

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

August 3, 2007

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-07-1206; TCEQ Docket No. 2004-0639-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Sam R. Dillon d/b/a Sam's Produce Farm (RN102267903)

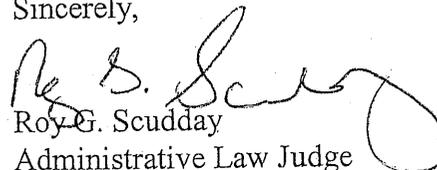
Dear Mr. Seal:

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 August 23, 2007. Any replies to exceptions or briefs must be filed in the same manner no later than September 3, 2007.

This matter has been designated **TCEQ Docket No. 2004-0639-PST-E; SOAH Docket No. 582-07-1206**. 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,


Roy G. Scudday
Administrative Law Judge

RGS/sb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

**300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: SAM R. DILLON / SAM'S PRODUCE FARM
SOAH DOCKET NUMBER: 582-07-1206
REFERRING AGENCY CASE: 2004-0639-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROY SCUDDAY**

REPRESENTATIVE / ADDRESS

PARTIES

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

SAM R. DILLON
OWNER
SAMS PRODUCE FARM
P. O. BOX 254
TIMPSON, TX 75975

SAMS PRODUCE FARM

xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-07-1206
TCEQ DOCKET NO. 2004-0639-PST-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
v.	§	OF
	§	
SAM R. DILLON dba SAM'S PRODUCE	§	
FARM (RN102267903),	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$16,800.00 in administrative penalties against, and require certain corrective actions by, Sam R. Dillon dba Sam's Produce Farm (Respondent) for violations of TEX. WATER CODE §§ 5.702, 26.3475(c) and (d) and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b), 312.9, 334.22(a), 334.47(a)(2), 334.49(a), and 334.50(a)(1)(A). Simply stated, the ED alleges that Respondent failed to permanently remove an underground storage tank (UST) system from service within 60 days of the date that upgrade requirements should have been in place on the system; failed to have a method of release detection that is capable of detecting a release from any portion of the UST system which contains regulated substances; failed to have corrosion protection for all USTs which contain a regulated substance; failed to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and failed to pay all Sludge Transporter (WMS) and all UST fees in a timely manner.

After being properly notified, Respondent failed to appear at the hearing on the merits concerning the ED's allegations and recommendation. Therefore, as set out below, the Administrative Law Judge (ALJ) recommends that the Commission enter a default order against

Respondent, deem as true the facts alleged by the ED, and assess a penalty of \$16,800.00 against and require certain corrective actions by Respondent.

II. JURISDICTION AND VIOLATIONS

Respondent owns and operates a former gasoline station now being operated as a produce stand located at Highway 59 at Willow Street, Garrison, Nacogdoches County, Texas. On November 19, 2003, a TCEQ Investigator conducted an inspection and discovered that Respondent had violated the Commission's rules and statutes within the Commission's jurisdiction as follows:

Respondent failed to permanently remove a UST system consisting of seven 1,000 gallon tanks from service within 60 days of the date that upgrade requirements should have been in place on the system;

Respondent failed to have a method of release detection that is capable of detecting a release from UST No. 5, which contains approximately 21 inches of regulated substance;

Respondent failed to have corrosion protection in place for UST No. 5, a steel tank which contains approximately 21 inches of regulated substance;

Respondent failed to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and

Respondent failed to pay all Sludge Transporter (WMS) and all UST fees in a timely manner as indicated by TCEQ Financial Administration Account Nos. 0801453H and 0060127U that have outstanding annual and late fees.

Under both TEX. HEALTH & SAFETY CODE § 341.049 and . TEX. WATER CODE ANN. § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code or the Texas Health and Safety Code within the Commission's jurisdiction or a rule adopted or an order or permit issued thereunder. The penalty:

may not be less than \$50 nor more than \$1,000 per day for each violation of TEX. HEALTH & SAFETY CODE Chapter 341 Subchapter C or a rule or order adopted or issued thereunder;¹

may not exceed \$500 per day for each violation of TEX. WATER CODE ANN. Chapter 13 or a rule or order adopted thereunder;²

may not exceed \$2,500 per day for violations arising under TEX. WATER CODE ANN. Chapter 37 or TEX. HEALTH & SAFETY CODE ANN. Chapters 366, 371, or 372;³ and

may not exceed \$10,000 per day of violation for all other violations.⁴

Additionally, the Commission may order the violator to take corrective action.⁵

In this case, Respondent is alleged to have violated TEX. WATER CODE §§ 5.702, 26.3475(c) and (d) and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b), 312.9, 334.22(a), 334.47(a)(2), 334.49(a), and 334.50(a)(1)(A), which are statutes and rules within the Commission's authority. Thus, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Default Order.

III. DEFAULT ORDER

A default order in this case should be entered pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.55 and 30 TAC §§ 70.106 and 80.113(d). A default may only be entered upon adequate proof

¹ TEX. HEALTH & SAFETY CODE § 341.049(a).

² TEX. WATER CODE ANN. § 13.4151(a).

³ TEX. WATER CODE ANN. § 7.052(a).

⁴ TEX. WATER CODE ANN. § 7.052(c).

⁵ TEX. WATER CODE ANN. § 7.073.

that proper notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law, the ALJ finds that the requisite notice has been provided to Respondent in this proceeding, in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; 1 TAC §§ 155.27 and 155.55; and 30 TAC §§ 1.11 and 39.25.

Therefore, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order assessing an administrative penalty of \$16,800.00 against Respondent for the violations in issue and directing Respondent to take the specified corrective actions.

SIGNED August 3, 2007.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties Against and
Ordering Corrective Action by
SAM R. DILLON dba SAM'S PRODUCE FARM
SOAH DOCKET NO. 582-07-1206
TCEQ DOCKET NO. 2004-0639-PST-E

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Sam R. Dillon dba Sam's Produce Farm (Respondent). A Proposal for Decision (PFD) was presented by Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on July 31, 2007, in Austin, Texas.

The Executive Director, represented by Xavier Guerra, 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 be entered against the Respondent. The ALJ agreed with the Executive Director's request.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns and operates a former gasoline station now being operated as a produce stand located at Highway 59 at Willow Street, Garrison, Nacogdoches County, Texas.
2. On November 19, 2003, a TCEQ Investigator conducted an inspection of Respondent's business/property to determine if Respondent was complying with statutes within the Commission's jurisdiction and the Commission's rules adopted thereunder.
3. On December 8, 2004, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove a UST system consisting of seven 1,000 gallon tanks from service within 60 days of the date that upgrade requirements should have been in place on the system; 30 TEX. ADMIN. CODE § 334.50(a)(1)(A) and TEX. WATER CODE § 26.3475(c)(1) by failing to have a method of release detection that is capable of detecting a release from UST No. 5, which contains approximately 21 inches of regulated substance; 30 TEX. ADMIN. CODE § 334.49(a) and TEX. WATER CODE § 26.3475(d) by failing to have corrosion protection in place for UST No. 5, a steel tank which contains approximately 21 inches of regulated substance; 30 TEX. ADMIN. CODE § 37.815(a) and (b) by failing to demonstrate continuous financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; and 30 TEX. ADMIN. CODE §§ 312.9 and 334.22(a) and TEX. WATER CODE § 5.702 by failing to pay all Sludge Transporter (WMS) and all UST fees in a timely manner as indicated by TCEQ

Financial Administration Account Nos. 0801453H and 0060127U that have outstanding annual and late fees; and recommending that the Commission enter an enforcement order assessing a total administrative penalty of \$16,800.00 against Respondent. The Executive Director also recommended that the Commission order Respondent to take certain corrective actions.

4. The total administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each different violation.
5. The Executive Director seeks a penalty of \$5,250.00, for Respondent's alleged violation of 30 TEX. ADMIN. CODE § 334.47(a)(2), based on the fact that the violation has the potential of causing major harm by exposing human health or the environment to a petroleum product that would exceed levels that are protective of human health or environmental receptors, based on two semiannual events.
6. The Executive Director seeks a penalty of \$5,250.00, for Respondent's alleged violation of 30 TEX. ADMIN. CODE § 334.50(a)(1)(A) and TEX. WATER CODE § 26.3475(c)(1), based on the fact that the violation has the potential of causing major harm by exposing human health or the environment to a petroleum product that would exceed levels that are protective of human health or environmental receptors, based on two semiannual events.
7. The Executive Director seeks a penalty of \$5,250.00, for Respondent's alleged violation of 30 TEX. ADMIN. CODE § 334.49(a) and TEX. WATER CODE § 26.3475(d), based on the fact that the violation has the potential of causing major harm by exposing human health or the environment to a petroleum product that would exceed levels that are protective of human health or environmental receptors, based on two semiannual events.

8. The Executive Director seeks a penalty of \$1,050.00, for Respondent's alleged violation of 30 TEX. ADMIN. CODE § 37.815(a) and (b), based on the fact that the violation was a single major event of not meeting the rule requirement.
9. The Executive Director mailed a copy of the EDPRP to Respondent's last address known to the TCEQ on the same date that the EDPRP was filed.
10. Respondent filed an answer to the EDPRP requesting a hearing, and the matter was referred to SOAH for hearing.
11. On December 21, 2006, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.
12. 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 the Executive Director alleged Respondent 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 twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP 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 shows how the penalty was calculated for the alleged violations.

13. On or about January 16, 2007, Respondent filed a petition for bankruptcy relief pursuant to Chapter 7 of the United States Code. On January 25, 2007, ALJ Cassandra J. Church convened the preliminary hearing. The Respondent did not appear, nor did a representative of the Respondent appear.
14. Jurisdiction was established at the preliminary hearing. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director seeks would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director. On March 23, 2007, the ALJ denied the motion for default, and on May 2, 2007, the ALJ ordered that the evidentiary hearing on the merits would convene on July 31, 2007 at 10:00 a.m.
15. On July 31, 2007 at 10:00 a.m., ALJ Roy G. Scudday convened the evidentiary hearing. The Respondent did not appear, nor did a representative of the Respondent appear.
16. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default against Respondent in which all of the Executive Director's allegations contained in the EDPRP would be deemed admitted as true, the penalties the Executive Director seeks would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director. The ALJ granted the motion.

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 or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed:
 - \$2,500 per day, per each violation of TEX. WATER CODE ANN. Chapter 37; TEX. HEALTH & SAFETY CODE ANN. Chapters 366, 371, or 372; or TEX. OCC. CODE ANN. Chapter 1903; or
 - \$10,000 per violation, per day for all other violations.
3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE § 155.55, that if Respondent failed to appear at the hearing, a default could be

rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.

6. 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.
7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default ^{order} judgment should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d); and
 - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE §§ 5.702, 26.3475(c) and (d) and TEX. ADMIN. CODE §§ 37.815(a) and (b), 312.9, 334.22(a), 334.47(a)(2), 334.49(a), and 334.50(a)(1)(A).
9. 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 violations 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.

10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, 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 \$16,800 is justified and should be assessed against Respondent.
12. As evidence by Finding of Fact No. 13, Respondent filed a petition for bankruptcy relief pursuant to Chapter 7 of the United States Code. The Automatic Stay imposed by the Bankruptcy Code (specifically, 11 U.S.C. § 362(a)) does not apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power, by virtue of the exception set out at 11 U.S.C. § 362(b)(4). Accordingly, TCEQ (a governmental unit as defined under 11 U.S.C. § 101(27)) is expressly excepted from the automatic stay in pursuing enforcement of the State's environmental protection laws, and in seeking to liquidate its damages for such violations. This assessed administrative penalty is a civil fine or penalty payable to a governmental unit and not for pecuniary compensation. Therefore, the assessed penalty is a nondischargeable debt under 11 U.S.C. § 523(a)(7). So long as Respondent's bankruptcy case is not dismissed, the TCEQ will, however, not seek to execute upon any monetary judgment obtained without first obtaining a judicial determination specifically holding that the debt is nondischargeable under Federal bankruptcy laws.

13. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

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

1. Sam Dillon dba Sam's Produce Farm is assessed an administrative penalty in the amount of \$16,800.00 for violations of TEX. WATER CODE § 26.3475(c) and (d) and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b), 312.9, 334.22(a), 334.47(a)(2), 334.49(a), and 334.50(a)(1)(A). The assessment of this administrative penalty and Mr. Dillon's compliance with all the terms and conditions set forth in this Order completely resolve 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 that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Sam Dillon dba Sam's Produce Farm; Docket No. 2004-0639-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. Within 60 days after the effective date of the Commission Order, Mr. Dillon shall permanently remove from service all seven USTs at the Facility, in accordance with 30 TEX. ADMIN. CODE § 334.55 (relating to Permanent Removal from Service).

3. Withing 90 days after the effective date of the Commission Order, Mr. Dillon shall submit copies of documentation necessary to demonstrate compliance with those Ordering Provisions to:

Work Leader
Section III, Team 5
Enforcement Division, MC 149
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

and

Mr. Keith Anderson, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway
Beaumont, Texas 77703-1892

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.
5. 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.
6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. 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