State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 SEP 26 PM 3:58
CHIEF CLERKS OFFICE

September 26, 2008

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

Re: SOAH Docket No. 582-08-1956; TCEQ Docket No. 2007-1295-PST-E; In the Matter of an Enforcement Action Against Dewayne Dyer, RN102255759

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 October 16, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than October 27, 2008.

This matter has been designated **TCEQ Docket No. 2007-1295-PST-E; SOAH Docket No. 582-08-1956**. 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 eleven 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,

William G. Newchurch for

Penny A. Wilkov
Administrative Law Judge

PAW/ap
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: DEWAYNE DYER

SOAH DOCKET NUMBER: 582-08-1956

REFERRING AGENCY CASE: 2007-1295-PST-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ PENNY WILKOV

REPRESENTATIVE / ADDRESS	PARTIES
BLAS J. COY, JR. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF PUBLIC INTEREST COUNSEL P.O. BOX 13087, MC-103 AUSTIN, TX 78711-3087 (512) 239-6363 (PH) (512) 239-6377 (FAX)	OFFICE OF PUBLIC INTEREST COUNSEL
DOCKET CLERK TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF THE CHIEF CLERK PO BOX 13087 AUSTIN, TX 78711 (512) 239-3300 (PH) (512) 239-3311 (FAX)	TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ANNA M. COX ATTORNEY TCEQ LITIGATION DIVISION P O BOX 13087 AUSTIN, TX 78711 (512) 239-3400 (PH) (512) 239-3434 (FAX)	EXECUTIVE DIRECTOR

DEWAYNE DYER
5194 FM 273
BONHAM, TX 75418
(214) 243-7739 (PH)

DEWAYNE DYER

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-08-1956
TCEQ DOCKET NO. 2007-1295-PST-E

2008 OCT 26 PM 3:58
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

IN THE MATTER OF	§	**BEFORE THE STATE OFFICE**
AN ENFORCEMENT ACTION	§	
AGAINST DEWAYNE DYER	§	
	§	**OF**
RN102255759	§	
	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) brought this enforcement action against Dewayne Dyer (Respondent) seeking to assess $6,3005.00 in administrative penalties and to require corrective actions for alleged violations of 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.7(d)(3). Specifically, the ED alleged that Respondent failed to permanently remove two underground storage tanks (USTs) from service and failed to notify the TCEQ of any change or additional information regarding the USTs within 30 days of the occurrence of the change.

After being properly notified, Respondent failed to appear at the hearing on the merits to contest the ED's allegations and recommendation. Therefore, as set out below, the Administrative Law Judge (ALJ) recommends that the Commission enter a default order against Respondent, accept the ED's allegations as true, assess a penalty of $6,300.00, and require certain corrective actions by Respondent.

II. JURISDICTION AND VIOLATIONS

Respondent owns the property located at 118 East Fannin Street, Leonard, Fannin County, Texas (the Site). On July 17, 2007, a TCEQ Dallas/Fort Worth Regional Office investigator documented the following violations:

a. Respondent 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 was not brought into timely compliance with the upgrade requirements of 30 TEX. ADMIN. CODE § 334.47(a)(2).

b. Respondent failed to notify the TCEQ of any change or additional information regarding the USTs within 30 days of the occurrence of the change as required by 30 TEX. ADMIN. CODE § 334.7(d)(3).

Respondent received notice of the violations on or about August 3, 2007.

Under TEX. WATER CODE ANN. § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code within the Commission's jurisdiction or a rule adopted or an order or permit issued thereunder. As relevant to this case, the penalty may not exceed $10,000.00 per day of violation.[1] Additionally, the Commission may order the violator to take corrective action.[2]

The Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as outlined in the Conclusions of Law that are in the attached Default Order.

III. DEFAULT ORDER

A default order in this case should be entered pursuant to 1 TEX. ADMIN. CODE § 155.55. That rules provides that a default may only be entered upon adequate proof that proper notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law, the ALJ finds that the requisite notice has been provided to Respondent in this proceeding, in accordance with TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; 1 TEX. ADMIN. CODE §§ 155.27 and 155.55; and 30 TEX. ADMIN. CODE §§ 1.11 and 39.25.

---

[1] TEX. WATER CODE ANN. § 7.052(c).

[2] TEX. WATER CODE ANN.§ 7.073.

Therefore, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law in the attached Default Order, assessing an administrative penalty of $6,300.00 against Respondent for the violations at issue and directing Respondent to take the specified corrective actions.

SIGNED September 26, 2008.

PENNY A. WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

DEFAULT ORDER

Assessing Administrative Penalties Against and Ordering Corrective Action by Dewayne Dyer; TCEQ Docket No. 2007-1295-PST-E; SOAH Docket No. 582-08-1956

On _____, 2008, 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 Dewayne Dyer (Respondent). A Proposal for Decision (PFD) was presented by Penny A. Wilkov, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 31, 2008, in Austin, Texas.

The Executive Director, represented by Anna Cox, appeared at the hearing. 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 be entered against the Respondent. 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 the property located at 118 East Fannin Street, Leonard, Fannin County, Texas (the Site).

2. The Site includes two underground storage tanks (USTs) that contain a regulated petroleum substance as defined in the rules of the Commission.

3. The Site's USTs are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

4. During an inspection on July 17, 2007, a TCEQ Dallas/Fort Worth Regional Office investigator documented that Respondent violated the Commission's rules relating to the USTs.

5. On October 9, 2007, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent had committed the following violations discovered during the investigation:

   a) Respondent 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 was not brought into timely compliance with the upgrade requirements of 30 TEX. ADMIN. CODE § 334.47(a)(2); and

   b) Respondent failed to notify the Commission of any change or additional information regarding the USTs within 30 days of the occurrence of the change as required by 30 TEX. ADMIN. CODE § 334.7(d)(3).

6. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of $6,300.00 against Respondent and that the Commission order Respondent to take certain corrective actions.

7. The total administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each violation.

8. For the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2), the Executive Director sought a penalty of $5,250.00, predicated on the two monthly violation events, the potential of causing major harm to the environment, and the calculated economic benefit of $4,632.00 from the violation.

9. For the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2), the Executive Director sought a penalty of $1,050.00, based on the single violation, which was considered a major programmatic violation, and with a calculated economic benefit of $3.00 from the violation.

10. The Executive Director mailed a copy of the EDPRP to Respondent at 5194 F.M. 273, Bonham, Texas, 75418, on the same date that the EDPRP was filed.

11. Respondent filed an answer to the EDPRP by letter dated January 3, 2008.

12. On February 13, 2008, the Executive Director requested the matter be referred to SOAH for hearing.

13. On March 5, 2008, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.

14. The notice of hearing:

- Indicated the time, date, place, and nature of the hearing;
- Stated the legal authority and jurisdiction for the hearing;

- Indicated the statutes and rules the Executive Director alleged Respondent violated.

- 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 legal 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

- Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.

15. On April 3, 2008, the ALJ convened the preliminary hearing. Respondent appeared by telephone. The parties presented an Agreed Scheduling Order, which the ALJ adopted by Order No. 2, to govern the discovery and set the hearing date. All parties received the Order by either mail or facsimile.

16. On July 31, 2008, the ALJ convened a hearing. Respondent did not appear and was not represented at the hearing.

17. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director seeks would be assessed against Respondent, and Respondent would be ordered to take the corrective action recommended by the Executive Director. The ALJ granted the motion.

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 or of the

Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued.

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 proceeding.

3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.

4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 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 TEX. ADMIN. CODE § 155.27; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE § 155.55, that if Respondent failed to appear at the hearing, a default 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 the above Findings of Fact and Conclusions of Law:

    a. A default judgment should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d); and

b. The allegations contained in the notice of hearing, including those in the EDPRP attached thereto, are deemed admitted as true.

8. Based on the Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.7(d)(3).

9. 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.

10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

11. 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 Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of $6,300.00 is justified and should be assessed against Respondent.

12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Dewayne Dyer is assessed an administrative penalty in the amount of $6,300.00 for violations of 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.7(d)(3). The payment of this administrative penalty and Dewayne Dyer's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this section. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Dewayne Dyer; Docket No. 2007-1295-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, Dewayne Dyer shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.47(a)(2).

3. Within 45 days after the effective date of the Commission Order, Dewayne Dyer shall submit an amended registration to reflect the current operational status of the UST system, in accordance with 30 TEX. ADMIN. CODE § 334.7(d)(3).

4. Within 60 days after the effective date of the Commission Order, Dewayne Dyer shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records, to demonstrate compliance with Ordering Provision Nos. 2 and 3. The certification shall be notarized by a State of Texas Notary Public and include the following 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."

Dewayne Dyer 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:

Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAH) 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 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

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