

401 Congress Avenue
Suite 2100
Austin, Texas 78701

512.370.2800 OFFICE
512.370.2850 FAX
winstead.com

direct dial: 512.370.2889
zangadicheril@winstead.com

July 22, 2010

Office of the Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg F
Austin, Texas 78753

Via Electronic Filing

Re: TCEQ DOCKET NO. 2007-1259-PST-E (SOAH DOCKET NO. 582-09-5891)
**EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY vs. 4200 ROSEDALE LLC AND THE
GOODYEAR TIRE & RUBBER COMPANY**

Dear Chief Clerk:

Pursuant to 30 Texas Administrative Code § 1.10, please find attached for filing The Goodyear Tire & Rubber Company's Reply to 4200 Rosedale, LLC's Exceptions to the ALJ's Proposal for Decision in the above-referenced matter.

Sincerely,



Zeena T. Angadicheril

ZA/jlc

Enclosures

cc: Blas J. Coy, Jr. (w/enclosure; via facsimile @ 239-6377)
Anna Treadwell (w/enclosure; via facsimile @ 239-3434)
S. George Alfonso (w/enclosure; via facsimile @ 972-458-6801)
The Honorable Amy L. Larsen (w/enclosure; via facsimile @ 475-4993)

SOAH DOCKET NO. 582-09-5891
TCEQ DOCKET NO. 2007-1259-PST-E

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

V.

4200 ROSEDALE LLC AND THE
GOODYEAR TIRE & RUBBER
COMPANY,
RESPONDENTS

§ BEFORE THE STATE OFFICE
§
§
§
§
§ OF
§
§
§
§
§ ADMINISTRATIVE HEARINGS

**THE GOODYEAR TIRE & RUBBER COMPANY'S REPLY TO 4200 ROSEDALE
LLC'S EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

The Goodyear Tire & Rubber Company ("Goodyear") submits this Reply to 4200 Rosedale LLC's Exceptions to the ALJ's Proposal for Decision.

SUMMARY

In its Exceptions to the Proposal for Decision, 4200 Rosedale LLC ("Rosedale") does not clearly object to any specific finding issued by the Administrative Law Judge ("ALJ"), but instead objects to the ALJ's ultimate conclusion that Rosedale is the party responsible for the violations alleged by the Executive Director. Rosedale, in its Exceptions, reiterates the same flawed arguments and analysis it has asserted throughout this case. Rosedale refuses to acknowledge that Texas law and the evidence presented in this action clearly establish that Rosedale is the owner of the underground storage tank ("UST") that is the subject of this proceeding. The Proposal for Decision ("PFD") and Order ("Proposed Order") demonstrate that the ALJ reached her conclusion after conducting a thorough review and analysis of the evidence and arguments set forth by Goodyear, Rosedale, and the Executive Director. The PFD and Proposed Order also reflect the evidence presented in this case and the proper interpretation of Texas law. Accordingly, the PFD and Proposed Order should be adopted, as modified by the specific exceptions proposed by the Executive Director and Goodyear.

REPLY

The ALJ reached the correct conclusion because Rosedale mischaracterized Goodyear's position and misinterpreted the governing law

1. Though the parties stipulated to a number of facts prior to the hearing in this matter,¹ Goodyear never took the position that it owned the underground storage tank at the property

¹ Exhibit 24. References to Exhibits herein shall refer to the corresponding exhibit admitted into evidence at the April 8, 2010 hearing in this matter.

located at 4200 East Rosedale Street, Fort Worth, Texas (the "Property"). In fact, Goodyear has expressly and consistently denied ever owning the UST.

2. In direct contradiction to the facts, evidence, and governing case law, Rosedale continues to incorrectly assert that Goodyear is the owner of the UST by virtue of Goodyear's lease at Property (the "Goodyear Lease"). Rosedale cites the TCEQ's current definition of "owner" as the authority for its improper assertion. The TCEQ's current definition of "owner" is codified at 30 TEX. ADMIN. CODE § 334.2(73). Under this rule, an "owner" is defined to be:

"[a]ny person who holds legal possession or ownership of an interest in an underground storage tank (UST) system or an aboveground storage tank (AST). **For the purposes of this chapter, if the actual ownership of a UST system or an AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person.** A person who has **registered as an owner** of a UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) **after September 1, 1987**, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration. This definition is subject to the limitations found in Texas Water Code, §26.3514, Limits on Liability of Lender; §26.3515, Limits on Liability of Corporate Fiduciary; and §25.3516, Limits on Liability of Taxing Unit." (emphasis added).

3. Rosedale incorrectly claims that the first sentence of the TCEQ's definition applies to Goodyear because Goodyear allegedly fits within the scope of "any person who holds legal possession of a UST."² However, the first sentence of the TCEQ's current definition of "owner", which is written in the present tense, does not apply because it is undisputed that Goodyear does not currently occupy the premises or utilize the UST. In fact, the parties stipulated that the Goodyear Lease expired on *January 31, 1986*.³ The TCEQ's current definition of "owner" was not even in existence on January 31, 1986 when Goodyear's Lease at the Property expired.⁴

4. The ALJ is correct in her conclusion because Rosedale failed to establish how a past operator of the UST, whose "possession" of the UST ended before TCEQ's definition of "owner" or any of the TCEQ's other UST regulations had even been promulgated, could possibly fit within the first sentence of TCEQ's definition. Goodyear's interest in the UST, if any, was solely

² Rosedale's Closing Argument, Paragraphs 39 and 48.

³ Exhibit 24, Stipulation 11.

⁴ See Source Note following 30 TEX. ADMIN. CODE § 334.2(73) ("The provisions of this §334.2 adopted to be effective September 29, 1989"); see also, Exhibit 24, Stipulation 27 (acknowledging the TCEQ's rules relating to underground storage tanks became effective on September 29, 1989).

a possessory interest under the Goodyear Lease, which expired when the lease at the Property expired. Therefore, Goodyear's possessory interest in the Property, and accordingly the UST, expired on January 31, 1986, since it no longer had the authority to use the UST at that point.

The ALJ reached the correct conclusion because Rosedale failed to overcome the statutory presumption that it owned the UST

5. For the above-stated reasons, the first sentence of the TCEQ's definition of "owner" does not apply to Goodyear in the present case. Because both Goodyear and Rosedale claim that the other owns the UST, the ownership of the UST at the Property is clearly in dispute. In these situations, the Texas Water Code and the TCEQ's rules require the ALJ to look to the second sentence of the TCEQ's definition of "owner". The ALJ correctly applied this provision which expressly sets forth that Rosedale, as the fee simple owner of the Property, is presumed to be the owner of the UST and has the burden of proving that the UST is owned by someone else.⁵ The ALJ was also correct in her determination that Rosedale had not met its burden to disprove its ownership of the UST.

6. Throughout this case, Rosedale solely relied upon two agency forms submitted to the State by Goodyear as proof of Goodyear's ownership of the UST: (1) the U.S. Environmental Protection Agency ("EPA") UST Notification Form dated April 29, 1986⁶ and (2) the Lease Expiration Notice dated July 29, 1992.⁷

7. At the hearing before the ALJ, Goodyear produced evidence of the transmittal letter under which the UST Notification Form was submitted to the State in 1986.⁸ The UST Notification Form, as well as over one hundred other notification forms for underground storage tanks in Texas, were attached to the transmittal letter and admitted into the hearing record as a Goodyear business record.⁹ This important piece of evidence, which Rosedale wholly ignored in its Exceptions, clearly established that Goodyear voluntarily filed this form (as well as the others) in support of the EPA's efforts to locate all underground storage tanks in existence in the country, and to ensure that the State of Texas knew about the location of the tanks that Goodyear was operating or had operated.¹⁰ The transmittal letter explicitly stated that Goodyear submitted the forms as the "operator of the tanks--not the owner."¹¹ The ALJ correctly concluded that the UST Notification Form (which was submitted by Goodyear on April 29, 1986 before the TCEQ's UST program had come into existence) was not enough to overcome Rosedale's presumption of ownership since the third sentence of the TCEQ's current definition of "owner" only encompasses forms submitted pursuant to TCEQ's rules after September 1, 1987.¹² Further,

⁵ Exhibit 24, Stipulation 37.

⁶ Exhibit 8, "UST Notification Form."

⁷ Exhibit 9, "Lease Expiration Notice."

⁸ Exhibit 28.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Exhibit 24, Stipulation 37. It should be noted that under the EPA's definition of "owner" that was in existence when the Goodyear Lease expired, an "owner" was defined as "...(a) in the case of an underground storage tank in

the ALJ correctly determined that the information in the forms submitted by Goodyear to the State were ambiguous and insufficient to demonstrate ownership of the UST by Goodyear.¹³

8. Similarly, the Lease Expiration Notice does not disprove Rosedale's ownership of the UST. Prior to the hearing, the parties stipulated that on or about July 29, 1992, Goodyear submitted a form to the State of Texas, notifying the State that Goodyear's lease at the Property had expired.¹⁴ Despite Rosedale's implication otherwise, the parties did not stipulate that the Lease Expiration Notice was an acknowledgment of Goodyear's ownership of the UST. Goodyear expressly and consistently denied that the 1992 form stood for anything more than a notice of the expiration of the Goodyear Lease.¹⁵

9. The evidence in the record also establishes that the State assessed UST fees against Goodyear between 1986-1992. However, after Goodyear submitted the Lease Expiration Notice, the Texas Water Commission deleted the underground storage tank fees that had been charged previously and improperly to Goodyear between 1988-1993.¹⁶ As the Executive Director's witness confirmed, the Lease Expiration Notice does not constitute Goodyear's registration of the UST at the Property, and therefore does not trigger for Goodyear any responsibilities as an "owner" under the third sentence of the TCEQ's definition of "owner".¹⁷ Additionally, in its response to Goodyear's Request for Admission #1, the Executive Director further acknowledged that this portion of the definition of "owner" does not apply to Goodyear, by admitting "Goodyear has not registered with the TCEQ as an owner of the UST after September 1, 1987."¹⁸ After considering all available evidence, including the testimony offered at the April 8th evidentiary hearing,¹⁹ the ALJ reasonably concluded that the Lease Expiration Notice did not establish that Goodyear was, or is, the owner of the UST.

use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use or dispensing of regulated substances...". See Exhibit 23, page 46612, column 3, § 280.1 (the preamble to this rule explains that this definition became effective on November 8, 1985). Thus, the EPA definition that was in existence at the time the Goodyear Lease expired is significantly more limited than the first sentence of the TCEQ's current definition, and further establishes that Goodyear's mere possession of the Property did not make it the owner of the UST. In addition, it is important to note that the EPA encouraged all persons associated with USTs to submit the UST notification form; thus, the filing of the form was not an admission by Goodyear of its ownership of the UST.

¹³ PFD at pages 4-5.

¹⁴ Exhibit 24, Stipulation 15.

¹⁵ Goodyear also denied the significance Rosedale places on the "Owner's Certification" portion of either the Lease Expiration Notice or the UST Notification Form. The express language of the forms indicates that they could be signed by an owner or a representative of the owner (such as a lessee).

¹⁶ Exhibit 10.

¹⁷ Exhibit 24, Stipulation 37.

¹⁸ Exhibit 26, Executive Director's Response to Request #1.

¹⁹ Lonnie Gilley, the Executive Director's investigator, testified at the April 8, 2010 hearing and provided his opinion that the two forms relied on by Rosedale do not establish that Goodyear is the owner of the UST. Mr. Gilley has been an environmental investigator for the State for over eighteen years. He has had significant training and is one of two individuals designated by the TCEQ as a technical expert on USTs. Mr. Gilley's extensive experience now includes training other TCEQ investigators in the UST area.

10. Rosedale's reference to July 1, 1987 in Paragraph 22 of its Exceptions is unclear and ambiguous, because neither the TCEQ's UST rules nor any other evidence presented to date in this case involve a July 1, 1987 deadline or effective date.²⁰ For the first time in this case, Rosedale now also suggests that one of the exceptions to 30 TEX. ADMIN. CODE § 334.7(a) applies because: "the tank is properly registered with the agency prior to the effective date of this subchapter under the provisions of the federal Solid Waste Disposal Act, §9002 (42 United States Code, § 6921, et seq.), provided that the owner or operator must submit notice of all changes and additional information in accordance with the provisions of subsection (d) of this section[.]"²¹ However, the exception only relates to whether an owner must register under 30 TEX. ADMIN. CODE § 334.7; the exception does not alter or limit the express provisions of and requirements under the statutory and regulatory definition of "owner". The language in the statute and TCEQ's rule is clear and unambiguous – a notice of registration must be filed after September 1, 1987 to create a presumption of ownership and additionally, the filing party must be registering as the owner of the UST. Goodyear did neither of these things – Goodyear did not file a registration form after September 1, 1987 and Goodyear did not register as an owner. The ALJ concurred, stating that the information on the forms submitted by Goodyear to the State was ambiguous at best, and insufficient to establish that Goodyear owned the UST. Further, one possible explanation for the definition's requirement that only registration forms submitted after September 1, 1987 be considered is that Texas lawmakers knew that the EPA had encouraged non-owners to submit UST notices prior to September 1, 1987 (as discussed herein at Footnote 12), and wanted to ensure that the EPA's UST notices were not construed as an admission of ownership. Thus, no presumption of ownership results from Goodyear's filing of the EPA's UST Notification Form.

11. After conducting discovery and considering all available evidence in this case, the Executive Director concurred with Goodyear that no evidence existed to overcome the statutory presumption that Rosedale owns the UST, and the ALJ correctly reached the same conclusion.

The ALJ reached the correct conclusion because Rosedale's position contradicts Texas case law and TCEQ decisions

12. Rosedale has wholly ignored, and in its Exceptions continues to ignore, the significance of three fundamental Texas real property tenets: (1) an underground storage tank, such as the UST in this case, is an improvement that is affixed to and part of the realty;²² (2) if land is conveyed by deed and the deed contains no reservation for fixtures or improvements that are part of the fee simple, title to the fixtures or improvements also passes to the transferees of the land;²³ and (3) an owner of property also owns the improvements on the property, unless there is clear intent to the contrary.²⁴

²⁰ The TCEQ's definition of an underground storage tank "owner" references September 1, 1987.

²¹ Rosedale's Exceptions at Paragraph 22 – 23, citing 30 TEXAS ADMIN. CODE § 334.7(a)(1)(C).

²² *Big West Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800 (Tex. App. – Amarillo 1992, no writ.)

²³ *Alexander v. Anderson*, 207 S.W. 205 (Tex. Civ. App. – San Antonio 1918, no writ); *see also, Boyd v. Hurd*, 207 SW 339 (Tex. Civ. App. – San Antonio 1918, no writ).

²⁴ *Travis Central Appraisal District v. Signature*, 140 S.W.3d 833, 838 (Tex App – Austin 2004, no pet.).

13. These three fundamental tenets clearly established that Rosedale is the owner of the UST under Texas law. The evidence in this case also established that the fee simple owners of the Property have always held title to the UST; Goodyear never owned the UST. In accordance with Goodyear's practice at the time, Doug Corder and Glenn Walls (the Property's first owners of record), installed and constructed the improvements at their expense, prior to Goodyear's occupancy of the Property.²⁵ By doing so, these fee simple owners owned the improvements outright, from the time they were installed. As the Property was conveyed through the years, in accordance with Texas case law, subsequent fee simple owners also acquired title to the improvements. There is no evidence in this case to rebut the presumption that the UST was transferred with the Property from Corder and Walls to several intermediary owners and ultimately to Rosedale (the current, undisputed fee simple owner). The deeds documenting the transfer of the Property²⁶ do not contain any type of reservation excluding the UST from the Property transferred. In fact, the general warranty deed through which Rosedale acquired the Property gives every indication that Rosedale knew it was purchasing the improvements on the Property. The deed through which Rosedale acquired the Property states that the conveyance expressly includes "any improvements" at the Property.²⁷

14. Though Rosedale does not have any legal authority for its position, Rosedale argues that the law "should not be interpreted to provide or allow for ownership of a UST to be automatically conveyed with the land, if the buyer of the surface estate is unaware of the presence of the UST."²⁸ This position is in direct contradiction to the three fundamental tenets above and several rulings by the TCEQ.

15. The TCEQ recently affirmed the position that a fee simple surface owner is presumed to own an underground storage tank located at the property, and that an underground storage tank is presumed to transfer with the surface estate when the surface estate is sold.²⁹ The TCEQ also recently considered whether to affirm penalties assessed against a property owner who claimed that he purchased land without knowing that the property purchased was in violation of the TCEQ's UST Rules.³⁰ In that case, the TCEQ determined that lack of knowledge could not be

²⁵ At the April 8th hearing, Goodyear presented the uncontroverted testimony of Donald R. Dixon, a Goodyear Global Real Estate Manager, who testified that the Goodyear Lease (Exhibit 4) was a standard Goodyear lease utilized in the 1970s. In his sworn testimony, Dixon explained that Paragraph 22(a) of the Goodyear Lease was a standard lease provision that had been utilized by Goodyear to document a typical "turn key" or "build to suit" arrangement. (Exhibit 4, Paragraph 22(a)). Under this standard lease arrangement, as described in Paragraph 22(a) of the Goodyear Lease, the property owner would construct certain improvements on the property, at the owner's expense for the use of Goodyear. (Exhibit 4, Paragraph 22(a)). Dixon further testified that in accordance with Goodyear's historic practices, a UST: (1) was an improvement installed and paid for by the owner of the surface estate, (2) fell within the scope of Paragraph 22(a) of the Goodyear Lease, and (3) remained affixed to the property at the conclusion of Goodyear's lease at a premises and was owned by the property owner. It is undisputed that the UST remained at the Property until June 30, 2008, when Rosedale notified the Executive Director of the UST's removal.

²⁶ Exhibits 1-3.

²⁷ Exhibit 3.

²⁸ Rosedale's Closing Argument, Paragraph 47.

²⁹ Executive Director's Closing Argument, Footnote 52.

³⁰ (TCEQ Docket No. 2008-1237-PST-E; SOAH Docket No. 582-09-2813. March 10, 2010 Agenda - Consideration of the Administrative Law Judge's Proposal for Decision and Order assessing administrative penalties, authorizing

used as a way to avoid liability for the underground storage tank that the property owner now owned, and the TCEQ affirmed the penalties assessed.³¹

16. It is clear from the recent decisions rendered by the TCEQ and from the well-settled cases cited above that purchasers of property are expected to inspect the property they seek to acquire. Rosedale's witness testified at the evidentiary hearing that Rosedale acquired the Property without even first viewing or visiting the Property. These decisions encourage parties to conduct due diligence on a property before entering into a significant real estate transaction (such as the one entered into by Rosedale). As an important matter of public policy, these decisions also hold purchasers accountable for the properties that they assume. Without this policy, property owners would too easily be able to avoid liability by simply asserting (like Rosedale attempts to do in this case) that "they did not know" a certain condition existed. Without this policy, liability for property-related claims would fall upon the sellers or previous owners of the property, who may be deceased, non-existent, or otherwise impossible to find. The most rudimentary of due diligence by Rosedale in this case would have revealed the likely presence of an underground storage tank at the Property because, as the Executive Director's witness testified, USTs are often located on properties that contain car service centers. The case law and TCEQ decisions confirm that Rosedale's claimed lack of knowledge does not allow it to avoid the liability that stems from its ownership of the Property and thus the UST. In accordance with established Texas law, the conveyance documents for the Property definitively convey the surface estate, including the UST, to Rosedale.

CONCLUSION

The sole issue in dispute – the ownership of the UST – has been extensively briefed and debated by both parties since the inception of this case. The ALJ carefully considered the evidence and arguments presented by Goodyear, Rosedale and the Executive Director at the April 8, 2010 hearing and throughout the course of this case. After this careful consideration, the ALJ issued her PFD and Proposed Order, correctly concluding that Rosedale had not carried its burden of proof under TCEQ's definition of "owner" to demonstrate that Goodyear is the owner of the UST at the Property. As demonstrated herein, the PFD and Proposed Order also reflect the evidence presented in this case and the proper interpretation of Texas law. Accordingly, the Commission should deny the relief requested by Rosedale, and the PFD and Proposed Order should be adopted, as modified by the specific exceptions proposed by the Executive Director and Goodyear.

installment payment, and requiring certain actions of Kenneth W. Blevins in Live Oak County, Texas; TCEQ ID No. RN101783496). The Commission assessed penalties against the property owner, despite the property owner's claim that he did not know the property he purchased was in violation of the TCEQ's UST Rules.

³¹ *Id.*

Respectfully Submitted,

WINSTEAD PC

401 Congress Avenue, Suite 2100
Austin, Texas 78701
512/370-2800 telephone
512-370-2850 telecopier

By: 

Albert R. Axe, Jr.
State Bar No. 01457400
Zeena T. Angadicheril
State Bar No. 24050228

**ATTORNEYS FOR THE GOODYEAR
TIRE & RUBBER COMPANY**

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the foregoing was filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas and was served on the following parties on July 22, 2010, as noted below:

Blas J. Coy, Jr.
Texas Commission on Environmental Quality
Office of the Public Interest Counsel
P.O. Box 13087, MC-103
Austin, TX 78711-3087
via facsimile – 512-239-6377

4200 Rosedale LLC
c/o Mr. S. George Alfonso, Attorney
S. George Alfonso, Attorney and
Counselor at Law
5340 Alpha Road
Dallas, TX 75240
via facsimile – 972-458-6801

Anna Treadwell, Attorney
Texas Commission on Environmental Quality
Office of Legal Services, Litigation Division
P.O. Box 13087
Austin, TX 78711-3087
via facsimile – 512-239-3434

The Honorable Amy L. Larson
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street, Suite 502
Austin, TX 78711-3025
via facsimile – 512-475-4993


Zeena T. Angadicheril