SOAH DOCKET NO. 582-05-8335
TCEQ DOCKET NO. 2004-1315-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	BEFORE THE
v.	§	TEXAS COMMISSION ON
MANUEL MANRIQUEZ DBA M&A OIL CO., Respondent	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S EXCEPTIONS AND PROPOSED MODIFICATIONS TO PROPOSAL FOR DECISION

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 Proposal for Decision, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

Manuel Manriquez dba M&A Oil Co. owns and operates a convenience store in Presidio, Texas (the "Mr. Manriquez" or the "Facility"). Three (3) underground petroleum storage tanks are located at the Facility; however, the tanks have not been used since 1992. Based on the evidence gathered by TCEQ investigators, the Executive Director brought an enforcement action against Mr. Manriquez, seeking administrative penalties and corrective actions. During the enforcement process, Mr. Manriquez applied for, and received, a financial inability to pay reduction of $2,400 in the $6,000 assessed penalty. Based on the financial documentation provided by Mr. Manriquez, the TCEQ Financial Administration Division recommended that Mr. Manriquez be required to pay the minimum allowable penalty of $3,600, or $100 per month for 36 months.

The State Office of Administrative hearings conducted an evidentiary hearing on January 5, 2006. At that hearing, the parties stipulated to a number of facts, including the occurrence of each of the violations alleged in the Executive Director's Preliminary Report and Petition ("EDPRP") and that all but one of the corrective actions recommended in the EDPRP is justified. Due to the parties' stipulations, only one contested issue remained in the case: whether the Respondent has the ability to pay the $3,600 penalty, and if so, over what amount of time he will be required to pay.

II. Exceptions

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJs") findings and conclusions. The ALJ determined that Mr. and Mrs. Manriquez's sources of income consist of social security benefits of $854 per month and salaries drawn from the store of $400 per month and that the Manriquez's IRS tax forms report losses in 2003 and 2004 of $6,953 and $6,630, respectively. The ALJ also determined that TCEQ financial analyst Donna Chaffin, through her evaluation of Mr. Manriquez's financial ability, concluded that Mr. Manriquez could not afford the $6,000 assessed penalty, and that she looked to TCEQ policy that establishes a minimum penalty for an operating business of $3,600.

The Executive Director also agrees with and supports the ALJ's recommendation that Mr. Manriquez carry out the required corrective action.

The Recommended Administrative Penalty

The Executive Director disagrees with the ALJ's recommendation that no administrative penalty be assessed against Mr. Manriquez. The Executive Director further disagrees with the ALJ's alternative recommendation that Mr. Manriquez's business be considered non-operating, and thus qualify for a lower penalty of $1,200.

The Executive Director properly applied the TCEQ's financial inability to pay policy in effect at the time that Mr. Manriquez applied for financial inability review.[1] That policy, incorporated into the Enforcement Division's Standard Operating Procedures, provides that for operating businesses, the minimum allowable payable penalty is $3,600, with an option of paying $100 installments over a 36-month period. In this case, the TCEQ financial analyst properly followed the directive of the agency's policy, and recommended that Mr. Manriquez not be required to pay the full $6,000 assessed penalty but rather be required to pay a $3,600 penalty over time. Thus, Mr. Manriquez qualified for a substantial $2,400 reduction in his penalty.

In addition, Mr. Manriquez's store is not a non-operating business. Although "non-operating business" is not formally defined in agency policy, the TCEQ Financial Administration Division views as "operating", any business that receives revenue from engaging in the retail sales of goods. Because the record in this case shows that Mr. Manriquez sold goods at the Facility, his business should not be considered "non-operating", and thus it was proper to disqualify Mr. Manriquez from receiving the lower penalty amount of $1,200.

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1 The TCEQ financial review policy was adopted during the TCEQ's extensive Enforcement Process Review, the purpose of which was to "ensure that the agency is enforcing its environmental laws fairly, effectively, and swiftly." *See* Enforcement Process Review Final Report, page 1.

III. Other Suggested Modifications

The Executive Director suggests the following changes be made to the ALJ's Proposed Order:

1. Add a citation to 30 TEX. ADMIN. CODE § 1.12 to Conclusion of Law No. 3.

2. Modify the address information in Ordering Paragraph No. 4 to read:

   Order Compliance Team
   Enforcement Division, MC 149A
   Texas Commission on Environmental Quality
   P.O. Box 13087
   Austin, Texas 78711-3088

   And. . .

IV. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

Respectfully Submitted,

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue, Acting Deputy Director
Office of Legal Services

Mary R. Risner, Acting Director
Litigation Division

By: Justin Lannen

Justin Lannen
State Bar of Texas No. 24043770
Litigation Division, MC R-4
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(817) 588-5927
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CERTIFICATE OF DELIVERY

I hereby certify on this 10th day of April, 2006, the original and 12 copies of the foregoing "Executive Director's Exceptions and Proposed Modification to the Proposal for Decision" ("Exceptions") were filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that a copy of the Exceptions were sent via facsimile to ALJ Shannon Kilgore with the State Office of Administrative Hearings at (512) 475-4994.

I further certify that on this day, a true and correct copy of the foregoing Exceptions were sent via facsimile to Rex. H. White, Jr., Attorney for Manuel Manriquez dba M&A Oil Co., (512) 472-8801. A copy was mailed via first class mail to Rex. H. White, Jr., 812 W. 11th St, Ste 203, Austin, Texas 78701.

I further certify that on this day a true and correct copy of the foregoing Exceptions were hand delivered to Blas Coy, Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.

Justin Lannen

Justin Lannen
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Requiring Certain Actions of
Manuel Manriquez dba M&A Oil Co.
SOAH DOCKET NO. 582-05-8335
TCEQ DOCKET NO. 2004-1315-PST-E

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring certain corrective actions of Manuel Manriquez dba M&A Oil Co.(Respondent). Shannon Kilgore, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on January 5, 2006, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, represented by Rex H. White, Jr., and the Commission's Executive Director (ED), represented by Justin Lannen, an attorney in TCEQ's Litigation Division.

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. At the time of the alleged violations, Respondent owned and operated a convenience store located at East Highway 170, Presidio, Presidio County, Texas, with retail sales of gasoline.

2. Respondent continues to operate the convenience store but no longer sells gasoline.

3. Three underground storage tanks (USTs) at Respondent's store have not been used since 1992.

4. The USTs are not exempt of excluded from regulation under the Texas Water Code or the Commission's rules.

5. As documented in a TCEQ investigation on July 8, 2004, Respondent had not permanently removed from service, within 60 days of the prescribed upgrade implementation date, an existing UST system for which any applicable component of the system was not brought into timely compliance with the minimum technical upgrade requirements in 30 TEX. ADMIN. CODE § 334.47(b). Specifically, the UST system had not been upgraded with proper corrosion protection, spill and overfill prevention, or release detection, and the system had not been permanently removed from service.

6. As documented in a TCEQ investigation on July 8, 2004, Respondent had not ensured that any residue from stored regulated substances, which remained in the temporarily out of service UST system, did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity.

7. As documented in a TCEQ investigation on July 8, 2004, Respondent had not provided written notice to the TCEQ within 30 days of any changes or additional information

concerning the UST system. Specifically, Respondent did not update the UST's registration to reflect the current out-of-service status of the UST system.

8. As documented during a record review investigation by a central TCEQ investigator on August 20, 2004, Respondent had not paid outstanding annual UST fees, including late penalties and interest. The fees total approximately $800.

9. The corrective action recommended by the ED in the Executive Director's Preliminary Report and Petition – including Respondent's submitting an amended registration for the UST system, paying all outstanding fees and associated late penalties and interest, permanently removing the UST system in accordance with the applicable rules, and submitting written certification of compliance – is justified except that the UST system need not be emptied of all regulated substances because this was already done on January 21, 2005.

10. The violations involved in the current enforcement action were documented after the conclusion of Respondent's Chapter 13 bankruptcy proceeding in March 2002.

11. On December 20, 2004, the ED issued the Executive Director's Preliminary Report and Petition, setting out Respondent's alleged violations and seeking an order assessing an administrative penalty of $6,000 and requiring corrective action.

12. On January 21, 2005, Respondent requested a contested case hearing regarding this enforcement action.

13. Respondent also sought staff review of his ability to pay the recommended penalty.

14. On May 31, 2005, and further on August 1, 2005, Respondent provided financial records and other information for review by the ED's staff. Respondent supplemented his information on October 3, 2005, by sending the TCEQ some materials about his indebtedness.

15. Donna Chaffin, a financial analyst with the TCEQ, evaluated Respondent's ability to pay the $6,000 penalty calculated by the ED. Ms. Chaffin determined that Respondent could not pay more than $3,600. She did not assess whether Respondent could pay a lesser amount.

16. On September 19, 2005, the Commission's Chief Clerk issued notice of the 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.

17. The preliminary hearing in this case was convened on October 20, 2005, by ALJ Suzanne Marshall at the offices of the State Office of Administrative Hearings, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. The ED was represented by TCEQ Litigation Division Attorney Justin Lannen. Respondent was represented by attorney Rex White.

18. The hearing on the merits was convened on January 5, 2006, by ALJ Shannon Kilgore. The record closed on January 30, 2006.

19. Internal Revenue Service (IRS) tax forms report a loss of $6,953 on Respondent's convenience store business at the facility for 2003.

20. IRS tax forms report a loss of $6,630 on the convenience store business at the facility for 2004.

21. Respondent reported on the TCEQ Financial Data Request Form that he receives $580 per month from social security.

22. Mrs. Manriquez reported on the TCEQ Financial Data Request Form that she receives $274 per month from social security.

23. Mr. and Mrs. Manriquez reported on the TCEQ Financial Data Request Form that they paid themselves a salary of $200 per person per month from the convenience store at the facility.

24. Social security benefits and salaries related to the convenience store are the Manriquez's only sources of income.

25. Respondent and his wife are both approximately 70 years old.

26. Respondent suffers from multiple serious health problems: he has had a heart attack and a stroke, and in June 2005 underwent emergency back surgery for spinal cord compression.

27. Respondent and his wife receive public assistance, including Medicaid benefits.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority. TEX. WATER CODE ANN. §§ 5.013 and 7.002.

2. Respondent was properly notified of his alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties. TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

3. Respondent was properly notified of the hearing on the alleged violations and the proposed penalties. TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 39.25 and 80.6 and 1.12.

4. 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. TEX. GOV'T CODE ANN. ch. 2003.

5. Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by not permanently removing from service, within 60 days of the prescribed upgrade implementation date, an existing UST system for which any applicable component of the system was not brought into timely compliance with the minimum technical upgrade requirements in 30 TEX. ADMIN. CODE § 334.47(b). Specifically, the UST system has not been upgraded with proper corrosion protection, spill and overfill prevention, or release detection, and the system has not been permanently removed from service.

6. Respondent violated 30 TEX. ADMIN. CODE § 334.54(d)(2) by not ensuring that any residue from stored regulated substances, which remained in the temporarily out of service UST system, did not exceed a depth of 2.5 centimeters at the deepest point and did not exceed 0.3% by weight of the system at full capacity.

7. Respondent violated 30 TEX. ADMIN. CODE § 334.7(d)(3) and TEX. WATER CODE § 26.346 by not providing written notice to the TCEQ within 30 days of any changes or additional information concerning the UST system. Specifically, Respondent did not update the UST's registration to reflect the current out-of-service status of the UST system.

8. Respondent violated 30 TEX. ADMIN. CODE § 334.22(a) and TEX. WATER CODE § 5.702 by not paying outstanding annual UST fees, including late penalties and interest.

9. Based on the above Findings of Fact and Conclusions of Law, an administrative penalty in the amount of three thousand six hundred dollars ($3,600) payable in one hundred dollar

($100) increments per month for thirty six (36) months should be assessed against Respondent. TEX. WATER CODE § 7.053 and 30 TEX. ADMIN. CODE § 70.8.

10. Based on the above Findings of Facts and Conclusions of Law, ordering Respondent to carry out the corrective actions specified below is a reasonable exercise of the Commission's authority. TEX. WATER CODE § 7.073.

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. Manuel Manriquez is assessed an administrative penalty in the amount of three thousand six hundred dollars ($3,600) as set forth in Conclusion of Law No. 9 for violations of TCEQ rules and state statutes. The imposition of this administrative penalty and Manuel Manriquez's compliance with all the terms and conditions set forth in this Order 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. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: Manuel Manriquez dba M & A Oil Co.; Docket No. 2004-1315-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 30 days after the effective date of the Commission Order, Mr. Manriquez shall submit amended registration to indicate the current operational status of the UST system in accordance with 30 TEX. ADMIN. CODE § 334.7 (relating to registration) to:

Registration & Reporting Section
Registration, Review, & Reporting Division, MC 138
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087.

3. Within 45 days after the effective date of the Commission Order, Mr. Manriquez shall pay all outstanding fees, including any associated penalties and interest and with the notation "Manuel Manriquez dba M&A Oil Co., Account No. 0007752U" 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

4. Within 60 days after the effective date of the Commission Order, Mr. Manriquez shall permanently remove the UST system from service in accordance with the applicable provisions of 30 TEX. ADMIN. CODE § 334.55 (relating to Permanent Removal from Service); and

5. Within 75 days after the effective date of the Commission Order, Mr. Manriquez shall submit written certification of compliance with the above ordering provisions (paragraphs 1 through 3) to:

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

and

Mr. Terry McMillan, Waste and Water Section Manager
Texas Commission on Environmental Quality
El Paso Regional Office
401 East Franklin Avenue, Suite 560
El Paso, Texas 79901-1206.

6. The ED 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 ED determines Respondent has not complied with one or more of the terms or conditions of this Order.

7. The Chief Clerk shall provide a copy of this Order to all of the parties.

8. The effective date of this Order is the date the order is final, as provided by TEX. GOV'T. CODE ANN § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.

9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

10. 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Kathleen Hartnett White, Chairman
For the Commission