

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 27, 2009

CHIEF CLERKS OFFICE

2009 APR 27 PM 4:10

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Re: SOAH Docket No. 582-09-2073; TCEQ Docket No. 2007-0553-PST-E; In Re:
An Enforcement Action Against Rodney Hyer, RN101864080

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 May 18, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than May 28, 2009.

This matter has been designated **TCEQ Docket No. 2007-0553-PST-E; SOAH Docket No. 582-09-2073.** 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 seven 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 black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/ds
Enclosures
cc: Mailing List

Post Office Box 13025 ♦ William P. Clements Building ♦ Austin Texas 78711-3025
(512) 475-4993 300 West 15th Street, Suite 502 ♦ Docket (512) 475-3445 ♦ Fax (512) 475-4994
<http://www.soah.state.tx.us>

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: RODNEY HYER

SOAH DOCKET NUMBER: 582-09-2073

REFERRING AGENCY CASE: 2007-0553-PST-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH

REPRESENTATIVE / ADDRESS

PARTIES

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TCEQ PUBLIC INTEREST COUNSEL

RODNEY HYER
419 SOUTH ASH
PERRYTON, TX 79070

RODNEY HYER

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2073
TCEQ DOCKET NO. 2007-0553-PST-E

2009 APR 27 PM 4:10

**IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST
RODNEY HYER;
RN101864080**

§
§
§
§
§

**BEFORE THE STATE OFFICE
OF
ADMINISTRATIVE HEARINGS**
CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that the Respondent Rodney Hyer has violated sections in 30 Texas Administrative Code (30 TAC) chapter 334. The ED asks the Commission to enter an order assessing an administrative penalty against Mr. Hyer in the amount of \$10,500.00 for these violations. He also recommends that the Commission order Mr. Hyer to take corrective action.

On July 12, 2007, the ED mailed his Executive Director's Preliminary Report and Petition (EDPRP) to Mr. Hyer by first class and certified mail.¹ Mr. Hyer filed a response to the EDPRP and asked for a contested case hearing.² On January 7, 2009, the ED sent a letter to the Chief Clerk of the TCEQ requesting that this case be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.³ The case was transferred to SOAH for hearing and on January 30, 2009, a notice of hearing was mailed to Mr. Hyer by first class and certified mail.⁴ A copy of the delivery record from the United States Postal Service shows that Mr. Hyer signed for the certified copy of the notice of hearing on February 2, 2009.⁵

On March 12, 2009, SOAH held a preliminary hearing. Although the required notice of hearing was sent to him, neither Mr. Hyer nor anyone on his behalf appeared at the hearing or sought a continuance. Barham A. Richard, staff attorney, appeared at the hearing on behalf of

¹ ED's Exh. A.

² ED's Exh. B.

³ ED's Exh. C.

⁴ ED's Exh. D.

⁵ ED's Exh. E.

the ED and moved for the issuance of a default order deeming as true the facts that were alleged in the EDPRP, imposing the proposed penalty, and ordering Mr. Hyer to take the proposed corrective action. The Administrative Law Judge recommends that the Commission grant the ED's motion and issue the attached default order granting the relief requested by the ED.

SIGNED April 27, 2009.



**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**Default Order Assessing Administrative Penalties Against and Ordering Corrective Action by RODNEY HYER;
SOAH Docket No. 582-09-2073
TCEQ Docket No. 2007-0553-PST-E**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Rodney Hyer (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing concerning the EDPRP on March 12, 2009, in Austin, Texas.

The Executive Director, represented by Barham A. Richard, appeared at the hearing. The Respondent was not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default order be entered against the Respondent and the ALJ agreed with the Executive Director's request.

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

I. FINDINGS OF FACT

1. Respondent owns a facility located at 119 S. Baylor St., Perryton, Ochiltree County, Texas (Facility). The Facility includes four underground storage tanks (USTs) that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission. The USTs contain a regulated petroleum substance as defined in the rules of the Commission.
2. As documented by an investigation conducted on September 22, 2006, Respondent failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four USTs for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
3. Respondent failed to pay the outstanding UST fees and associated fees for TCEQ Financial Administration Account No. 0033865U for fiscal year 2007.
4. Respondent received notice of the violations on or about April 2, 2007.
5. On July 12, 2007, the Executive Director filed the EDPRP, in accordance with the TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated TEX. WATER CODE ANN. § 5.702 and 30 TEX. ADMIN. CODE (TAC) §§ 334.22(a) and 334.47(a)(2). The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$10,500.00 against Respondent. The Executive Director also recommended that the Commission order Respondent to take certain corrective actions.
6. On July 12, 2007, the Executive Director mailed a copy of the EDPRP to Respondent's last address of record with TCEQ: 419 South Ash, Perryton, Texas 79070.

7. On October 28, 2008, Respondent filed an answer to the EDPRP requesting a hearing and the matter was referred to SOAH.
8. On January 30, 2009, the TCEQ Chief Clerk mailed the notice of the March 12, 2009, preliminary hearing by certified and first class mail to Respondent at Respondent's last address of record with TCEQ.
9. The notice of the March 12, 2009 preliminary 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 Executive Director alleged Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - e. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by 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 Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
10. A copy of the delivery record from the United States Postal Service shows that Respondent signed for the certified copy of the notice of hearing on February 2, 2009.
11. On March 12, 2009, the ALJ convened the preliminary hearing and jurisdiction was established. The Respondent failed to appear at the preliminary hearing.
12. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

13. The total administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each different violation.
14. The Executive Director seeks a penalty of \$10,500.00 for Respondent's alleged violation of 30 TAC § 334.47(a)(2), based on four monthly events (one monthly event for each UST), which includes a 5% enhancement penalty for one Notice of Violation (NOV) with the same or a similar violation. The Executive Director did not recommend a penalty for the violation of TEX. WATER CODE ANN. § 5.702 and 30 TAC § 334.22(a) because a penalty and interest will be assessed at the next billing.
15. Based on Respondent's failure to appear at the March 12, 2009, preliminary hearing, the Executive Director moved for a default judgment against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director sought would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director.

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 Texas Water Code 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 the violations alleged in this case.
3. Under TEX. WATER CODE ANN. § 7.073, the Commission may order the violator to take corrective action.

4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TAC § 155.401; and 30 TAC §§ 1.11, 1.12, 39.425, 70.104 and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TAC § 155.501 and 30 TAC §§ 70.106(b) and 80.113(d), that if Respondent failed to appear at the 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 Proposal for Decision with Findings of Fact and Conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on these Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondent in accordance with 1 TAC § 155.501 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 EDPRP attached thereto, are admitted as true.
8. Based on these Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE ANN. § 5.702 and 30 TAC §§ 334.22(a) and 334.47(a)(2).

9. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
- a. the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
 - b. the impact of the violation on:
 - i. air quality in the region;
 - ii. a receiving stream or underground water reservoir;
 - iii. instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - iv. affected persons;
 - c. with respect to the alleged violator;
 - i. the history and extent of previous violations;
 - ii. the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - iii. the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - iv. economic benefit gained through the violation; and
 - v. the amount necessary to deter future violations; and
 - d. any other matters that justice may require.
10. Based on consideration of these 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 Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$10,500.00 is justified and should be assessed against Respondent.

11. Pursuant to TEX. WATER CODE ANN. § 7.073, if a person violates any statute or rule within the Commission's jurisdiction, the Commission may order the person to take corrective action.
12. Based on these Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective action measures that the Executive Director recommends.

III. 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, Rodney Hyer shall pay an administrative penalty in the amount of \$10,500.00 for violations of 30 TEX. ADMIN. CODE § 334.47(a)(2). 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: Rodney Hyer; TCEQ Docket No. 2007-0553-PST-E" 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

2. Within 30 days after the effective date of the Commission Order, Mr. Hyer shall undertake the following technical requirements:

- a. Permanently remove the UST system from service, in accordance with 30 TAC § 334.55; and
- b. Submit payment for all outstanding fees, including any associated penalties and interest and with the notation, "Rodney Hyer, TCEQ Financial Administration Account No. 033865U," to the below address:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P. O. Box 13088
Austin, Texas 78711-3088

3. Within 45 days after the effective date of the Commission Order, Mr. Hyer shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with Ordering Provision Nos. 2.a. and 2.b. 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."

Mr. Hyer shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Eddie Vance, Waste Section Manager
Texas Commission on Environmental Quality
Amarillo Regional Office
3918 Canyon Cr.
Amarillo, Texas 79109-4933

4. The payment of the administrative penalty and compliance with all the terms and conditions set forth in this Order will completely resolve the violation 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.
5. 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.
6. 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.
7. 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 TAC § 80.273.
8. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

9. 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**