

**SOAH DOCKET NO. 582-07-0102
TCEQ DOCKET NO. 2005-1744-PST-E**

THE EXECUTIVE DIRECTOR OF	§	BEFORE THE STATE OFFICE
THE TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	OF
PETITIONER	§	
V.	§	
	§	ADMINISTRATIVE HEARINGS
GB'S SELF SERVE, INC.,	§	
RESPONDENT	§	

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that GB's Self Serve, Inc. (Respondent) violated 30 TEX. ADMIN. CODE (TAC) §§ 334.22(a), 334.78 and 334.80 and TEX. WATER CODE (Water Code) §§ 5.702 and 26.121(a). Simply stated, the ED alleges that the Respondent failed to prevent an unauthorized discharge of hydrocarbons into or adjacent to waters in the State, implement the required investigations and corrective actions after the discharge, or pay outstanding underground storage tank (UST) late fees for fiscal year 2005. The ED seeks no penalty for the failure-to-pay-fees violations, recommending that a penalty and interest be assessed at the next billing period. The ED asks the Commission to assess a total of \$17,500 in administrative penalties for the other violations.

After being properly notified, the Respondent failed to generally appear at the hearing. Respondent's counsel was consulted on the telephone prior to and during the hearing. Counsel stated that the Respondent was no longer in business, was bankrupt, had no assets to pay any fees or penalties, and was aware that the ED would proceed on a default basis if the Respondent was not present or represented. Counsel stated that he was authorized to waive any objection to the timeliness of the filing of the ED's Second Amended Report and Petition, but not authorized to represent the Respondent in any other way.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties Against
GB's Self Serve, Inc.
TCEQ Docket No. 2005-1744-PST-E
SOAH Docket No. 582-07-0102

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against GB's Self Serve, Inc. (Respondent). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case on March 6, 2007, in Austin, Texas.

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

I. FINDINGS OF FACT

1. At the time of the alleged violations, the Respondent owned an out-of-service convenience store with retail sales of gasoline at 207 West Commerce, Wills Point, Van Zandt County, Texas (the Facility). The Respondent's underground storage tanks (USTs) at the Facility contained a regulated petroleum substance as defined in the rules of the Commission and

were neither exempt nor excluded from regulation under the TEX. WATER CODE (Water Code) or the Commission's rules.

2. On July 17, 1998, one 8,000-gallon gasoline tank, one 6,000-gallon gasoline tank, and one 4,000-gallon diesel tank were removed at the Facility. Soil samples that were collected from the excavation yielded the following results:

benzene	14.181 mg/kg - exceeded action level of 0.5 mg/kg
toluene	104.92 mg/kg - exceeded action level of 100 mg/kg
ethyl benzene	138.74 mg/kg - exceeded action level of 70 mg/kg
xylenes	522.77 mg/kg
total petroleum hydrocarbons (TPH)	12,620 mg/kg - exceeded action level of 100 mg/kg

3. The tank pit excavation was deep enough to reach the saturated zone, and groundwater seeped into the former tank hold during the excavation activities. The groundwater in the tank hold pit exhibited product sheen on the surface. Samples from the tank hold pit collected for laboratory analysis revealed the following:

benzene	<0.010 mg/L - inconclusive (action level is 0.005 mg/L)
toluene	2.249 mg/L - exceeded action level of 1.0 mg/L
ethyl benzene	1.726 mg/L - exceeded action level of 0.70 mg/L
xylenes	12.30 mg/L - exceeding action level of 10 mg/L
TPH	144.8 mg/L - exceeded action level of 5.0 mg/L

4. On October 13, 1998, TCEQ staff conducted an investigation and review of the Respondent's business records to determine if the Respondent was complying with statutes within the Commission's jurisdiction and the Commission's rules adopted thereunder.
5. During that review, an investigator documented that the Respondent had violated Water Code § 26.121(a), by failing to prevent an unauthorized discharge of hydrocarbons into or adjacent to waters in the state. Specifically, the analytical results of the soil samples collected on July 17, 1998, indicated that the contaminant levels exceeded the action levels for benzene, toluene, ethyl benzene, xylenes, and TPH.
6. During that same investigation, an investigator documented that the Respondent had violated 30 Tex. Administrative Code (TAC) §§ 334.78 and 334.80 by failing to implement the required investigations and corrective actions after the release of hydrocarbons from the USTs at the Facility.
7. During a record review conducted on October 11, 2005, a TCEQ staff member documented that the Respondent violated 30 TAC § 334.22(a) and Water Code § 5.702, by failing to pay outstanding UST late fees for TCEQ Account No. 0012288U for the fiscal year 2005.
8. On July 6, 2005, the Respondent received a notice of an enforcement action concerning the above.
9. On February 13, 2006, the ED filed an Executive Director's Preliminary Report and Petition (EDPRP), in accordance with Water Code § 7.054, alleging that Respondent had committed the above violations.
10. In the EDPRP, the ED sought a total of \$17,500 in administrative penalties for the Water Code § 26.121(a) and 30 TAC §§ 334.78 and 334.80 violations and corrective action. The

ED sought no penalty for the 30 TAC § 334.22(a) and Water Code § 5.702 violations, recommending that a penalty and interest be assessed at the next billing period.

11. On February 13, 2006, the same date the EDPRP was filed, the ED mailed a copy of the EDPRP to Respondent's last addresses of record known to the ED: GB's Self Serve, 1449 Inwood Road, Dallas, Texas 75247-6807; and GB's Self Serve, 5230 Boca Raton Drive, Dallas, Texas 75229-3001.
12. On March 14, 2006, the Respondent filed an answer to the EDPRP requesting a hearing, and the matter was subsequently referred to SOAH for hearing.
13. On September 21, 2006, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to the Respondent at GB's Self Service, Inc., 5230 Boca Raton Drive, Dallas, Texas, 75229-3001; and the Respondent's attorney of record, Donald Grissom, 609 West 10th Street, Austin, Texas, 78701. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the ED alleged the Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED;
 - e. Advised the 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
 - f. Included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
14. On October 11, 2006, the parties filed a joint motion to waive the preliminary hearing, admit jurisdictional exhibits, and set a case schedule.

15. On October 12, 2006, the ALJ granted the motion and issued and sent to the parties an order setting the hearing on the merits on March 6, 2007.
16. On March 1, 2007, the ED filed his First Amended Report and Petition.
17. On March 2, 2007, the ED filed his Second Amended Report and Petition, which alleged the violations, sought the penalties described above, and proposed corrective action; and the ED served it on the Respondent.
18. On March 6, 2007, the ALJ convened the hearing on the merits as previously scheduled.
19. The ED appeared, through his attorney, Kathleen C. Decker.
20. The Respondent did not generally appear, but its attorney of record, Mr. Grissom, did appear on its behalf for the limited purpose of waiving any objection to the timeliness of the March 2, 2007, Second Amended Report and Petition.
21. Mr. Grissom also indicated that the Respondent was bankrupt, had no assets to pay an assessed penalty, had instructed Mr. Grissom not to otherwise represent it further, and was aware that a default order would likely be issued.
22. Based on the Respondent's failure to generally appear at the hearing, the ED moved for a default judgment against the Respondent in which all of the ED's allegations in the Second Amended Report and Petition would be deemed admitted as true, the penalties the ED sought therein would be assessed against the Respondent, and the corrective actions proposed therein would be ordered. The ALJ granted the motion.

II. CONCLUSIONS OF LAW

1. Under Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or the Tex. Health & Safety Code within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day for each violation at issue in this case.
3. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the Respondent was notified of the EDPRP and of the opportunity to request a hearing on the violations alleged and the penalties and corrective actions proposed therein.
4. As required by Tex. Gov't Code (Gov't Code) § 2001.052; Water Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, the Respondent was notified of the hearing. Additionally, the Respondent was notified, that if the Respondent failed to appear at the hearing, a default judgment could be rendered against the Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.
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 Gov't Code ch. 2003.
6. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106(b); and

- b. The allegations contained in the Second Amended Report and Petition are admitted as true.
7. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC §§ 334.22(a) , 334.78 and 334.80; and Water Code §§ 5.702 and 26.121(a).
8. In determining the amount of an administrative penalty, Water 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 the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$17,500 is justified and should be assessed against the Respondent for the violations of 30 TAC §§ 334.78 and 334.80; and Water Code § 26.121(a).
11. Based on the above Findings of Fact, the Respondent should be required to take the corrective action measures recommended by the ED in the Second Amended Report and Petition.

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 Order, the Respondent shall:
 - a. Pay an administrative penalty in the amount of \$17,500 for the violations of 30 TAC §§ 334.78 and 334.80 and Water Code § 26.121(a) and all outstanding fees, including any associated penalties and interest, with the notation “GB’s Self Serve, Inc.; TCEQ Account No. 0012288U,” 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.
 - b. Initiate an investigation to determine the source(s) and to characterize the nature, lateral and vertical extent, direction, rate of movement, volume, composition, and concentration of contaminants in soil and groundwater at the Facility (Site Investigation) in accordance with 30 TAC ch. 334, subchs. D and G (relating to Release Reporting and Corrective Action, and Target Concentration Criteria, respectively).
2. Within 120 days after the effective date of this Order, the Respondent shall complete the Site Investigation and submit a report which summarizes the findings of the investigation (Site Investigation Report) to the ED for review and approval. The Site Investigation Report shall include a proposal for corrective action. The proposal shall be submitted in accordance with

30 TAC 334, subchs D and G (above) or other applicable guidance approved by the ED.

Upon review, possible modification, and approval by the ED, the Respondent shall implement the proposal in accordance with the approved implementation schedule.

3. If, after receipt of the Site Investigation Report, the ED determines that additional investigation is necessary, the Respondent shall implement such investigation and shall report the results to the ED within the timeframe specified in the request.
4. If the ED determines that additional information or actions are required to ensure that adequate remediation of all contaminated areas has been completed, the Respondent shall submit the additional information to the ED and perform the additional actions within the timeframe specified in the request.
5. Within 135 days after the effective date of this Order, the Respondent shall submit written certification as described below, and include detailed and supporting documentation including photographs, receipts, and other records to demonstrate compliance with this Order. This certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

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

with a copy to:

Phillip Winsor, Team Leader
Environmental Cleanup Team I
Remediation Division, MC 221
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3087

and

Michael Brashear, Waste Section Manager
Tyler Regional Office
Texas Commission on Environmental Quality
2916 Teague Drive
Tyler, Texas 75701-3756

6. The payment of the administrative penalties and the performance of all corrective actions ordered herein will completely resolve 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.
7. 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 the Respondent if the ED determines that the Respondent has not complied with one or more of the terms or conditions in this Order.

8. 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.
9. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
10. The Commission's Chief Clerk shall forward a copy of this Order to the Respondent.
11. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Kathleen Hartnett White, Chairman
For the Commission

The Administrative Law Judge (ALJ) recommends that the Commission issue the attached default order, deem as true the facts alleged by the ED, assess the proposed \$17,500 penalty against Respondent, and order the corrective action recommended by the ED.

SIGNED May 1, 2007.

**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**