

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

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER**

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BEFORE THE STATE OFFICE

VS.

OF

**C.B. EXPRESS, INC. D/B/A DISCOUNT
BEER & CIGARETTES,
RESPONDENT**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) asserts that C. B. Express, Inc., dba Discount Beer & Cigarettes (Respondent or C. B. Express) committed violations of the state's petroleum storage tank program by failing to do the following: (1) ensure that all underground storage tanks (USTs) are monitored in a manner that will detect a release at a frequency of at least once every month; and (2) have the required UST records maintained, readily accessible, and made available for inspection upon request by agency personnel. The ED seeks assessment of a total administrative penalty of \$2,695. The Administrative Law Judge (Judge) recommends the Commission require Respondent to pay the total penalty of \$2,695.

II. BACKGROUND AND PROCEDURAL HISTORY

Until October 2007 when the corporation ceased to exist, C. B. Express owned and operated a convenience store, located at 3430 East University Drive in Denton, Denton County, Texas (the Facility), with retail sales of gasoline. The Facility had two USTs that were not exempt or excluded from regulation under the Texas Water Code (Water Code) or the rules of the Commission. The Facility's two USTs contained a regulated petroleum substance as defined in the Commission's rules.

On July 27, 2006, TCEQ Investigator Jurandir Felipe-Ortega, with the DFW Regional Office, conducted a compliance investigation of the Facility. He determined that Respondent had violated the following Commission rules and statutes:

1. Water Code § 26.3475(c)(1) and 30 TEX. ADMIN. CODE (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). Specifically, Respondent failed to put the automatic tank gauge (ATG) into test mode at least once a month.
2. 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.

The ED sent Respondent a Notice of Enforcement dated September 8, 2006. On February 13, 2007, the ED filed and served Respondent with a Preliminary Report and Petition (EDPRP) that asserted Respondent had violated the above-noted Commission rules and statute. The ED at that time recommended that the Commission enter an enforcement order imposing a penalty of \$3,570 and requiring Respondent to take corrective action. At the hearing, however, the ED reduced his recommended penalty against Respondent¹ to \$2,695 and did not seek corrective action from Respondent because Respondent had come into compliance on August 6, 2006.

Carol Wood, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings (SOAH), convened a preliminary hearing in this action on May 3, 2007, in Austin, Texas. On November 29, 2007, Judge Wood convened an evidentiary hearing in Austin. The ED was represented by Benjamin Thompson, staff attorney. Respondent was represented by Habib Arab, president. The record closed that same day.

¹ The ED reduced the total base penalty by 25 percent for Respondent's good faith effort to comply.

III. DISCUSSION

A. Whether Respondent failed to ensure that all USTs are monitored in a manner that will detect a release at a frequency of at least once a month. Specifically, whether Respondent failed to put the automatic tank gauge (ATG) into test mode at least once a month.

The Judge recommends the Commission find that 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.

Mr. Felipe-Ortega testified that, during the July 2006 investigation, he observed the Facility using an automatic tank gauging (ATG) system, specifically a Veeder-Root system, and inventory control as its release detection method. He stated that Respondent was unable to provide any records indicating the ATG system was conducting leak detection tests on the USTs. He noted that Mr. Arab stated his employees had been throwing away all of the ATG leak-test receipts.

Despite not having any receipts, Mr. Felipe-Ortega testified that neither he nor a Veeder-Root technician could make the ATG system produce its leak test history. He stated the Facility's particular Veeder-Root model, Model TLS 350, has the capacity to retain a history of its last successful tank-fullness tests conducted over the past three months. He further noted that there are two reasons why an ATG system could not produce its test history: either the ATG system had not performed any tests or a power outage had occurred. In either case, however, Mr. Felipe-Ortega testified that backup ATG leak-test receipts would have been required as proof that the ATG system was conducting monthly leak detection tests.

Although Respondent provided evidence that leak tests on the USTs were performed by the ATG system on July 28, 2006,² Respondent was required to provide records that the ATG

² See Ex. ED-12.

system had conducted monthly leak detection tests prior to, or at the time of, the July 27, 2006, inspection in order to avoid an administrative penalty.

B. Whether Respondent failed to have the required UST records maintained, readily accessible, and made available for inspection upon request by agency personnel.

The Judge recommends the Commission find that Respondent failed to have the UST records maintained, readily accessible, and available for inspection.

Mr. Felipe-Ortega testified that UST owners must have physical evidence demonstrating that leak tests are being performed on the USTs in case the ATG system is unable to produce a leak test history. He noted that Respondent did not have such evidence at the time of his inspection of the Facility and that Respondent admitted his employees had thrown away the leak-test receipts.

Respondent did not present evidence controverting Mr. Felipe-Ortega's testimony.

IV. ADMINISTRATIVE PENALTY RECOMMENDATIONS

TCEQ Enforcement Coordinator Philip DeFrancesco testified the penalties proposed by the ED were assessed under terms of the Commission's 2002 Penalty Policy.³ The total base administrative penalty sought by the ED in this case was \$3,500. This base penalty was enhanced by 2 percent for one prior notice of violation (NOV) for dissimilar violations, for a resulting subtotal of \$3,570. However, the \$3,500 base penalty was reduced by 25 percent for Respondent's good faith effort to comply,⁴ for an adjustment of \$875. No other factors for enhancement or reduction were applicable. After making adjustments for Respondent's compliance history and good faith effort to comply, the ED thus seeks a total administrative penalty of \$2,695.

³ Ex. ED-15.

⁴ Respondent came into compliance on August 9, 2006.

A. Violation No. 1: Failure to ensure that all USTs are monitored at least once a month in a manner that will detect a release.

Mr. DeFrancesco stated that the Environmental, Property, and Human Health Matrix was used to determine that this violation constituted a potential major release. As a potential major release, 25 percent of the statutory maximum penalty of \$10,000, or \$2,500, was calculated as the base penalty subtotal. The penalty amount was further calculated based on one monthly event, computed from the investigation date until the August 6, 2006, compliance date. Multiplying the base penalty subtotal of \$2,500 by one event equals a violation base penalty of \$2,500. After enhancing the base penalty by 2 percent for compliance history (\$50) and reducing the base penalty by 25 percent for good faith effort (\$625), the ED's final recommended penalty amount for Violation No. 1 is \$1,925.

B. Violation No. 2: Failure to have the required UST records maintained, readily accessible, and made available for inspection upon request by agency personnel.

Mr. DeFrancesco testified that the Programmatic Matrix was used to determine that this violation is major because 100 percent of the rule requirement was not met. As a programmatic major violation, 10 percent of \$10,000, or \$1,000, was calculated as the base penalty subtotal. Only one event, based on the investigation date, was recommended, resulting in a violation base penalty of \$1,000. After enhancing the base penalty by 2 percent for compliance history (\$20) and reducing the base penalty by 25 percent for good faith effort (\$250), the ED's final recommended penalty amount for Violation No. 2 is \$770.

C. Judge's Penalty Recommendation

The ED's Penalty Calculation Worksheet generally documents that the required statutory factors set forth in Water Code § 7.053 were considered by the ED in calculating the proposed penalty. Pursuant to Water Code § 7.051, the Commission has authority to impose penalties of up

to \$10,000 per day for each violation discussed above. The ED has offered reasoned explanations for seeking assessment of a total administrative penalty of \$2,695 against Respondent for two violations of the state's petroleum storage tank program. Accordingly, the Judge recommends the Commission assess an administrative penalty of \$2,695.

V. ADDITIONAL FACTS

In addition to the facts addressed in the preceding discussion, the proposed Findings of Fact contained in the attached Order include other facts, established during the proceeding, that are necessary to show compliance with regulatory requirements applicable to these proceedings. These additional facts are incorporated by reference in this Proposal for Decision (PFD).

VI. CONCLUSION

After a review of the record and for the reasons given, the Judge recommends that the Commission find Respondent liable for the violations of regulatory standards asserted by the ED and assess Respondent a penalty of \$2,695 for these violations. A draft order incorporating these recommendations is attached to this PFD.

SIGNED January 28, 2008.

**CAROL WOOD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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 _____, 2006, 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, 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 October 2007 when the corporation ceased to exist, C. B. Express, Inc., dba Discount Beer & Cigarettes (Respondent) owned and operated a convenience store, located at 3430 East University Drive in Denton, Denton County, Texas (the Facility), with retail sales of gasoline.
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.
3. On July 27, 2006, TCEQ Investigator Jurandir Felipe-Ortega, with the DFW Regional Office, conducted a compliance investigation of the Facility.
4. As a result of Mr. Felipe-Ortega's investigation, Respondent received a Notice of Enforcement filed by TCEQ on September 8, 2006.
5. On February 13, 2007, the ED filed and served Respondent with 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 § 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 release under the Environmental, Property, and Human Health Matrix set forth in the Commission's 2002 Penalty Policy. As a potential major release, 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.
19. 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 imposition 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 the 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

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 that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
7. 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.
8. 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.
9. 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.
10. 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