

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 10 PM 3:03
CHIEF CLERKS OFFICE

December 10, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order
M.V.K, Inc. dba EZ Express 1
SOAH Docket No. 582-08-3469; TCEQ Docket No. 2004-0694-PST-E; Enf. No. 15793

Dear Ms. Castañuela:

Enclosed for filing are the originals of 1) The Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order and 2) The Executive Director's Proposed Order to Supplement the Executive Director's Suggestions to the Honorable Administrative Law Judge's Order.

Enclosed please also find eight copies of this letter to you, eight copies of the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order, eight copies of the Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Proposal for Decision, and eight copies of the letter to the Respondent. Please file stamp one copy of each of these documents and return them to Kari L. Gilbreth, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-1320.

Sincerely,

A handwritten signature in cursive script that reads "Kari L. Gilbreth".

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

Ms. LaDonna Castañuela, Chief Clerk
Re: M.V.K, Inc. dba EZ Express 1
December 10, 2008
Page 2

cc: Mr. Mohammad Ali, Via CM/RRR No. 9171082133393523099914
The Honorable Roy G. Scudday, Via Facsimile and Via Interoffice Mail
Mr. Steven Lopez, Enforcement Division, TCEQ MC 128
Mr. Frank Burlison, Waste Section Manager, TCEQ MC R-9
Mr. Blas Coy, Public Interest Counsel, TCEQ, MC 103

SOAH DOCKET NO. 582-08-3469
TCEQ DOCKET NO. 2004-0694-PST-E

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 DEC 10 PM 3:04
CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

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BEFORE THE

VS.

STATE OFFICE OF

M.V.K, INC. DBA EZ EXPRESS 1
RESPONDENT

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S SUGGESTED MODIFICATIONS
TO THE HONORABLE ADMINISTRATIVE LAW JUDGE'S ORDER**

TO THE HONORABLE JUDGE POMERLEAU:

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director agrees with and supports the adoption of all of the Administrative Law Judge's ("ALJ") Findings of Fact and Conclusions of Law, with suggested Modifications to the Order as outlined below.

1. The Executive Director recommends that the period (".") be removed after the letter "K" in "M.V.K., Inc. dba EZ Express 1" to be commensurate with how the name was filed with the Secretary of State's Office regarding the Articles of Incorporation filed by the Respondent.

The Executive Director recommends that the above change be made as follows:

- a) In the style of the case;
 - b) In the opening paragraph; and
 - c) In Ordering Provision 1 (in three places).
2. The Executive Director recommends modifying Findings of Fact No. 3 to reflect an amended petition that was filed by the Executive Director. Currently, Findings of Fact No. 3 refers to the "Executive Director's Preliminary Report and Petition (EDPRP)". This should be changed to, "Executive Director's First Amended Report and Petition ("EDFARP").

The Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order

SOAH Docket No. 582-08-3469

TCEQ Docket No. 2004-0694-PST-E

Page 2

3. The Executive Director recommends that the term "base penalty" be changed to "recommended payable penalty" for the violations in Findings of Fact No. 5 to accurately reflect the 2002 Penalty Policy's designation of such an amount.
4. The Executive Director recommends that the acronym "EDPRP" be changed to "EDFARP" in Findings of Fact No. 7 and Conclusions of Law No. 4 to indicate that the Executive Director filed a First Amended Report and Petition.
5. The ALJ's Order cites to "30 TEX ADMIN. CODE § 334.50(a)(1)(A)" as one of the alleged violations in Findings of Fact No. 3, Conclusion of Law No. 7, and Ordering Provision No. 1. The Executive Director recommends that the citation be changed to: "30 TEX ADMIN. CODE § 334.50(b)(1)(A)" in order to reflect the correct citation for the release detection violation.
6. The ALJ recommends that second paragraph numbered as "Findings of Fact No. 7", be changed to "Findings of Fact No. 8", and renumber the remaining paragraphs as Nos. 9 through 14.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

By: 
Kari L. Gilbreth
State Bar of Texas No. 24040969
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-1320
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2008, the original and seven (7) copies of the foregoing "Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent mailed via Certified Mail, return receipt requested (Article No. 9171082133393523099914), to:

Mr. Mohammad Ali
M.V.K, Inc. dba EZ Express 1
1701 Hewitt Drive
Waco, Texas 76712

I further certify that on this day a true and correct copy of the foregoing Exceptions was hand-delivered, to Blas Coy, Jr., Office of the Public Interest Counsel, Texas Commission on Environmental Quality - MC 103.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via facsimile to (512) 475-4994 and mailed via interagency mail, to:

The Honorable Roy G. Scudday
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025



Kari L. Gilbreth
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
M.V.K, Inc. dba EZ Express 1
TCEQ DOCKET NO. 2004-0694-PST-E
SOAH DOCKET NO. 582-08-3469**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against M.V.K, Inc., dba EZ Express 1 (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on November 6, 2008, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On January 12, 2004, an Environmental Investigator for TCEQ conducted an investigation of Respondent's convenience store and gas station located at 1701 Hewitt Drive, Waco, McLennan County, Texas. The investigator observed several violations of the TCEQ rules regarding underground storage tanks.

2. On February 11, 2004, Respondent received the TCEQ Notice of Enforcement.
3. On March 24, 2008, the ED issued the Executive Director's First Amended Report and Petition (EDFARP) in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated Code § 26.3475(a),(c)(1) and (d) and 30 TEX. ADMIN. CODE (TAC) §§ 334.8(c)(5)(C), 334.49(c)(4)(C), and 334.50(b)(1)(A), (b)(2)(A)(i)(III) and (b)(2)(A)(ii)(I), specifically for failing to have the pressurized piping tightness tested annually; failing to have the line leak detectors tested annually; failing to monitor for releases at least once per month; failing to have the corrosion protection system(s) inspected and tested once every three years; and failing to number all tanks according to the registration/self-certification form.
4. The ED recommended the imposition of an administrative penalty in the amount of \$8,500.00, and corrective action to bring the site into compliance.
5. The proposed penalty of \$8,500.00 is the recommended payable penalty for the violations.
6. An administrative penalty of \$8,500.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
7. On April 21, 2008, Respondent requested a contested case hearing on the allegations in the EDFARP.
8. On June 9, 2008, the case was referred to SOAH for a hearing.
9. On June 20, 2008, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

10. At the preliminary hearing that was held on July 31, 2008, the ED established jurisdiction to proceed.
11. The hearing on the merits was conducted on November 6, 2008, in Austin, Texas, by ALJ Roy G. Scudday.
12. Respondent was represented at the hearing by Mohammed Ali, one of its owners. The ED was represented by Kari Gilbreth, attorney in TCEQ's Litigation Division.
13. Although Respondent was in violation as alleged at the time of the inspection, it has corrected the violations.
14. Because Respondent is now in compliance, corrective action is no longer necessary.

II. CONCLUSIONS OF LAW

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002.
4. As required by Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations, or the penalties and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 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.

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 Respondent violated Code § 26.3475(a),(c)(1) and (d) and 30 TAC §§ 334.8(c)(5)(C), 334.49(c)(4)(C), and 334.50(b)(1)(A), (b)(2)(A)(i)(III) and (b)(2)(A)(ii)(I).
8. In determining the amount of an administrative penalty, Code § 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.
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, the factors set out in Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$8,500.00 is justified and should be assessed against Respondent.

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. M.V.K, Inc. is assessed an administrative penalty in the amount of \$8,500.00 for violation of 30 TEX. WATER CODE § 26.3475(a),(c)(1) and (d), and TEX. ADMIN. CODE §§ 334.8(c)(5)(C), 334.49(c)(4)(C), and 334.50(b)(1)(A), (b)(2)(A)(i)(III) and (b)(2)(A)(ii)(I). The payment of this administrative penalty and M.V.K, Inc.'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: M.V.K, Inc.; Docket No. 2004-0694-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 (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.

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.
4. 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.
5. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk 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

Buddy Garcia, Chairman
For the Commission

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 10, 2008

Via Interagency Mail, and Via Facsimile Transmission to: (512) 475-4994

The Honorable Roy G. Scudday
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711

Re: The Executive Director's Proposed Modifications to the Honorable Administrative Law Judge's Order and The Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Proposal for Decision;
M.V.K, Inc. dba EZ Express 1
SOAH Docket No. 582-08-3469; TCEQ Docket No. 2004-0694-PST-E; Enf. No. 15793

Dear Judge Scudday:

Please find enclosed a copy of 1) the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order. These pleadings are being filed in response to your Proposal for Decision dated on October 21, 2008. If you have any questions or comments, please call me at (512) 239-1320.

Sincerely,

A handwritten signature in cursive script that reads "Kari L. Gilbreth".

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. Mohammad Ali, Via Certified Mail No. 9171082133393523099914