

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

February 8, 2008

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

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: SOAH Docket No. 582-07-3620; TCEQ Docket No. 2006-0560-PST-E; In Re:
Murmur Corporation

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 February 28, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than March 9, 2008.

This matter has been designated **TCEQ Docket No. 2006-0560-PST-E; SOAH Docket No. 582-07-3620**. 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,

A handwritten signature in cursive script that reads "Carol Wood".

Carol Wood
Administrative Law Judge

CW/ds
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: MURMUR CORPORATION
SOAH DOCKET NUMBER: 582-07-3620
REFERRING AGENCY CASE: 2006-0560-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ CAROL WOOD**

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
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OFFICE OF PUBLIC INTEREST COUNSEL
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

HOMER J KIRBY
REGISTERED AGENT
MURMUR CORPORATION
P.O. BOX 224566
DALLAS, TX 75222-4500
(214) 630-5400 (PH)

MURMUR CORPORATION

xc: Docket Clerk, State Office of Administrative Hearings

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**Assessing Administrative Penalties Against and
Ordering Corrective Action by
Murmur Corporation;
TCEQ Docket No. 2006-0560-PST-E
SOAH Docket No. 582-07-3620**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Murmur Corporation (Murmur or Respondent). A proposal for decision (PFD) was presented by Carol Wood, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on August 23, 2007, and December 5, 2007, in Austin, Texas.

The Executive Director (ED) appeared at the hearing through Staff Attorney Lena Roberts. Respondent was neither present at the hearing nor represented by counsel. The ED requested that the hearing proceed on a default basis, and the ALJ agreed with the ED's request.

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

I. FINDINGS OF FACT

1. Murmur owns an inoperative lead smelter with a fleet-refueling facility located at 2823 North Westmoreland Road, Dallas, Dallas County, Texas (the Facility).
2. The Facility's two underground storage tanks (USTs) contain regulated petroleum substances as defined in the rules of the Commission.
3. The Facility's USTs are not exempt or excluded from regulation under the Texas Water Code (Water Code) or the rules of the Commission.
4. During an inspection conducted on May 8, 2006, a TCEQ Dallas-Fort Worth Regional investigator documented that Murmur had violated Commission rules by failing to permanently remove from service its out-of-service USTs that had not been upgraded with a cathodic protection system by the implementation date of December 22, 1998.
5. On approximately May 18, 2006, Murmur received notice of the violation from TCEQ.
6. On February 5, 2007, the ED filed with the Commission's Chief Clerk the ED's Preliminary Report and Petition.
7. On June 13, 2007, the ED filed with the Commission's Chief Clerk the ED's First Amended Report and Petition, alleging that Respondent had violated 30 TEX. ADMIN. CODE (TAC) § 334.47(a)(2), by failing to permanently remove from service, by no later than 60 days after the prescribed upgrade implementation date of December 22, 1998, those USTs for which any applicable components of the system were not brought into timely compliance with the upgrade requirements. Specifically, the ED alleged that Respondent's USTs were out-of-service and had not been upgraded with a cathodic protection system by December 22, 1998.

8. The ED seeks a total administrative penalty of \$5,250 for the violation (a \$10,000 base penalty with a downward adjustment of \$7,500 for a \$2,500 base penalty subtotal; multiplied by two violation events, that is, one monthly event per tank, for a total base penalty of \$5,000). The ED recommends a five percent enhancement of the total base penalty, or \$250, because Murmur received one prior notice of violation with the same or similar violations.
9. The violation poses a major potential of harm because human health or the environment could be exposed to pollutants that would exceed levels that are protective of human health or environmental receptors as a result of the violation.
10. Murmur derived an economic benefit of \$6,985 through noncompliance.
11. No adjustment of the penalty is necessary to deter future violations or to ensure justice. No adjustment of the penalty is warranted by Respondent's culpability, good faith efforts to comply, or economic benefit derived from the violation.
12. The ED mailed a copy of the Petition to Respondent at the last address known to TCEQ on the same date the ED filed the Petition with the Commission's Chief Clerk.
13. On June 22, 2007, Respondent filed an answer to the Petition requesting a hearing, and the matter was referred to SOAH for hearing.
14. On July 24, 2007, the Commission's Chief Clerk mailed notice of the scheduled preliminary hearing by certified mail, return receipt requested, and by first class mail to Homer Kirby, Owner, Murmur Corporation, at P.O. Box 224566, Dallas, Texas, 75222.
15. 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 Petition, a copy of which was attached, which indicated the matters asserted by the ED;
 - Advised Respondent 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 Petition being deemed admitted 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 that shows how the penalty was calculated for the alleged violation.
16. The return receipt, signed by Homer Kirby, president of Murmur Corporation, was received by the Commission on August 1, 2007.
 17. On August 23, 2007, the ALJ convened the preliminary hearing in Austin, Texas. Neither Murmur nor its representative appeared at the hearing.
 18. On August 27, 2007, Homer Kirby filed a request seeking to reconvene the hearing on the basis that he had been incapacitated and thus unable to attend the August 23, 2007, hearing.
 19. The ALJ granted Homer Kirby's request and rescheduled the preliminary hearing to December 5, 2007.
 20. Notice of the reconvened public hearing was sent by first class mail to Homer Kirby, Registered Agent, Murmur Corporation, at P.O. Box 224566, Dallas, Texas, 75222.
 21. At the reconvened hearing on December 5, 2007, the ED appeared through Staff Attorney Lena Roberts. Neither Homer Kirby nor any other representative for Respondent appeared.

22. Based on Murmur's failure to appear at the preliminary hearing, the ED requested that the hearing proceed as a default in which all of the ED's allegations against Respondent would be deemed admitted as true; the penalties the ED seeks would be assessed against Respondent; and Respondent would be ordered to take the corrective actions recommended by the ED. The ALJ granted the ED's request.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE (Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or any rule adopted thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per day for each violation at issue in this case.
3. The Commission may order the violator to take corrective action concerning the violation. TEX. WATER CODE § 7.073.
4. As required by Water Code § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the Petition and of the opportunity to request a hearing on the alleged violations, the penalties, and corrective actions proposed therein.
5. 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, Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions. Additionally, Respondent was notified in accordance with 1 TAC § 155.55 that, if it failed to appear at the preliminary hearing, a default judgment could be rendered against Respondent

in which all the allegations contained in the notice of hearing would be deemed admitted as true.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a PFD with findings of fact and conclusions of law, pursuant to GOV'T CODE ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondent in accordance with 1 TAC § 155.55 and 30 TAC §§ 70.106(b) and 80.113(d); and
 - b. The allegations contained in the notice of the hearing, including those in the Petition attached thereto, are admitted as true.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TAC § 334.47(a)(2).
9. In determining the amount of an administrative penalty, Water Code § 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.

10. The Commission adopted a Penalty Policy on September 1, 2002, which set forth its policy regarding the computation and assessment of administrative penalties.
11. Based on the above Findings of Fact and Conclusions of Law, the factors set out in WATER CODE § 7.053, and the Commission's 2002 Penalty Policy, the ED correctly calculated the penalties for the alleged violation, and a total administrative penalty of \$5,250 is justified and should be assessed against Respondent.
12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the ED recommended in the Petition, which are set out below.

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, Murmur shall pay an administrative penalty in the amount of \$5,250 for violation of 30 TAC § 334.47(a)(2), discussed above.
2. The payment of this administrative penalty and Respondent'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.
3. Payment rendered to pay the penalties imposed by this Order shall be made out to "TCEQ" and sent with the notation "Re: Murmur Corporation, TCEQ Docket No. 2006-0560-PST-E".
4. The above payment shall be sent 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

5. Within 180 days after the effective date of the Commission Order, Respondent shall:
 - a. Permanently remove the UST system from service in accordance with the applicable provisions of 30 TAC § 334.55, and
 - b. Submit to TCEQ an updated UST registration reflecting the permanent removal of the UST system, in accordance with 30 TAC § 334.7.
6. Within 190 days after the effective date of this Commission Order, Respondent shall submit written, verified certification with detailed supporting documents including, but not limited to, photographs, receipts, and other records that demonstrate compliance with Ordering Provision Nos. 5.a and 5.b, above. The 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.”

7. The notarized 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:

Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas-Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

8. 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 Respondents if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
9. 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.
10. 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.
11. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to each of the parties.
12. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**H.S. "Buddy" Garcia, Chairman
For the Commission**