

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**S. GEORGE ALFONSO**  
Attorney & Counselor at Law  
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2010 SEP 14 PM 3:37  
CHIEF CLERKS OFFICE

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Phone: (972) 458-6800  
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September 14<sup>th</sup>, 2010

**Texas Commission on Environmental Quality**  
**Chief Clerk: LaDonna Castanuela**  
P.O. Box 13087, MC 101  
Austin, Texas 78711-3087

**Sent Via Facsimile: [512-239-3311]**  
**Sent Via U.S. Mail**

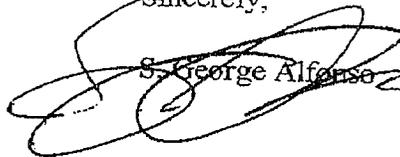
Re : Unopposed Motion for Extension of Time;  
Our Client : 4200 Rosedale, LLC;  
TCEQ Docket No. : 2007-1259-PST-E;

Dear Ms. Castanuela:

Enclosed please find the original "Unopposed Motion for Extension of Time to File Exceptions to the ALJ's Proposal for Decision ("Unopposed Motion for Extension of Time"), plus seven copies.

Should you have any questions, please do not hesitate to contact me at my office number listed above.

Sincerely,



Enclosed:

Original "Unopposed Motion for Extension of Time to File Exceptions to the ALJ's Proposal for Decision";  
Seven Copies of "Unopposed Motion for Extension of Time to File Exceptions to the ALJ's Proposal for Decision";

cc:

TCEQ Counsel;  
Counsel for Goodyear Tire & Rubber Co.;

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

DOCKET NO. 2007-1259-PST-E

2010 SEP 14 PM 3:37

IN THE MATTER OF AN  
ENFORCEMENT ACTION  
CONCERNING 4200 ROSEDALE, LLC  
RN101554012

§  
§  
§  
§

CHIEF CLERKS OFFICE  
BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**4200 ROSEDALE, LLC'S UNOPPOSED MOTION FOR EXTENSION OF TIME TO  
FILE EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

4200 Rosedale, LLC ("Rosedale") submits this, its Unopposed Motion for Extension of Time to File Exceptions to the ALJ's Proposal for Decision ("Unopposed Extension of Time") and would respectfully show the Commission/The Office of the General Counsel of the Texas Commission of Environmental Quality ("TCEQ") the following:

**I.**

**Brief Procedural Background**

1. On June 22<sup>nd</sup>, 2010, the Honorable Amy L. Larson, the Administrative Law Judge in this matter ("ALJ"), issued her "Proposal for Decision" ("ALJ Proposal") regarding this matter. Attached to the ALJ Proposal was a cover letter sent from the ALJ to Les Trobman, the General Counsel ("General Counsel") of the Texas Commission on Environmental Quality ("TCEQ"), copied to all parties, in which she directed that "Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 12, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than July 22, 2010." (Please See Exh. No. 1; Cover letter of ALJ Proposal, June 22<sup>nd</sup>, 2010).

2. Rosedale drafted and completed its "Exceptions to the ALJ's Proposal for Decision" ("Rosedale Exceptions") by July 12<sup>th</sup>, 2010. Counsel for Rosedale attempted to file the Rosedale Exceptions at approximately 4:45 p.m. on July 12<sup>th</sup>, 2010, but was unable to

effectuate a receipt tone with facsimile machine at the Chief Clerk of the TCEQ for approximately ten minutes.

3. Counsel for Rosedale subsequently succeeded in faxing the Rosedale Exceptions to TCEQ on or about 5:00 p.m. on July 12<sup>th</sup>, 2010.

4. Counsel for Rosedale also e-filed the Rosedale Exceptions with TCEQ on or about 5:00 p.m. on July 12<sup>th</sup>, 2010 and sent the Rosedale Exceptions to TCEQ via U.S. mail on July 12<sup>th</sup>, 2010.

5. Counsel for Rosedale sent via e-mail a copy of the Rosedale Exceptions to counsel for TCEQ and counsel for Goodyear Tire & Rubber Company ("Goodyear") on or about 5:00 p.m. on July 12<sup>th</sup>, 2010.

6. Counsel for Rosedale sent a copy of the Rosedale Exceptions to the ALJ on July 12<sup>th</sup>, 2010.

7. On July 21<sup>st</sup>, 2010, the ALJ addressed a letter to TCEQ, General Counsel Les Trobman, in which she stated:

This is my response to the proposed revisions filed to my Proposal for Decision (PFD) in the above case by the Executive Director (ED) and to the separate exceptions filed by Respondents Goodyear Tire and Rubber Co. and 4200 Rosedale.

I recommend that you grant all of the ED's exceptions as well as those raised by Goodyear Tire and Rubber co.

I recommend that you deny all of the exceptions to the PFD filed by 4200 Rosedale LLC.

(Please See Exh. No. 2; ALJ Letter to General Counsel Les Trobman, July 21<sup>st</sup>, 2010).

8. On July 22<sup>nd</sup>, 2010, the deadline for filing replies, Goodyear filed its "Reply to 4200 Rosedale LLC's Exceptions to the ALJ's Proposal for Decision" ("Goodyear Reply), with an attached fax cover sheet listing a timing of fax to TCEQ and all other parties as 5:07 p.m., with counsel for Rosedale receiving said Reply at 5:08 p.m. (Please See Exh. No. 3; Goodyear Reply).<sup>1</sup>

9. On September 10<sup>th</sup> 2010, counsel for Rosedale was, for the first time, contacted by the Office of General Counsel of TCEQ and informed that TCEQ's fax receipt confirmation page had a time received fax-filed time stamp for Rosedale Exceptions of 5:03 p.m.

10. Counsel for Rosedale hereby submits this Unopposed Extension of Time in order to eliminate any potential issue regarding the timeliness of the already filed Rosedale Exceptions.

## II.

### BASIS FOR UNOPPOSED MOTION FOR EXTENSION OF TIME

11. Rosedale's Unopposed Extension of Time is made in good faith, in order to avoid and resolve any possible issue regarding the timeliness of filing of the Rosedale Exceptions.

12. As evidenced in the attached exhibits, no party (including the ALJ), at any time, objected to the timeliness of the filing of the Rosedale Exceptions.

13. The ALJ's letter to TCEQ General Counsel confirms her receipt, acceptance *and* review of the Rosedale Exceptions – with no objections.

14. Rosedale asserts that the actions of the ALJ effectively confirm her order, as provided for by 30 Texas Administrative Code to accept as timely filed the Rosedale Exceptions, as she recommended "[denial of] all of the exceptions to the PFD *filed by 4200 Rosedale LLC.*"

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<sup>1</sup>. Respondent Goodyear did not object to the timeliness of Rosedale's Exceptions in its Reply (and has never objected to the timeliness in any capacity). TCEQ did not file a Reply to the Rosedale Exceptions and has also never raised any issue or objection with the timeliness of the Rosedale Exceptions.

(*emphasis added*)(Please See Exh. No. 3; ALJ Letter to General Counsel Les Trobman, July 21<sup>st</sup>, 2010).<sup>2</sup>

15. No party has been prejudiced in any way as a result of the timing of the filing of the Rosedale Exceptions (5:03 p.m.) on July 12<sup>th</sup>, 2010.

**III.**  
**UNOPPOSED REQUEST FOR EXTENSION OF TIME**  
**TO FILE ROSEDALE EXCEPTIONS**

16. Rosedale asserts that the acts of all parties, including the ALJ, have manifestly demonstrated an acceptance of the Rosedale Exceptions as timely and without objection or prejudice; however, in order to avert any potential speculation or future issue, now files this its Unopposed Extension of Time Motion and, if deemed necessary by the General Counsel, seeks an extension of one day or in the alternative, an extension of a sufficient period in which to deem the actual filing time of the Rosedale Exceptions as timely.

**IV.**  
**PRAYER**

WHEREFORE, 4200 Rosedale, LLC respectfully requests that the General Counsel, grant this, Rosedale's Unopposed Extension of Time Motion for one day or in the alternative, an extension of time of a sufficient period in which to deem the actual filing time of the Rosedale Exceptions as timely.

---

<sup>2</sup> The boilerplate language on the bottom of each e-filed e-mail receipt from TCEQ cites 30 TAC Section 1.10(h) and states in part: "Filings are considered timely if received by close of business (usually 5:00 p.m. CST) on the deadline date *unless otherwise ordered (emphasis added)*. The actions and writings of the ALJ confirm not only her absence of objection to the timeliness of the Rosedale Exceptions, but evidence her order to deem the Rosedale Exceptions as timely filed. See also 30 TAC §1.11(g) "[...] the commission or judge may extend the time for taking the action required of such party or grant such other relief as they deem just.

Respectfully submitted,

/S/S. George Alfonso

S. George Alfonso  
THE LAW OFFICES OF  
S. GEORGE ALFONSO  
5340 Alpha Road  
Dallas, TX. 75240  
Phone: (972) 458-6800  
Fax: (972) 458-6801  
Texas State Bar No. 00785658

Attorney for Respondent  
4200 Rosedale, LLC

**CERTIFICATE OF CONFERENCE**

On September 13<sup>th</sup>, 2010 the undersigned conducted a teleconference with Anna Cox, attorney for TCEQ, regarding the substantive matters set forth in this motion. During that teleconference Ms. Cox expressed that she and her client were not in opposition to the relief sought in this motion.

/S/S. George Alfonso

S. GEORGE ALFONSO

**CERTIFICATE OF CONFERENCE**

On September 13<sup>th</sup>, 2010 the undersigned conducted a teleconference with Al Axe, Jr., attorney for Goodyear Rubber & Tire Co., regarding the substantive matters set forth in this motion. Shortly after that teleconference Mr. Axe left a voice mail expressing that he and his client were not in opposition to the relief sought in this motion.

/S/S. George Alfonso

S. GEORGE ALFONSO

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing "Unopposed Motion for Extension of Time to File Exceptions to the ALJ's Proposal for Decision", has been filed and duly properly served in accordance with all required rules on this the 14<sup>th</sup> day of September, 2010 to:

/S/S. George Alfonso  
S. GEORGE ALFONSO

**Texas Commission on Environmental Quality**  
**Chief Clerk LaDonna Castanuela**  
P.O. Box 13087, MC 101  
Austin, Texas 78711-3087  
Phone: (512) 239-1000  
Fax: (512) 239-3311

**Texas Commission on Environmental Quality**  
**Counsel Anna M. Cox**  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087  
Phone: (512) 239-0974  
Fax: (512) 239-3311

**Texas Commission on Environmental Quality**  
**General Counsel: Les Trobman**  
**Attn.: Barham Richard**  
P.O. Box 13087, MC 101  
Austin, Texas 78711-3087  
Phone: (512) 239-1000  
Fax: (512) 239-5533

**Winstead PC**  
**Albert R. Axe, Jr.**  
401 Congress Avenue | Suite 2100 |  
Austin, Texas 78701  
Phone: (512) 370.2806  
Fax: (512) 370.2850

TEXAS  
COMMISSION  
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QUALITY  
2010 SEP 14 PM 3:38  
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**Exhibit No. 1**  
**(Cover letter of ALJ Proposal)**  
**[June 22<sup>nd</sup>, 2010]**

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

June 22, 2010

CHIEF CLERKS OFFICE

2010 JUN 22 PM 4: 08

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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

Re: SOAH Docket No. 582-09-5891; TCEQ Docket No. 2007-1259-PST -E; In Re:  
Executive Director of the Texas Commission of Environmental Quality, v.  
4200 Rosedale LLC and the Goodyear Tire & Rubber Company

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 documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 12, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than July 22, 2010.

This matter has been designated TCEQ Docket No. 2007-1259-PST-E; SOAH Docket No. 582-09-5891. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Ami L. Larson  
Administrative Law Judge

ALL/slc  
Enclosures  
cc: Mailing List

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

**Exhibit No. 2**  
**(ALJ Letter to General Counsel)**  
**[July 21<sup>st</sup>, 2010]**

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

July 21, 2010

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

**Re: SOAH Docket No. 582-09-5891; TCEQ Docket No. 2007-1259-PST-E; In The Matter of Texas Commission on Environmental Quality Enforcement Action Against 4200 Rosedale LLC and Goodyear Tire and Rubber Co. RN 104917885**

Dear Mr. Trobman:

This is my response to the proposed revisions filed to my Proposal for Decision (PFD) in the above case by the Executive Director (ED) and to the separate exceptions filed by Respondents Goodyear Tire and Rubber Co. and 4200 Rosedale LLC.

I recommend that you grant all of the ED's exceptions as well as those raised by Goodyear Tire and Rubber Co.

I recommend that you deny all of the exceptions to the PFD filed by 4200 Rosedale LLC.

Sincerely,

Ami L. Larson  
Administrative Law Judge

ALL/slc  
cc: Mailing List

**Exhibit No. 3**  
**(Goodyear Reply)**  
**[July 22<sup>nd</sup>, 2010]**

**WINSTEAD**

direct dial: 512-370-2889  
zangadicheril@winstead.com

**FAX COVER SHEET**

1636. 46797-6

PLEASE DELIVER TO:	COMPANY	PHONE NO.	FAX NO.
ANNA TREADWELL	TEXAS COMMISSION OF ENVIRONMENTAL QUALITY		239 3434
S. GEORGE ALFONSO	4200 ROSEDALE, LLC		972-458-6801
BLAS J. COY, JR.	TEXAS COMMISSION OF ENVIRONMENTAL OFFICE OF PUBLIC INTEREST COUNSEL		239-6377
THE HONORABLE AMY L. LARSON	ADMINISTRATIVE LAW JUDGE - STATE OFFICE OF ADMINISTRATIVE HEARINGS		475-4993

MESSAGE:

FROM: ZEENA T. ANGADICHERIL PHONE No.: 512-370-2889  
 DATE: JULY 22, 2010 TIME IN: \_\_\_\_\_

NO. OF PAGES \_\_\_\_\_ INCLUDING COVER SHEET.

If any transmission problems, please call  
 Fax Operator: 512-370-2914

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Jul-22-2010 05:00pm From-Winstead PC

T-021 P.002/010 F-834

# WINSTEAD

Austin Dallas Fort Worth Houston San Antonio The Woodlands Washington, D.C.

401 Congress Avenue  
Suite 2100  
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zangadicheril@winstead.com

July 22, 2010

Office of the Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 36 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)



Jul-22-2010 05:08pm From=Winstead PC

T-021 P.004/010 F-834

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."<sup>2</sup> 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*.<sup>3</sup> The TCEQ's current definition of "owner" was not even in existence on January 31, 1986 when Goodyear's Lease at the Property expired.<sup>4</sup>

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

<sup>2</sup> Rosedale's Closing Argument, Paragraphs 39 and 48.

<sup>3</sup> Exhibit 24, Stipulation II

<sup>4</sup> 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.<sup>5</sup> 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, 1986<sup>6</sup> and (2) the Lease Expiration Notice dated July 29, 1992.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The transmittal letter explicitly stated that Goodyear submitted the forms as the "operator of the tanks--not the owner."<sup>11</sup> 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.<sup>12</sup> Further,

<sup>5</sup> Exhibit 24, Stipulation 37.

<sup>6</sup> Exhibit 8, "UST Notification Form."

<sup>7</sup> Exhibit 9, "Lease Expiration Notice."

<sup>8</sup> Exhibit 28.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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".<sup>17</sup> 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."<sup>18</sup> After considering all available evidence, including the testimony offered at the April 8th evidentiary hearing,<sup>19</sup> the ALJ reasonably concluded that the Lease Expiration Notice did not establish that Goodyear was, or is, the owner of the UST.

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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.

<sup>13</sup> PFD at pages 4-5.

<sup>14</sup> Exhibit 24, Stipulation 15.

<sup>15</sup> 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).

<sup>16</sup> Exhibit 10.

<sup>17</sup> Exhibit 24, Stipulation 37.

<sup>18</sup> Exhibit 26, Executive Director's Response to Request #1.

<sup>19</sup> 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.<sup>20</sup> 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[.]"<sup>21</sup> 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;<sup>22</sup> (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;<sup>23</sup> and (3) an owner of property also owns the improvements on the property, unless there is clear intent to the contrary.<sup>24</sup>

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

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

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

<sup>23</sup> *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).

<sup>24</sup> *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.<sup>25</sup> 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 Property<sup>26</sup> 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.<sup>27</sup>

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."<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> In that case, the TCEQ determined that lack of knowledge could not be

<sup>25</sup> 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.

<sup>26</sup> Exhibits 1-3.

<sup>27</sup> Exhibit 3.

<sup>28</sup> Rosedale's Closing Argument, Paragraph 47

<sup>29</sup> Executive Director's Closing Argument, Footnote 52.

<sup>30</sup> (TCEQ Docket No. 2008-1237-PST-E, SOAH Docket No. 582-00-2813 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.<sup>31</sup>

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.

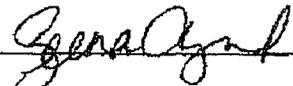
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*installment payment, and requiring certain actions of Kenneth W. Blevins in Live Oak County, Texas; TCEQ ID No RN101783496).* The Commission assessed penalties against the property owner, despite the property owner's claim that he did not know the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

<sup>31</sup> *Id*

Respectfully Submitted,

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**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:

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