

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 9, 2009

CHIEF CLERKS OFFICE

2009 FEB 10 PM 1:19

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. 582-08-1691; TCEQ Docket No. 2007-0741-PST-E; In Re:  
Gwen Gordon and Wanda Percy, d/b/a Holliday Cafe

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 Monday, March 2, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than Thursday, March 12, 2009.

This matter has been designated **TCEQ Docket No. 2007-0741-PST-E; SOAH Docket No. 582-08-1691**. 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 cursive script that reads "Richard R. Wilfong".

Richard R. Wilfong  
Administrative Law Judge

RRW/ds  
Enclosures  
cc: Mailing List

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** GWEN GORDAN & WANDA PERCY dba HOLLIDAY CAFE  
**SOAH DOCKET NUMBER:** 582-08-1691  
**REFERRING AGENCY CASE:** 2007-0741-PST-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ RICHARD WILFONG**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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WANDA PERCY

GWEN GORDON

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-08-1691  
TCEQ DOCKET NO. 2007-0741-PST-E

2009 FEB 10 PM 1:19

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
Petitioner

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BEFORE THE STATE OFFICE OF CHIEF CLERKS OFFICE

OF

V.

GWEN GORDON AND WANDA PERCY  
DBA HOLLIDAY CAFE,  
Respondents

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) brought this enforcement action against Gwen Gordon and Wanda Percy d/b/a, Holliday Café (Respondents) asserting that Respondents violated the Commission's Petroleum Storage Tank Rules pertaining to permanent removal of underground storage tanks (USTs). The ED requests imposition of an administrative penalty of \$5,250 and a requirement that the Respondent undertake corrective action. As discussed below, the alleged violation has been established. Nevertheless, relying primarily on the discretion to adjust the penalty "as justice may require," the Administrative Law Judge (ALJ) recommends that no monetary penalty be imposed in this proceeding.

**II. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE**

The evidentiary hearing convened on December 18, 2008, at the hearing facilities of the State Office of Administrative Hearings (SOAH) in Austin, Texas. Barham A. Richard and Tammy Mitchell, attorneys in TCEQ's Litigation Division, represented the ED. Attorney, Jesse L. Nickerson III, represented the Respondents. The record closed on January 15, 2009, with the admission of additional evidence and closing arguments. The Findings of Fact in the Proposed

Order recite other undisputed procedural facts. There is no dispute concerning the Commission's or SOAH's jurisdiction.

### III. DISCUSSION

The underlying facts are not in dispute. On January 24, 2007, Ms. Lana Love, Environmental Investigator, with the TCEQ Tyler Regional Office conducted an on-site Compliance Evaluation Investigation at what had been Gray's Grocery, then currently known as Holliday Café, located at 10934 Texas Highway 24 South, Paris, Texas in Lamar County. The property had at some time in the past been used for a convenience store and fuel station by a prior owner. Respondents purchased the property approximately three months before this TCEQ inspection and were operating a Café. Respondents were unaware of any USTs on their property. During a walking tour of the property the Environmental Investigator observed two vent lines that normally connect to a UST system. Further investigation confirmed the presence of two 1000 gallon USTs; however, no fill pipes were observed and the USTs were no longer in service. The Environmental Investigator noted the following violation of the Commission's rules:

30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.<sup>1</sup>

This violation was confirmed during a record review conducted on April 20, 2007, and Respondents received notice of the violation on or about April 27, 2007.

Respondents testified that they were not aware of any fuel tanks being on the property before the TCEQ inspection on January 24, 2007. In their contract for the purchase of the property the Sellers represented that they had no knowledge of any fuel tanks on the property. At no time since

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<sup>1</sup> ED Ex. ED-A and Ex. ED-4.

they purchased the property has any gasoline or other petroleum product been put in the tanks and no use has been made of the property except for the operation of a Café. Respondents further assert that they are without any financial means to pay the proposed fine. Respondents are sisters. They jointly purchased the real property for \$55,000 plus \$20,000 for furniture, fixtures and equipment. They paid \$12,000 that they received from their father as a down payment and financed the balance of \$63,000. Unfortunately, the café business was unsuccessful. The lender foreclosed on the property, after the existence of the USTs became known, and it sold at foreclosure sale for \$18,000. While Respondents are pursuing an action against the Seller for breach of contract, their counsel, Mr. Nickerson, testified that they would probably windup with only a "paper judgment." In other words, that any judgment would unlikely be collectible. Mr. Nickerson further testified that he has not been paid anything for his representation of Respondents. Ms. Percy testified that she earns approximately \$800 per month and that her husband works as a roofer and goes long periods without work. Ms. Gordon testified that she works at a drycleaner store and earns approximately \$1000 per month.

Based on the record in this proceeding, the ED has plainly established that Respondents did not remove the USTs during the brief time that they owned the property. Accordingly, the real issue at the hearing was what the appropriate consequence should be for this violation under the circumstances of this case.

Section 7.053 of the Texas Water Code provides that the Commission must consider the nature, circumstances, extent, duration, and gravity of the violation with special emphasis on water rights and potential hazards to the public health and safety. With respect to the alleged violator, the factors to consider are: the history and extent of previous violations; 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; the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to

compensate affected persons; economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.

TCEQ Enforcement Coordinator, Kimberly Morales, explained that the requested \$5,250 penalty was calculated on a standard penalty calculation worksheet, based on the Commission's September 1, 2002 Penalty Policy, which provides guidance for applying the factors set out in Section 7.053 of the Water Code.

The steps in the process were as follows: the "Environmental, Property and Human Health Matrix" contained within the Penalty Policy was applied (as opposed to the alternative "Programmatic Matrix") because of the potential of the violations to harm the environment and/or human health. In accordance with the Penalty Policy, the violations were classified as "potential" as opposed to "actual" releases with a potential for "major" harm, on a three-tier scale of major, moderate, or minor. The matrix notes for the violation indicate that the violation could allow undetected releases of petroleum products "which would exceed levels that are protective of human health or environmental receptors." According to Ms. Morales, potential major violations by small facilities such as Respondents' are typically assessed at 25 percent of the maximum authorized penalty for each violation. The maximum authorized penalty for the alleged violation would be \$10,000 per violation. Accordingly, the starting point for these penalties was \$2,500 per event. Ms. Morales identified two monthly events for the violation (one month per UST).

With the adjusted base penalty set at \$ 2,500 per event and the number of events set at two, Ms. Morales considered adjustments based on the categories of compliance history, culpability, good faith effort to comply, and economic benefit. She recommended a 5% upward adjustment to the penalties based on Respondents compliance history. Ms. Morales recommended no adjustments based on the categories of culpability (because the Respondents conduct did not rise to gross negligence), good faith effort to comply (because there has been no apparent attempt to correct the

violation), or economic benefit (because the minimum gain required to trigger an adjustment based on this factor was not met). Ms. Morales also recommended no adjustment based on the “other factors as justice may require” category. She testified that this category is used to adjust the penalty mainly in cases where there are multiple violations and the penalty would be inequitably harsh without an adjustment, as well as in instances where the violator reports the violations. She stated that this adjustment is used rarely and that she was unaware of its use simply to moderate the penalty in a sympathetic type of case.

With two exceptions, the ALJ believes Ms. Morales established that the penalty was calculated appropriately and in accordance with Section 7.053 of the Water Code and the Commission’s Penalty Policy. In the absence of compelling mitigating circumstances, the ALJ would have accepted this calculation. As addressed below, however, the ALJ finds that the “other factors as justice may require” category and the statutory consideration of the amount needed to deter future violations overwhelm all other considerations in this proceeding in terms of the assessment of the penalty. Accordingly, in the ALJ’s view, the penalty should be adjusted to zero based on the justice and deterrence factors.

While the ED’s staff is understandably reluctant to use the justice factor as a mechanism for wholesale adjustments to the penalty calculation, this consideration is, in fact, a broad and inherently subjective category built into both Section 7.053 of the Water Code and the Commission’s Penalty Policy. The Penalty Policy provides that adjustments under this category are to be made “on a case-by-case basis, upon a consideration of factors unique to the situation.”<sup>2</sup> The Penalty Policy does not limit application of this factor to the types of situations identified by Ms. Morales, nor does it specify the amount or percentage of any adjustment to be made. That is all left to the specific circumstances of the case.

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<sup>2</sup> Penalty Policy at p. 15. (ED Ex. ED-12)

All things considered, the ALJ believes the penalty should be adjusted to zero based on “other factors that justice may require.” The concept of “justice” is admittedly fairly broad and nebulous. In its every day use, it encompasses moral rightness, fairness, and equity.<sup>3</sup> While the ALJ generally shares the ED’s reluctance to allow the broad justice category to override all of the other specific and tangible penalty considerations, the facts to analyze under this category are compelling in this case, and both Section 7.053 and the Penalty Policy require serious consideration of them. Respondents purchased the property where the USTs are located without knowledge of their existence and in reliance on the Seller’s representation that there were no USTs on the property. Respondents made no attempt to use the USTs in any way. Additionally, and pertinent to both the deterrence and justice factors, no penalty is necessary to deter future violations, in that Respondents no longer own the property due to the foreclosure sale. Under these circumstances, the ALJ believes the imposition of any penalty against Respondents would be gratuitous and contrary to the requirements of justice. Piling a \$5,250 administrative penalty on top of Respondents’ other troubles and modest financial means would serve no apparent benefit or purpose.

Notwithstanding the ALJ’s recommendation that no administrative penalty should be assessed in this case, the ALJ is mindful that the ED’s enforcement policy should encourage persons who engage in a commercial real estate transaction, to employ due diligence to ascertain whether USTs are present so that proper compliance measures will be undertaken as part of the transaction. If this consideration alone persuades the Commission to not accept the ALJ’s recommendation of no penalty, then the ALJ believes that a penalty of not more than \$1,000 would be appropriate in the circumstances of this case.

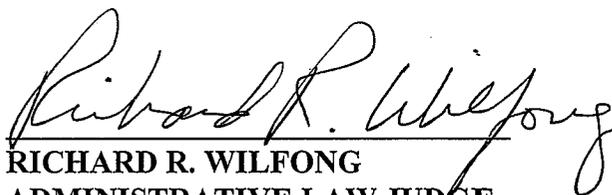
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<sup>3</sup> *American Heritage Dictionary of the English Language.*

#### IV. CONCLUSION

The ED has established that Respondents failed to perform the required removal of the USTs. In light of the Respondents' lack of knowledge that the USTs existed when the property was purchased, their loss of the property at foreclosure sale, and poor financial condition, the ALJ recommends that, in the interest of justice, no administrative penalty be assessed. Accordingly, the ALJ recommends that the Commission adopt the attached proposed order, including the Findings of Fact and Conclusions of Law.

**SIGNED February 9, 2009.**



**RICHARD R. WILFONG  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER** Finding Violations by Gwen Gordon  
And Wanda Percy dba Holliday Cafe  
SOAH DOCKET NO. 582-08-1691  
TCEQ Docket No. 2007-0741-PST-E

On \_\_\_\_\_, 2009, the Texas Commission On Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (Petition) recommending that the Commission enter an enforcement order assessing administrative penalties against Gwen Gordon and Wanda Percy dba Holliday Café. Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing on this matter on December 18, 2008, in Austin, Texas, presented the Proposal for Decision.

The following are parties to the proceeding: the Commission's Executive Director (ED), represented by Barham Richard, an attorney in TCEQ's Litigation Division; Gwen Gordon and Wanda Percy dba Holliday Cafe, represented by attorney Jesse L. Nickerson; and the Public Interest Counsel. The Public Interest Counsel did not appear or otherwise participate in the hearing.

After considering the ALJ's Proposal for Decision, the evidence and arguments presented, and the exceptions to the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

## I. FINDINGS OF FACT

### The Violations

1. Gwen Gordon and Wanda Percy dba Holliday Cafe (Respondents) owned property used for a cafe located at 10934 Texas Highway 24 South, Paris, Lamar County, Texas (Facility).
2. The Facility has two abandoned underground storage tanks (USTs).
3. A Commission inspection of the Facility on January 24, 2007, and record review on April 20, 2007, revealed that the Respondents had failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

### Penalty Considerations

1. The worksheets used to calculate the ED's proposed penalty includes matrices that took into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, economic benefit, and "other factors as justice may require."
2. Based on the worksheets, the ED proposed a penalty of \$5,250 for the acts described in Finding of Fact No. 3.
3. The Respondents purchased the Facility to operate a cafe.
4. The Respondents were unaware that USTs were present on the Facility.

5. The Facility closed down and was sold at foreclosure sale prior to the hearing.
6. The Respondents made no use of the USTs while they owned the Facility.

### **Notice and Procedural History**

1. On November 29, 2007, the ED served its Preliminary Report and Petition on the Respondents.
2. By Answer dated December 14, 2007, the Respondents requested a hearing on the ED's initial allegations.
3. The case was referred to SOAH for a hearing on January 18, 2008.
4. The Commission's Chief Clerk issued notice of the hearing to all parties on February 11, 2008.
5. The preliminary hearing was waived by agreement of the parties and the hearing on the merits was conducted on December 18, 2008. The Respondents and the ED were represented by counsel.
6. The record closed on January 15, 2009, after the parties were given the opportunity to present additional closing arguments.

### **II. CONCLUSIONS OF LAW**

1. The Respondents are subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. §§ 5.013 and 7.002.

2. The Commission may order the Respondents to take corrective action. TEX. WATER CODE ANN. § 7.073
3. The Respondents were notified of the alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.
4. The Respondents were notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, and 80.6(b)(3).
5. SOAH has jurisdiction over matters related to the hearing in this docket, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.
6. The Respondents violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.
7. 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 any rule, order, or permit adopted or issued thereunder.
8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 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 consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the imposition of a penalty should be waived in this proceeding.

NOW THEREFORE BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. The action taken in this proceeding and the Respondents' 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.

2. The Chief Clerk shall provide a copy of this Order to all of the parties.
3. The effective date of this Order is the date the order is final, as provided by 30 TAC § 80.273 and Tex. Gov't. Code Ann § 2001.144.
4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
5. 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Buddy Garcia  
Chairman