer to the EDPRP and timely requested a hearing to address the Executive Director's allegations.
8. On or about May 12, 2006, the Commission's Chief Clerk, on the request of the Executive Director, referred this case to SOAH for hearing.
9. On June 1, 2006, the Chief Clerk mailed notice of the scheduled hearing, by certified mail, return receipt requested, and first class mail, to: Akber Ali, Ammar Food, Inc., d/b/a Sunrise Food Mart, 2820 South New Braunfels Avenue, San Antonio, TX 78210-5267, the address provided by Respondent in its request for hearing and the address maintained on file for the Respondent with the Commission.
10. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules that the Executive Director alleged that the Respondent had violated;
 - Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - Advised Respondent, in at least 12-point bold-faced type, that failure to appear at the public hearing in person or by legal representative would result in the factual allegations contained in the notice and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and

- Included a copy of the Executive Director's penalty calculation worksheet, which alleged how the Commission should calculate a penalty for the alleged violations.
11. From June 1, 2006, through March 26, 2007, this matter was continued to allow the Executive Director to file an amended petition seeking additional relief, and to serve Respondent with the amended petition. During this time, it was very difficult for the Executive Director to locate Respondent and its authorized representatives in order to obtain service. During the course of attempting to locate Respondent and effect service, the Executive Director learned that the Sunrise Food Mart was operating under new ownership.
 12. On March 19, 2007, the ED sent by certified mail, return receipt requested, and by regular mail, a copy of the ED's Second Amended Report and Petition (Petition) to Akber Ali, vice President of Ammar Food, Inc., at his residence located at 2234 Opal Creek Drive, San Antonio, TX 78232-5625. The certified mail was returned to the ED as unclaimed mail; however, the first class mail was not returned.
 13. The Executive Director alleged the following violations in the Petition, pursuant to the inspection conducted at the Facility on November 20, 2003:
 - a. Respondent failed to have a method of release detection that was capable of detecting a release from any portion of the UST system containing a regulated substance and failed to maintain monitoring records and inspection records as required, in violation of TEX. WATER CODE § 26.3475(a) and TEX. ADMIN. CODE §§ 334.10(b) and 334.50(a)(1)(A).
 - b. Respondent failed to utilize a gauge stick for inventory control purposes capable of measuring the level of stored petroleum product over the full range of the USTs height to the nearest one-eighth of an inch and failing to maintain inventory control records. The gauge stick used for inventory control was worn and had no end button, and no inventory control records were made available on request during the investigation, in violation of 30 TEX. ADMIN. CODE §§ 334.10(b) and 334.50(d)(1)(B)(iii)(II).

- c. Respondent failed to have overfill prevention equipment installed on the 6,000 and 8,000 gallon USTs in use at the Facility. Specifically, the two USTs lacked ball float valves or drop tubes with flap valves, in violation of TEX. WATER CODE § 26.3475(c)(2) and 30 TEX. ADMIN. CODE § 334.51(b)(2)(C).
 - d. Respondent failed to inspect the rectifier of the impressed current cathodic protection system at least once every 60 days to ensure proper operation and failed to maintain the records of the cathodic protection system inspections, in violation of 30 TEX. ADMIN. CODE §§ 334.10(b) and 334.49(c)(2)(C).
14. Based on the penalty calculation worksheet, the Executive Director alleged that a penalty of \$7,875 should be assessed for each of the four violations asserted in the Petition. The Executive Director asserted that each of the four violations posed a potential major threat as assessed pursuant to the Commission's Penalty Matrix in that Respondent's failure to have a method of release detection, failure to use a gauge stick for inventory control purposes capable of adequately measuring the level of stored petroleum product, failure to have overfill prevention equipment, failure to inspect the rectifier of the cathodic protection system, and the failure to provide sufficient records to the inspector could have exposed the public to levels of petroleum product that exceeded acceptable levels. It is appropriate to conclude that three (3) quarterly violation events occurred for each of the four violations, by calculating that one violation event occurred per quarter from November 20, 2003, to July 19, 2004. The calculation indicates that the Respondent derived an economic benefit through non-compliance in the amount of \$2,090, for the first violation, \$1,435 for the second violation, \$30 for the third violation, and \$132 for the fourth violation, for a total economic benefit of \$3,687.
15. In March 2007, Staff advised the ALJ that it had achieved service on Mr. Ali and requested that a hearing be scheduled in this case. A preliminary hearing was scheduled for May 9,

2007. Counsel for the ED appeared; Respondent did not appear. A procedural schedule was adopted, ED's jurisdictional exhibits A - D were admitted into evidence, and this matter was set for hearing on August 15, 2007.

16. On August 15, 2007, the ALJ convened the hearing on the merits. The Executive Director appeared through counsel, Jim Sallans. However, Respondent did not appear, either in person or through a representative, at the hearing on August 15, 2007.
17. On that same date, the Executive Director moved that a default order be entered against Respondent, in which all of the Executive Director's allegations would be deemed admitted as true and the penalties and revocation of Mr. Ali's delivery certificates sought by the would be assessed against Respondent.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day for each violation at issue in this case.
3. Based on the above Findings of Fact and as required by TEX. WATER CODE Ann. § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the Petition and of the opportunity to request a hearing on the alleged violations, the proposed penalties, and the proposed revocation of delivery certificates.

4. Based on the above Findings of Fact, Respondent was appropriately notified of the hearing on the alleged violations, the proposed penalties, and the proposed revocation of delivery certificates, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6. Additionally, Respondent was notified, in accordance with 1 TAC § 155.55, that if it failed to appear at the hearing, a default order could be rendered against Respondent by which all the allegations contained in the notice of hearing would be deemed admitted as true.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
6. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default order should be issued against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106(b); and
 - b. The allegations that were contained in the notice of the hearing, including those in the Petition attached thereto, should be admitted as true.
7. Based on the above Findings of Fact and Conclusions of Law, the Respondent has violated TEX. WATER CODE ANN. §§ 26.3475(a), (c)(1), and (c)(2) and 30 TAC §§ 334.10(b), 334.49(c)(2)(C), 334.50(a)(1)(A) and (d)(1)(B)(iii)(II), and 334.51(b)(2)(C) that are statutes and rules within the Commission's authority.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors, including:
 - Its impact or potential impact on public health and safety, natural resources, and their uses, and other persons;

- The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violation by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact and Conclusions of Law, the factors set out in TEX. WATER CODE ANN. § 7.053 and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$31,500 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact and Conclusions of Law, the revocation of UST delivery certificates for good cause by the Executive Director is authorized by 30 TAC § 334.8(c)(6).

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Commission Order, Ammar Food, Inc. d/b/a Sunrise Food Mart shall pay an administrative penalty in the amount of thirty-one thousand, five hundred dollars (\$31,500) for violations of TEX. WATER CODE ANN. §§ 26.3475(a), (c)(1) and (c)(2) and 30 TEX. ADMIN. CODE §§ 334.10(b), 334.49(c)(2)(C), 334.50(a)(1)(A), and (d)(1)(B)(iii)(II), and 334.51(b)(2)(C). Further, Mr. Akber Ali, vice-president of Ammar Food, Inc., shall surrender his UST delivery certificates to the Commission, pursuant to 30 TEX. ADMIN. CODE § 334.8(c)(6). The payment of this administrative penalty and the revocation of the UST delivery certificates completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties shall be sent with the notation: "Re: Ammar Food, Inc., d/b/a Sunrise Food Mart, TCEQ Docket No. 2004-0555-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

2. 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 Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

3. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.
4. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
5. As required by WATER CODE § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Respondent.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission