

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

October 16, 2007

CHIEF CLERKS OFFICE

2007 OCT 16 PM 4:15

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Re: SOAH Docket No. 582-06-2152; TCEQ Docket No.2005-1300-PST-E; In Re:
Assessing Administrative Penalties against SNW Enterprises, inc., d/b/a Super
Stop 12 and Super Stop 13

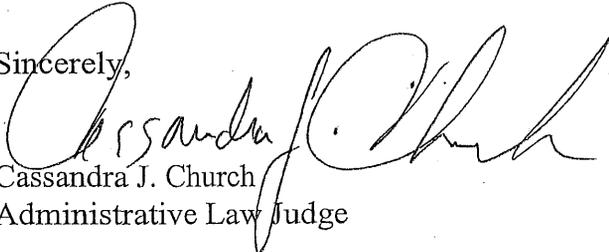
Dear Ms. Baker:

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 November 5, 2007. Any replies to exceptions or briefs must be filed in the same manner no later than November 15, 2007.

This matter has been designated **TCEQ Docket No. 2005-1300-PST-E; SOAH Docket No. 582-06-2152**. 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,


Cassandra J. Church
Administrative Law Judge

CC/ds
Enclosures
cc: Mailing List

William P. Clements Building
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: SNW ENTERPRISES INC / SUPER STOP 12 AND SUPER STOP 13
SOAH DOCKET NUMBER: 582-06-2152
REFERRING AGENCY CASE: 2005-1300-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CASSANDRA CHURCH**

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 INTEREST COUNSEL

JENNIFER FLECK
TED A. COX, P.C.
4910 DACOMA, STE. 100
HOUSTON, TX 77092
(713) 956-9400 (PH)
(713) 956-8485 (FAX)

RESPONDENT

ROBERT R. MOSLEY
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LEGAL DIVISION
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-3400 (PH)
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-06-2152
TCEQ DOCKET NO. 2005-1300-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS §
COMMISSION ON ENVIRONMENTAL §
QUALITY, §
Petitioner §
v. §
SNW ENTERPRISES, INC., dba §
SUPER STOP 12 AND SUPER STOP 13, §
Respondent §

BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2007 OCT 16 PM 4:15

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess an administrative penalty of \$44,880.00 against SNW Enterprises, Inc., dba Super Stop 12 and Super Stop 13 (Respondent), for violating several provisions of the Texas Water and Health and Safety Codes and the Commission's rules governing the operation of underground petroleum storage tanks (USTs). Respondent operated USTs at convenience stores in Nederland and Port Neches, Texas. The sole contested issue was whether the Respondent qualifies for a reduced penalty amount based on its ability to pay despite an ED policy prohibiting reductions to respondents represented by attorneys. As Respondent no longer owns the convenience stores and both are closed, the ED withdrew his request for corrective action.

The Administrative Law Judge (ALJ) concluded that, in a contested case, the Commission may consider a respondent's request for reduction of the penalty amount based on ability to pay, notwithstanding the ED's policy against administrative reviews of such requests. The ALJ further concluded that the facts in this case supported a reduction in the proposed penalty amount.

II. PROCEDURAL HISTORY

The hearing on this case was conducted on August 13, 2007, and the record closed on August 17, 2007. Robert R. Mosley, Staff Attorney, represented the ED. Attorney Jennifer Fleck

represented Respondent. The parties agreed on facts concerning Respondent's operations and the violations. Undisputed matters concerning notice, jurisdiction, and the violations are set out in the Proposed Order.

III. SUMMARY OF VIOLATIONS

Generally, the violations were similar for each of the two stores. They consisted of failures to properly reconcile inventory records to check for possible releases, to properly test pumping equipment and the USTs, to properly educate store employees concerning the Stage II Vapor Recovery System, to promptly investigate and confirm all suspected releases, and provide all required records to investigators. TCEQ staff members investigated the two stores in May 2005. Both stores were closed by December 2005.

IV. DISCUSSION

A. Parties' Contentions

The dispute in this case centered on whether, as a matter of policy, the ED can decline to consider a reduction based on a respondent's inability to pay an administrative penalty when the respondent is represented by an attorney. The ED contended that the ED's internal policy against a reduction under those circumstances also should be followed in a contested case. The ED stated that this policy had been in place for about two to three years and had been consistently applied.

Respondent contended that the ED's policy against reductions for represented respondents did not conform to the language in the Commission's written policy. Respondent further contended that, even if the policy were appropriate, the agency did not properly notify regulated persons that securing an attorney would exclude them from consideration for a penalty

reduction. In other words, the ED breached a duty to inform respondents facing a potential penalty assessment in advance of the dangers and disadvantages of securing counsel.

The parties agreed that Respondent otherwise qualified for a substantial penalty reduction based on inability to pay. The analysis showed that Respondent was capable of paying \$26,661.00 of the proposed administrative penalty, or somewhat over half.

B. Applicable Law and Policies

The Commission's rule regarding inability to pay puts the burden of proof on a respondent to demonstrate that a lesser penalty than the one proposed is warranted and sets deadlines for production of the required records.¹ It does not discuss representation by an attorney. Rule 70.8 states as follows:

(a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

(b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

To conduct inability-to-pay reviews, the ED has adopted two internal administrative policies. One is a set of guidelines adopted in August 2005 by the Commission's Office of

¹ 30 TEX. ADMIN. CODE § 70.8 (eff. July 7, 1999) (Rule 70.8).

Administrative Services (OAS).² The second is a segment of the Enforcement Division's standard operating procedures.³ Taken together, the two establish the ED's policy of declining to review any claim for adjustment of a proposed penalty based on inability to pay if the respondent has secured an attorney (representation policy). There was no evidence showing the Commission had adopted or approved either document. The components of the representation policy are set forth in more detail below.

The OAS guidelines list the factors that the Financial Administrative Division is to apply and also sets procedures for when the division is to undertake a review. The Litigation Division must authorize the financial division to conduct a review. The section on applicability reads as follows:

This policy applies when the Financial Administration Division is asked to conduct a financial analysis for a business to determine its ability to pay an administrative penalty. This policy applies to sole proprietors, limited and general partnerships, limited liability companies, and corporations.

If a request for financial review is received and it is determined that the respondent is represented by an attorney, Financial Administration will request confirmation from the Director of the Litigation Division that a financial review should be conducted. If confirmation to conduct the review is not received, Financial Administration will return the financial packet to the requestor with a memo stating that the case is ineligible for financial review. Financial Administration will log the request, return date, and reason into tracking databases for financial review assignments.

Under the section titled "Inability to Pay," the Enforcement Division's standard operating procedures state as follows:

² Resp. Exh. 1, *Financial Review Policy for Administrative Penalty Inability to Pay Claims*, August 19, 2005. The applicable section is titled "Financial Review for Businesses."

³ ED Exh. 5, *Enforcement Standard Operating Procedures*, pp. 51-53, revised May 25, 2007.

If a respondent receiving an order with penalties *does not have an attorney representing them*, they have the right to present evidence in an effort to prove that they are unable to pay all or part of the penalty. If the respondent is represented by an attorney, the EC [Enforcement Coordinator] shall not discuss the option to present evidence in support of a hardship claim. If an attorney is insistent that they be allowed to claim an inability to pay, then settlement negotiations must be terminated and the case referred for litigation. (Emphasis in original).

The evidence was inconclusive as to whether these policy documents appear on the Commission's website and, if they are posted there, are readily accessible to inquiring members of the public. Neither paper copy of the policy documents introduced into evidence appeared to be a reprint of a posted web page.

In presenting this case, the Litigation Division contended that Respondent's motion to compel a financial analysis was not timely as the ED only reviews a respondent's ability to pay before the referral of the case to the State Office of Administrative Hearings (SOAH).⁴ This case was referred for contested case hearing on May 1, 2006.⁵

C. Facts in This Case

Respondent engaged an attorney, Ms. Fleck, to represent him after the ED issued his Notice of Violation on July 19, 2005.⁶ The precise date that Respondent secured representation is not in the record. However, it was undisputed that Ms. Fleck represented Respondent during at least part of the administrative review of the case, before it was referred to SOAH. Respondent compiled and

⁴ Response Opposing Respondent's Motion for Continuance and Leave of Court, September 6, 2006.

⁵ Official notice of contents of SOAH's case file, Request to Docket Case, May 1, 2006.

⁶ ED Exh. 1. Although the NOV date listed in the EDFARP is July 19, 2006, the ALJ concluded the correct date would be July 19, 2005, which was two months after the field investigation.

submitted financial information before referral, although it appeared the information was not reviewed at that time.

Firdous Hamani, a business representative speaking on behalf of Respondent, stated that the Respondent's staff had spent many hours accumulating the records submitted to the ED during the administrative review of the case. He also said that he could not recall being told about the ED's representation policy during that review. Ms. Fleck asserted that she first learned of the representation policy a few weeks before the contested case hearing in August 2007.

During the course of the hearing, on Respondent's motion, the ALJ ordered the ED to perform the financial analysis in order to determine whether Respondent's factual case had merit.⁷ In issuing that order, the ALJ ruled that Rule 70.8 did not bar consideration of a respondent's inability to pay if the respondent first raised this issue in the contested case hearing. The ED did not raise the issue of the representation policy in his response to Respondent's motion.

To support the application of the representation policy, the ED presented testimony by Richard Dana Clarke, manager of the Air Enforcement Section. Mr. Clarke stated that the representation policy had been in place between two and three years and had been consistently applied during that time. Mr. Clarke did not state the reason for implementing this policy. He also stated that, in his view, it covered all phases of a disputed enforcement claim, including the contested case hearing.

D. Discussion

The ALJ concluded that the representation policy at the administrative level does not bar the Commission from considering the inability to pay issue when raised in a contested case.

⁷ Order No. 2, Resetting Hearing and Granting Leave to File Financial Documents, September 11, 2006.

First, Rule 70.8 expressly states that the issue may be raised in a contested enforcement case. Essentially, it allows a respondent to raise what amounts to an affirmative defense against the proposed administrative penalty. Secondly, the rule sets out procedural elements, *i.e.*, assignment of the burden of proof and discovery, which reinforce the idea that inability to pay is an issue contemplated for consideration in a contested case proceeding. Thus, applying the ED's policy in the context of a contested case hearing would vitiate Rule 70.8.

An additional difficulty in extending the representation policy to the contested case process is the fact that neither component of the policy specifically states that it applies to a contested case. The Enforcement Division's operating procedures state that an inability-to-pay claim in which the attorney is insistent shall immediately be referred for litigation. However, it does not address what may happen in litigation.⁸ The OSA policy merely states that the Financial Division will not conduct a review without confirmation from the Director of the Litigation Division.⁹ Neither policy appears to set out guidelines for the issuance of a confirmation for review.

There is also no support in the Commission's Penalty Policy, statutes, or rules for the practice. Nor do any of these give the ED the independent authority to adopt binding policies. In short, the ALJ concluded there is no direct policy support for the ED's position that consideration of this issue is barred in a contested case if properly raised there.

As the ALJ concluded that application of Rule 70.8 resolves this issue in favor of considering Respondent's claim in the contested case hearing, further discussion of the ED's representation policy, including the issue of sufficient public notice of this policy, need not be addressed here.

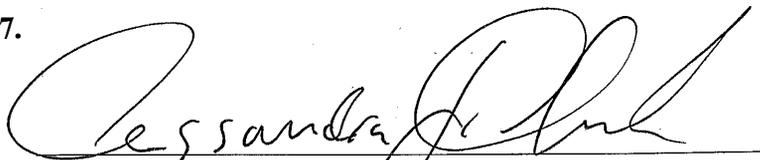
⁸ Resp. Exh. 5, p. 1.

⁹ ED Exh. 1, p. 1.

V. SUMMARY

In sum, the ALJ concluded that Rule 70.8 permits a person whose business activity is subject to regulation by the Commission to raise the issue of inability to pay the proposed administrative penalty in a contested case hearing. As the analysis of Respondent's ability to pay showed that Respondent has the ability to pay only a part of the proposed penalty, the ALJ recommends that the penalty amount be reduced to \$26,661.00 in conformity with that determination. The ALJ further recommends that the Commission find that Respondent committed all the violations alleged, in accordance with the stipulations entered by the parties.

SIGNED October 16, 2007.

A handwritten signature in black ink, appearing to read "Cassandra J. Church", written over a horizontal line.

**CASSANDRA J. CHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

**Assessing Administrative Penalties Against
SNW Enterprises, Inc.,
dba Super Stop 12 and Super Stop 13
TCEQ Docket No. 2005-1300-PST-E
SOAH Docket No. 582-06-2152**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Preliminary Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties of \$44,880.00 against SNW Enterprises, Inc. (Respondent), dba Super Stop 12 and Super Stop 13, for violations arising from operation of underground petroleum storage tanks (USTs) at convenience stores in Nederland and Port Neches, Texas. A Proposal for Decision (PFD) was presented by Cassandra J. Church, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDFARP on August 13, 2007, in Austin, Texas.

The Executive Director (ED), represented by Staff Attorney Robert M. Mosley, and Respondent, represented by Attorney Jennifer Fleck, appeared at the hearing. The record closed August 17, 2007, after submission of an additional exhibit.

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

I. FINDINGS OF FACT

1. SNW Enterprises, Inc. (Respondent), operated convenience stores with retail sales of gasoline located at 2223 Nederland Avenue, Nederland, Jefferson County, Texas (Station 12) and 1202 Magnolia Avenue, Port Neches, Jefferson County, Texas (Station 13).
2. In May 2005, Respondent's USTs at Stations 12 and 13 contained a regulated petroleum substance as defined by the rules of the Texas Commission on Environmental Quality (Commission).
3. The USTs at Stations 12 and 13 are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
4. On May 3 and 4, 2005, a Commission investigator inspected Stations 12 and 13 to determine whether Respondent was complying with statutes within the Commission's jurisdiction and rules adopted thereunder.
5. On May 3, 2005, Respondent failed to maintain a copy of the applicable California Air Resources Board (CARB) Executive Order for the Stage II Vapor Recovery System and failed to maintain a record of the results of Stage II Vapor Recovery System testing and results of daily inspections conducted at Station 12 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.246(1), (5), and (6).
6. On May 3, 2005, Respondent failed to verify proper operation of the Stage II equipment at least once every 12 months at Station 12 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.245(2).

7. On May 3, 2005, Respondent failed to ensure that each current employee was made aware of the purpose and correct operation of the Stage II equipment at Station 12 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.248(1).
8. On May 3, 2005, Respondent failed to maintain the Stage II Vapor Recovery System in proper operating condition, including but not limited to the absence or disconnection of any component that is a part of the approved system and the pressure/vacuum relief valves, vapor check valves, or Stage I dry breaks that were inoperative or defective at Station 12 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.242(3)(A) and (J).
9. On May 3, 2005, Respondent failed to demonstrate acceptable 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 USTs at Station 12 in violation of 30 TEX. ADMIN. CODE § 37.815(a) and (b).
10. On May 3, 2005, Respondent failed to ensure that Station 12 had a release-detection method capable of detecting a release from any portion of the UST system which contained regulated substances, including the tanks, piping, and other ancillary equipment; failed to conduct proper release detection for the piping associated with the UST system; failed to test the line leak detector on an annual basis for performance and operational reliability; and failed to conduct monthly reconciliation of inventory control records in a manner sufficiently accurate to detect a release which equalled or exceeded the sum of one percent

- of flow-through plus 130 gallons in violation of TEX. WATER CODE § 26.3475(a) and (c)(1) and 30 TEX. ADMIN. CODE § 334.50(a)(1)(A), (b)(2), (b)(2)(A)(i)(III), and (d)(1)(B)(ii).
11. On May 3, 2005, Respondent failed to ensure that the self-certification form for Station 12 was fully and accurately completed and submitted to the Commission in a timely manner in violation of 30 TEX. ADMIN. CODE § 334.8(c)(4)(B).
 12. On May 3, 2005, Respondent failed to have all emergency shutoff valves securely anchored at the base of each aboveground dispensing unit at Station 12 in violation of 30 TEX. ADMIN. CODE § 334.45(c)(3)(A).
 13. On May 3, 2005, Respondent failed to notify the Commission regarding any Statistical Inventory Reports (SIRs) that were noted as inconclusive, or of a suspected release at Station 12, in violation of 30 TEX. ADMIN. CODE §§ 334.50(d)(9)(A)(v) and 334.72.
 14. On May 3, 2005, Respondent failed to immediately investigate and to confirm within 30 days all suspected releases of regulated substances at an UST at Station 12 in violation of 30 TEX. ADMIN. CODE § 334.74.
 15. On May 4, 2005, Respondent failed to maintain a copy of the applicable CARB Executive Order for the Stage II Vapor Recovery System, failed to maintain proof of attendance and completion of Stage II training records, and failed to record the results of Stage II Vapor Recovery System testing at Station 13 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.246(1), (4), and (5).
 16. On May 4, 2005, Respondent failed to verify proper operation of the Stage II equipment at least once every 12 months at Station 13 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.245(2).

17. On May 4, 2005, Respondent failed to ensure that each current employee at Station 13 was made aware of the purpose and correct operation of the Stage II equipment in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.248(1).
18. On May 4, 2005, Respondent failed to maintain the Stage II Vapor Recovery System in proper operating condition, including but not limited to the absence or disconnection of any component that was a part of the approved system at Station 13 in violation of TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.242(3)(A).
19. On May 4, 2005, Respondent failed to present for inspection by Commission personnel all required records at Station 13 pertaining to an UST system in violation of 30 TEX. ADMIN. CODE § 334.10(b).
20. On May 4, 2005, Respondent failed to ensure that Station 13 had a release-detection method capable of detecting a release from any portion of the UST system which contained regulated substances, including the tanks, piping, and other ancillary equipment; failed to conduct proper release detection for the piping associated with the UST system; failed to test the line leak detector on an annual basis for performance and operational reliability; and failed to conduct monthly reconciliation of inventory control records in a manner sufficiently accurate to detect a release which equalled or exceeded the sum of one percent of flow-through plus 130 gallons in violation of TEX. WATER CODE § 26.3475(a) and (c)(1) and 30 TEX. ADMIN. CODE § 334.50(a)(1)(A), (b)(2), (b)(2)(A)(i)(III), and (d)(1)(B)(ii).
21. On May 4, 2005, Respondent failed to ensure that a fully and accurately completed self-certification form was submitted to the Commission and failed to ensure that a valid, current delivery certificate was posted at Station 13 and was visible at all times in violation of

TEX. WATER CODE § 26.3475(c)(1) and 30 TEX. ADMIN. CODE § 334.8(c)(4)(B) and (c)(5)(A)(iii).

22. On May 4, 2005, Respondent failed to notify the Commission regarding any SIRs that were noted as inconclusive, or of a suspected release at Station 13, in violation of 30 TEX. ADMIN. CODE §§ 334.72 and 334.50(d)(9)(A)(v).
23. On May 4, 2005, Respondent failed to immediately investigate and confirm within 30 days all suspected releases of regulated substances at an UST at Station 12 in violation of 30 TEX. ADMIN. CODE § 334.74.
24. On May 4, 2005, Respondent failed to conduct a tank tightness test on an UST at Station 13 and to internally inspect and assess the tank prior to placing the tank back into operation to assure that the tank was sound and free of corrosion holes in violation of 30 TEX. ADMIN. CODE § 334.52(b)(5).
25. Station 12 ceased operation in September 2005.
26. Station 13 ceased operation in December 2005.
27. The ED withdrew the request in the EDFARP for corrective action by Respondent.
28. For violations found at both Stations 12 and 13, the ED sought a total penalty of \$44,880.00.
28. The proposed penalty for violations at Station 12 comprised the following :
 - (a) a penalty of \$1,300.00 for violations in regard to the Stage II Vapor Recovery System;
 - (b) a penalty of \$6,500.00 for two events of failure to test the Stage II Vapor Recovery System equipment annually;
 - (c) a penalty of \$1,300.00 for failure to properly train employees;

- (d) a penalty of \$1,300.00 for failure to properly maintain the Stage II Vapor Recovery System;
- (e) a penalty of \$3,900.00 for failure to demonstrate proper financial assurance;
- (f) a penalty of \$3,250.00 for failure to have in place a release-detection method;
- (g) a penalty of \$130.00 for failure to complete and submit a self-certification form;
- (h) a penalty of \$650.00 for failure to have all emergency shutoff valves properly anchored;
- (i) a penalty of \$1,300.00 for failure to properly notify the Commission regarding certain SIR reports of concern; and
- (j) a penalty of \$3,250.00 for failure to promptly investigate and confirm suspected releases from the USTs.

29. The proposed penalty for violations at Station 13 comprised the following :

- (a) a penalty of \$1,250.00 for violations in regard to record keeping for the Stage II Vapor Recovery System;
- (b) a penalty of \$6,250.00 for two events of failure to test the Stage II Vapor Recovery System equipment annually;
- (c) a penalty of \$1,250.00 for failure to properly train employees;
- (d) a penalty of \$1,250.00 for failure to properly maintain the Stage II Vapor Recovery System;
- (e) a penalty of \$1,250.00 for failure to provide all required records;
- (f) a penalty of \$3,125.00 for failure to have in place a release-detection method;
- (g) a penalty of \$125.00 for failure to complete and submit a self-certification form;

- (h) a penalty of \$1,250.00 for failure to properly notify the Commission regarding certain SIR reports of concern;
 - (i) a penalty of \$3,125.00 for failure to promptly investigate and confirm suspected releases from the USTs; and
 - (j) a penalty of \$3,125.00 for failure to contact a tank tightness test and to internally inspect and assess an UST before putting the tank back into service.
30. The proposed base penalty of \$17,600.00 for Station 12 was increased by \$5,280.00 on the basis of one Notice of Violation (NOV) and one findings order issued to Respondent for a total penalty of \$22,880.00.
31. The proposed base penalty of \$17,600 for Station 13 was increased by \$4,400.00 on the basis of one findings order issued to Respondent for a total penalty of \$22,000.00.
32. Pursuant to Order No. 2 issued on September 11, 2006, by the presiding ALJ, the TCEQ Financial Administration Division performed a financial review to determine Respondent's ability to pay the proposed administrative penalty.
33. Respondent is able to pay \$26,661.00 of the proposed administrative penalty.
34. On February 21, 2006, the ED mailed a copy of the EDFARP to Respondent .
35. On March 14, 2006, Respondent requested a contested case hearing .
36. On May 1, 2006, the ED referred the case to SOAH for hearing.
37. On May 3, 2006, the Chief Clerk of the Commission mailed notice of the scheduled preliminary hearing to Respondent.
38. 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 ED alleged Respondent violated;
- Referred to the EDFARP, a copy of which was attached, which indicated the matters asserted by the ED;
- Advised Respondent, in at least 12-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 ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.

39. At the preliminary hearing on May 25, 2006, the ED appeared through Attorney Robert R. Mosley and established jurisdiction to proceed. Respondent appeared through Attorney Jennifer Fleck.
40. The hearing on the merits was conducted on August 13, 2007, by ALJ Cassandra J. Church, after agreed continuances requested by the parties and a review of Respondent's ability to pay.
41. The record closed on August 17, 2007, with the filing of an agreed exhibit.

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 TEX. WATER CODE ANN. or of the TEX. HEALTH & SAFETY CODE ANN. 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 \$10,000.00 per violation, per day for each violation at issue in this case.
3. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 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 or corrective actions proposed therein.
4. 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.
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, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.246(1), (5), and (6).
7. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.245(2).

8. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.248(1).
9. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TEX. ADMIN. CODE § 115.242(3)(A) and (J).
10. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 37.815(a) and (b).
11. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE § 26.3475(a) and (c)(1) and 30 TEX. ADMIN. CODE § 334.50(a)(1)(A), (b)(2), (b)(2)(A)(i)(III), and (d)(1)(B)(ii).
12. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.8(c)(4)(B).
13. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.45(c)(3)(A).
14. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE §§ 334.50(d)(9)(A)(v) and 334.72.
15. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.74.
16. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.10(b).
17. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.52(b)(5).
18. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:

- The violation's 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.
19. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
20. 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 ED correctly calculated the penalties for each of the alleged violations, resulting in a total proposed administrative penalty in the amount of \$44,880.00.
21. Respondent timely raised the issue of its ability to pay the proposed penalty and met its burden of proof, pursuant to 30 TEX. ADMIN. CODE § 70.8, to show that Respondent is able to pay an administrative penalty only in the amount \$26,661.00.
22. Based on consideration of the above Findings of Fact and Conclusions of Law, an administrative penalty in the amount of \$26,661.00 is justified, a reasonable exercise of the Commission's authority, and should be assessed against Respondent.

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, Respondent shall pay an administrative penalty in the amount of \$26,661.00 for violations of TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. WATER CODE § 26.3475(a) and (c)(1); and 30 TEX. ADMIN. CODE §§ 115.242(3)(A); 115.246(1), (4) and (5); 115.248(1); 334.8(c)(4)(B) and (c)(5)(A)(iii); 334.10(b); 334.50(a)(1)(A), (b)(2), (b)(2)(A)(i)(III), and (d)(1)(B)(ii); 334.50(d)(9)(A)(v); 334.52(b)(5); 334.72; and 334.74. The payment of the administrative penalty herein completely resolves the violations set forth by this Order. 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 imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: SNW Enterprises, Inc., ID No. 26440 RN."

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.
4. 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.
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