

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 15, 2008

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087

Re: Executive Director's Exceptions to the ALJ's Proposal for Decision  
C.B. Express, Inc. dba Discount Beer & Cigarettes; RN101274389  
TCEQ Docket No. 2006-1661-PST-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of the 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision.

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the letter to the Administrative Law Judge. Please file stamp these documents and return them to Benjamin Thompson, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0624.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Thompson".

Benjamin O. Thompson  
Attorney  
Litigation Division

Enclosures

cc: Mr. Habib Arab, President, 4644 Old Pond Dr. Plano, Texas 75024-4704  
Philip DeFrancesco, Enforcement Division, TCEQ, MC R-4  
Sam Barrett, Waste Section Manager, TCEQ, MC R-4  
Blas Coy, Public Interest Counsel, TCEQ, MC 103

2008 FEB 15 PM 4:30  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 15, 2008

**Via Interagency Mail and  
Via Facsimile Transmission to: (512) 475-4994**

The Honorable Carol Wood  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision;  
C.B. Express, Inc. dba Discount Beer & Cigarettes; RN10274389;  
SOAH Docket No. 582-07-2361; TCEQ Docket No. 2006-1661-PST-E

To The Honorable Judge Wood:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision signed on January 28, 2008. If you have any questions or comments, please call me at (512) 239-1297.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill", with a long horizontal flourish extending to the right.

Benjamin O. Thompson  
Attorney  
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105  
Mr. Habib Arab, President, 4644 Old Pond Dr., Plano, Texas 75024-4704

SOAH DOCKET NO. 582-07-2361  
TCEQ DOCKET NO. 2006-1661-PST-E

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

V.

C.B. EXPRESS, INC. DBA DISCOUNT  
BEER & CIGARETTES

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 FEB 15 PM 4:30  
CHIEF CLERK'S OFFICE

**EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Benjamin O. Thompson, and makes the following exceptions and suggestions to modify the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

**I.**

The Executive Director suggests the following modifications to the ALJ's Proposed Order:

1. That the first introductory paragraph be modified to reflect the correct year that the Commission will be considering the proposed order, 2008.
2. That in the second introductory paragraph, the abbreviation "(ED)" be inserted after the words "Executive Director."
3. That proposed Finding of Fact No. 1 be modified to reflect the correct date and manner whereby the respondent corporation ceased to exist, and be edited for clarity. Proposed Finding of Fact No. 1 should read: "Until November 2, 2006, when the corporation was voluntarily dissolved, C.B. Express, Inc., dba Discount Beer & Cigarettes (Respondent) owned and operated a convenience store with retail sales of gasoline, located at 3430 East University Drive in Denton, Denton County, Texas (the Facility)."
4. That proposed Finding of Fact No. 2 be modified to add the words "as defined by the rules of the Commission" so the second sentence reads: "The Facility's two USTs contained a regulated substance as defined in the rules of the Commission."
5. That in proposed Finding of Fact No. 3, "DFW" be replaced with the phrase "Dallas-Fort Worth."

6. That proposed Finding of Fact No. 4 be modified to read: "As a result of Mr. Felipe-Ortega's investigation, the ED issued Respondent a Notice of Enforcement on September 8, 2006."
7. That in proposed Finding of Fact No. 5 the words "notice of" be inserted, so that the paragraph reads: "On February 13, 2007, the ED filed and served Respondent with notice of a Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess a total administrative penalty of \$3,570. The ED also recommended that the Commission order Respondent to take certain corrective actions."
8. That in proposed Finding of Fact No. 12, the comma after the date July 27, 2006 be removed, and the abbreviation (Water Code) be inserted after the full citation "TEX. WATER CODE."
9. That in proposed Finding of Fact No. 13, the comma after the date July 27, 2006 be removed.
10. That throughout proposed Finding of Fact No. 14, the phrase "potential major release" be replaced with the phrase "potential major violation."
11. That the second Finding of Fact numbered 19 be re-numbered as Finding of Fact No. 20.
12. That in proposed Ordering Provision No. 2, the word "imposition" be replaced with the word "payment" and the phrase "the subject of the Order" be replaced with the phrase "the subject of this Order."
13. That proposed Ordering Provisions numbered 6 through 10 be re-numbered as Ordering Provisions 3 through 7.

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is attached.

Respectfully Submitted,

Texas Commission on Environmental Quality

Glenn Shankle  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Mary R. Risner, Division Director  
Litigation Division



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Benjamin O. Thompson  
State Bar of Texas No. 24056429  
Litigation Division, MC 175  
P.O. Box 13088  
Austin, TX 78711  
(512) 239-1297  
(512) 239-3434 (FAX)

**CERTIFICATE OF SERVICE**  
**C.B. Express, Inc. dba Discount Beer & Cigarettes**  
**SOAH Docket No. 582-07-2361**  
**TCEQ Docket No. 2006-1661-PST-E**

I hereby certify that on this 15<sup>th</sup> day of February, 2008, the original and 11 copies of the foregoing "Executive Director's Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Modifications") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Modifications were sent to the following:

**Via Inter-Agency Mail and Via Facsimile to (512) 475-4994**

The Honorable Carol Wood  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

**Via Certified Mail, Postage Prepaid**

Mr. Habib Arab, President  
C.B. Express, Inc.  
4644 Old Pond Drive  
Plano, Texas 75024-4704  
Article No. 7000 0520 0022 7534 4108

**Via Hand Delivery**

Blas Coy, Public Interest Counsel MC 103



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Benjamin O. Thompson  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**ORDER**      **Assessing Administrative Penalties Against  
C. B. Express, Inc., dba Discount Beer &  
Cigarettes, TCEQ Docket No. 2006-1661-  
PST-E, SOAH Docket No. 582-07-2361**

On \_\_\_\_\_, 2008, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP or Petition) recommending that the Commission enter an order assessing administrative penalties against C. B. Express, Inc., dba Discount Beer & Cigarettes (Respondent). A Proposal for Decision was presented by Carol Wood, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the Petition on November 29, 2007, in Austin, Texas.

The Executive Director (ED), represented by Benjamin Thompson, an attorney with the Commission's Litigation Division, appeared at the hearing. Respondent appeared at the hearing and was represented by Habib Arab, president.

After considering the ALJ's Proposal for Decision, the Texas Commission on Environmental Quality adopts the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

1. Until November 2, 2006, when the corporation was voluntarily dissolved, C. B. Express, Inc., dba Discount Beer & Cigarettes (Respondent) owned and operated a convenience store with retail sales of gasoline, located at 3430 East University Drive in Denton, Denton County, Texas (the Facility).
2. The Facility had two underground storage tanks (USTs) that were regulated by the Commission. The Facility's two USTs contained a regulated petroleum substance as defined in the rules of the Commission.
3. On July 27, 2006, TCEQ Investigator Jurandir Felipe-Ortega, with the Dallas-Fort Worth Regional Office, conducted a compliance investigation of the Facility.
4. As a result of Mr. Felipe-Ortega's investigation, the ED issued Respondent a Notice of Enforcement on September 8, 2006.
5. On February 13, 2007, the ED filed and served Respondent with notice of a Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order against Respondent for violating statutory and regulatory requirements and assess a total administrative penalty of \$3,570. The ED also recommended that the Commission order Respondent to take certain corrective actions.
6. On February 27, 2007, Respondent requested a hearing on the allegations and penalties proposed in the EDPRP.
7. On March 28, 2007, at the ED's request, the Commission's Chief Clerk referred this case to SOAH for an evidentiary hearing.

8. On April 11, 2007, the Chief Clerk served Respondent with a Notice of Hearing setting forth the nature of the alleged violations; the legal authority and jurisdiction for the hearing; the laws and rules that apply; and the date, time, and place of the hearing.
9. ALJ Carol Wood convened a preliminary hearing in this matter on May 3, 2007, in Austin, Texas.
10. ALJ Wood convened the evidentiary hearing in this action on November 29, 2007, in Austin, Texas. The ED appeared and was represented by counsel. Respondent appeared and was represented by its president.
11. At the hearing, the ED reduced his recommended penalty against Respondent by 25 percent, for a total administrative penalty of \$2,695, and did not seek corrective action from Respondent because Respondent had come into compliance on August 6, 2006.
12. Prior to the July 27, 2006, compliance investigation, Respondent, by neglecting to put the ATG into test mode at least once a month, failed to ensure that all USTs are monitored at least once a month in a manner that will detect a release, as required by TEX. WATER CODE (Water Code) § 26.3475(c)(1) and 30 TEX. ADMIN. CODE (TAC) § 334.50(b)(1)(A).
13. During the July 27, 2006, compliance investigation, Respondent failed to have the UST records maintained, readily accessible, and available for inspection, as required by 30 TAC § 334.10(b).
14. Respondent's failure to ensure that all USTs are monitored at least once a month in a manner that will detect a release constitutes a potential major violation under the Environmental, Property, and Human Health Matrix set forth in the Commission's 2002 Penalty Policy. As a potential major violation, 25 percent of the statutory maximum penalty of \$10,000, or

\$2,500, is the base penalty subtotal. In this case, there was one monthly event, computed from the investigation date of July 27, 2006, until the August 6, 2006, compliance date, resulting in a violation base penalty of \$2,500. Adjusting the violation base penalty for Respondent's compliance history and good faith effort results in a final penalty amount of \$1,925 for this violation.

15. Respondent's failure to have the UST records maintained, readily accessible, and available for inspection is a major programmatic violation because 100 percent of the rule requirement was not met. As a programmatic major violation, 10 percent of \$10,000, or \$1,000, is the base penalty subtotal. Adjusting the violation base penalty for Respondent's compliance history and good faith effort results in a final penalty amount of \$770 for this violation.
16. The total base administrative penalty sought by the ED in this case was \$3,500.
17. The total base administrative penalty was enhanced by 2 percent for one prior notice of violation (NOV) for dissimilar violations.
18. The total base administrative penalty was reduced by 25 percent for Respondent's good faith effort to comply.
19. Adjustments for Respondent's compliance history and good faith effort to comply results in a total administrative penalty of \$2,695.
20. The total administrative penalty of \$2,695 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Water Code § 7.053 and the Commission's 2002 Penalty Policy.

## II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority, pursuant to Water Code §§ 5.013 and 7.002.
2. Under Water Code § 7.051, the Commission may impose penalties of up to \$10,000 per day for the violations at issue in this case.
3. Pursuant to TEX. GOV'T CODE (Gov't Code) ch. 2003, SOAH has jurisdiction over all matters relating to the hearing on the alleged violations, including the preparation of a proposal for decision with findings of fact and conclusions of law.
4. Based on the above Findings of Fact, Respondent was properly notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, proposed penalties, or corrective action, in accordance with Water Code §§ 7.054 and 7.056.
5. Respondent violated Water Code § 26.3475(c)(1) and 30 TAC § 334.50(b)(1)(A) by failing to ensure that all USTs are monitored in a manner that will detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring).
6. Respondent violated 30 TAC § 334.10(b), by failing to have the required UST records maintained, readily accessible, and made available for inspection upon request by agency personnel.
7. Based on the above Findings of Fact and Conclusions of Law, an administrative penalty of \$2,695 is a reasonable exercise of the Commission's authority under Water Code § 7.051 and takes into account all the factors set out in Water Code § 7.053.

8. Based on the above Findings of Fact, Conclusions of Law, and the Commission's 2002 Penalty Policy in effect at the time of the violations, the Commission should assess Respondent an administrative penalty of \$2,695.

### **ORDERING PROVISIONS**

**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, C. B. Express, Inc., dba Discount Beer & Cigarettes, shall pay an administrative penalty in the amount of \$2,695 for violations of Water Code ch. 26 and rules of the Commission.
2. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order resolve only the violations that are the subject of this Order. The Commission shall not be constrained in any manner from requiring corrective action or penalties for 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: C. B. Express, Inc., dba Discount Beer & Cigarettes, Docket No. 2006-1661-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

3. 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 that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
4. 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 for want of merit.
5. 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.
6. As required by Water Code § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to C. B. Express, Inc., dba Discount Beer & Cigarettes.
7. 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

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Buddy Garcia, Chairman  
For the Commission