

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

November 20, 2008

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

CHIEF CLERKS OFFICE

2008 NOV 20 PM 2:21

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: SOAH Docket No. 582-08-3469; 2004-0694-PST-E; TCEQ Docket No. 2004-0694-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. M.V.K., Inc., d/b/a EZ Express I (RN102455375)

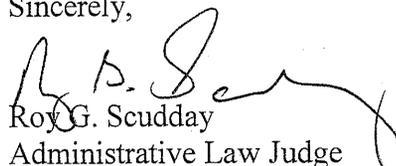
Dear Mr. Trobman:

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 December 11, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than December 22, 2008.

This matter has been designated **TCEQ Docket No. 2004-0694-PST; SOAH Docket No. 582-08-3469**. 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

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: M.V.K. INC. dba EZ EXPRESS 1

SOAH DOCKET NUMBER: 582-08-3469

REFERRING AGENCY CASE: 2004-0694-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CAROL S. BIRCH**

REPRESENTATIVE / ADDRESS

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M.V.K., INC. D/B/A EZ EXPRESS I

xc: Docket Clerk, State Office of Administrative Hearings

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

2008 NOV 20 PM 2: 21

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner

v.

M.V.K., INC., D/B/A/ EZ EXPRESS I
(RN102455375),
Respondent

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BEFORE THE STATE OFFICE

CHIEF CLERKS OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$8,500.00 in administrative penalties against M.K.V., Inc., (Respondent) for violations of TEX. WATER CODE (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(a)(1)(A), (b)(2)(A)(i)(III) and (b)(2)(A)(ii)(I). Simply stated, the ED alleges that Respondent failed to test line leak detectors and product piping at least once per year for performance and operational liability, failed to monitor tanks (release detection) for releases at a frequency of at least once every month; failed to test the cathodic protection system within the past three years for operability and adequacy of protection; and failed to permanently tag, label, or mark the UST system with an identification number that corresponds to Respondent's registration and self-certification form.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$8,500.00.

II. PROCEDURAL HISTORY AND JURISDICTION

The hearing convened on November 6, 2008, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ED was represented by Kari Gilbreth, Attorney, Litigation Division. Mohammed Ali appeared on behalf of Respondent. The record closed on the date of the hearing.

Jurisdiction was proved as found in the order dated August 22, 2008. Undisputed procedural facts are set out in findings in the Proposed Order.

III. DISCUSSION

A. Violations

Respondent owns and operates a convenience store and gasoline station (Facility) located at 1701 Hewitt Drive, Waco, McLennan County, Texas. On January 12, 2004, TCEQ Investigator Jason Neumann conducted an inspection of the Facility and discovered that Respondent had violated rules and statutes within the Commission's jurisdiction as follows:

Respondent failed to have the pressurized piping tested annually for tightness;

Respondent failed to have the line leak detectors tested annually;

Respondent failed to monitor for releases at least once per month;

Respondent failed to have the corrosion protection system(s) inspected and tested once every three years; and

Respondent failed to number all tanks according to the registration/self-certification form.

Under Code § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Code.¹ Additionally, the Commission may order the violator to take corrective action.²

In this case, Respondent is alleged to have 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(a)(1)(A), (b)(2)(A)(i)(III) and (b)(2)(A)(ii)(I), 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.

Respondent does not dispute that it had not performed the required tests, properly documented its release monitoring, or properly numbered its tanks prior to the inspection, but points out that it has subsequently come into compliance in regard to all the violations after they were brought to its attention.

B. Penalties

The total administrative penalty sought for the two violations is \$8,500.00. The penalty amount for the first violation comprises a penalty of \$2,500 for each violation event, one for each of two times in a one-year period that Respondent was in violation, for a total of \$5,000. The penalty amount for the second violation comprises a penalty of \$2,500. The penalty amount for the third violation comprises a penalty of \$1,000. The proposed penalty was assessed under terms of the

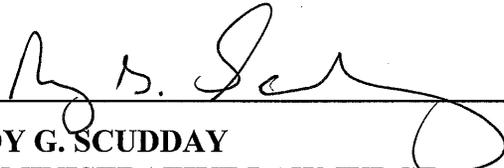
¹ Code § 7.052(c).

² Code § 7.073.

Commission's 2002 Penalty Policy.³ Because Respondent has shown subsequent compliance, corrective action originally asked for is no longer being sought by the ED. Respondent did not dispute the overall accuracy of the ED's calculation of the penalty, but argued that some consideration should be given to the fact that it came into compliance once the violations were brought to its attention, as well as to Respondent's ability to pay such a substantial penalty. However, Respondent did not offer any evidence on its ability to pay the proposed penalty.

Based on the above analysis, the ALJ concludes that a penalty of \$8,500.00 is consistent with the factors in TEX. WATER CODE ANN. § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.⁴ The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

SIGNED November 20, 2008.



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

³ ED Ex.13, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

⁴ Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

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 Preliminary Report and Petition (EDPRP) 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(a)(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 base 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 EDPRP.
7. On June 9, 2008, the case was referred to SOAH for a hearing.
8. 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.

- 9 At the preliminary hearing that was held on July 31, 2008, the ED established jurisdiction to proceed.
10. The hearing on the merits was conducted on November 6, 2008, in Austin, Texas, by ALJ Roy G. Scudday.
11. 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.
12. Although Respondent was in violation as alleged at the time of the inspection, it has corrected the violations.
13. 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 EDPRP 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(a)(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. MVK, 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(a)(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