

SOAH DOCKET NO. 582-09-2308  
TCEQ DOCKET NO. 2008-1885-PST-E

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY  
Petitioner

V.

JULUIS L. BROOKS  
Respondent

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO  
THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Stephanie J. Frazee, and makes the following exceptions and suggestions to modify the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director suggests the following modifications to the ALJ's Proposed Order:

1. That Section I, Paragraph 6 be changed to "On October 31, 2006, and on February 16, 2007, Notice of Violation letters were issued to the Respondent. On October 24, 2007, a Notice of Enforcement letter was issued to the Respondent."
2. That in Section I, Paragraph 7.a., "a UST" be replaced with "a UST system."
3. That in Section I, Paragraph 9, "sought in the EDPRP" be removed. Currently, Paragraph 9 states that the "\$3,675 administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each violation, which Respondent agreed was a reasonable amount." The administrative penalty sought in the EDPRP, however, was \$11,550. Mr. Brooks stipulated to the penalty amount of \$3,675, which was not pled in the EDPRP but was the penalty that resulted from a change in TCEQ policy regarding penalty calculations for UST system removal cases.
4. That in Section I, Paragraph 10, "and the EDPRP" be removed.
5. That in Section I, Paragraph 10, "and 1301 East Front Street, Midland, Texas 79701" be added after "501 East Texas Avenue, Midland, Texas, 79701,".
6. That in Section II, Paragraph 7.a., "a UST" be replaced with "a UST system."
7. That in the Ordering Provisions on page 8, Paragraph 1, the citations be altered to state "30

TAC §§ 334.7(a)(1) and 334.47(a)(2).”

8. That in the Ordering Provisions on page 8, Paragraph 3, “SUT” be replaced with “UST.”
9. That in the Ordering Provisions on page 8, Paragraph 3, “the UST” be replaced with “the UST system.”

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is attached.

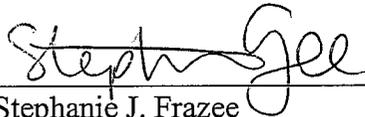
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division



---

Stephanie J. Frazee  
State Bar of Texas No. 24059778  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, TX 78711  
(512) 239-3693  
(512) 239-3434 (FAX)

**CERTIFICATE OF SERVICE**  
**Juluis L. Brooks**  
**SOAH Docket No. 582-09-2308**  
**TCEQ Docket No. 2007-1885-PST-E**

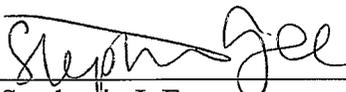
I hereby certify that on this 19<sup>th</sup> day of February, 2010, the original and 7 copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Modifications") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Modifications were sent to the following:

**Via Inter-Agency Mail and Via Facsimile to (512) 475-4994**  
The Honorable Steven D. Arnold  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649

**Via Certified Mail, Postage Prepaid**  
Mr. Juluis L. Brooks  
1800 East Oak Avenue  
Midland, Texas 79705  
**Article No. 7002 2030 0005 7060 4655**

**Via electronic mail**  
Blas Coy, Public Interest Counsel

  
\_\_\_\_\_  
Stephanie J. Frazee  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER** Assessing Administrative Penalties Against  
and Ordering Corrective Action by Juluis L.  
Brooks; TCEQ Docket No. 2007-1885-PST-E;  
SOAH Docket No. 582-09-2308

On \_\_\_\_\_, 2010, 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 Juluis L. Brooks (Respondent). A Proposal for Decision (PFD) on Motion for Summary Disposition was presented by Steven D. Arnold, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

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

## I. FINDINGS OF FACT

1. Respondent Juluis L. Brooks owns a former retail gasoline service station at 1301 East Front Street, Midland, Midland County, Texas (Facility).
2. Four underground storage tanks (UST) that are not exempt or excluded from regulation exist beneath the Facility.
3. On October 23, 2007, a TCEQ Midland Regional Office investigator documented that Respondent's USTs were not in compliance with the upgrade requirements.

4. There was no evidence of corrosion or cathodic protection on Respondent's USTs.
5. Respondent had not updated the UST registration with TCEQ to reflect the correct ownership information.
6. On October 31, 2006, and on February 16, 2007, Notice of Violation letters were issued to the Respondent. On October 24, 2007, a Notice of Enforcement Letter was issued to the Respondent.
7. On October 22, 2008, the Executive Director filed a Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. §7.054. the EDPRP alleged that:
  - (a) Respondent violated 30 TAC §334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and
  - (b) Respondent violated 30 TAC §334.7(d)(3) by failing to provide an amended UST registration to the Commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition.
8. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$11,550 against Respondent and that the Commission order Respondent to take certain corrective actions. The amount of the recommended administrative penalty was subsequently reduced to \$3,675 on July 8, 2009, in accordance with current Litigation Division policy.

9. The \$3,675 administrative penalty is an accumulation of the different penalties assessed for each violation, which Respondent agreed was a reasonable amount.
10. The Executive Director mailed a copy of the original EDPRP to Respondent at 501 East Texas Avenue, Midland, Texas 79701, and 1301 East Front Street, Midland, Texas 79701, on the same date that such was filed.
11. Respondent filed an answer to the EDPRP on November 21, 2008, and requested a hearing.
12. On January 16, 2009, the TCEQ referred this matter to SOAH for a contested case hearing.
13. On February 9, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for March 26, 2009.
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 shows how the penalty was calculated for the alleged violations.
15. On March 26, 2009, the Executive Director and Respondent appeared at a preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on July 30, 2009.

16. Among the items in the agreed procedural schedule was a deadline directing the parties to complete discovery by July 15, 2009. Respondent did not respond to discovery, and on July 23, 2009, the ALJ entered Order No. 2 Ruling on Motion to Compel and Motion for Sanctions. The ALJ granted the motion, stating that “the requests for admission included the Executive Director’s discovery request are deemed admitted and [Respondent] is prohibited from introducing any information at hearing that contradicts his deemed admissions....”
17. On July 22, 2009, Respondent filed a Motion for Continuance, which was denied on July 29, 2009.
18. The evidentiary hearing in this case was scheduled for July 30, 2009. On that day, before the hearing commenced, the parties came to an agreement. Respondent stipulated to the violations and the penalty in the case, and the parties jointly requested a continuance for three months to allow for further settlement negotiations. Respondent agreed to submit to the Executive Director, within one month from the date of the hearing: (1) financial information sufficient to permit the Executive Director to evaluate Respondent’s claimed financial inability, and (2) a written plan for removing the USTs on his property.
19. Although Respondent submitted additional financial information, he did not submit sufficient information to allow the Financial Administration Division (FAD) to make a determination as to Respondent’s ability to pay the recommended penalty. Specifically, in response to the Executive Director’s request that Respondent’s wife sign the disclosure documents required by the FAD, Respondent submitted a statement that his wife would not sign any of the required disclosures. Therefore, the FAD could not determine whether Respondent’s wife holds any community property assets in her name that could

be used to pay the penalty. Further, Respondent did not submit a plan for removing his USTs. He merely stated that he was attempting to find another entity, such as the original owner of the tanks, who may at some point assist him in removing the USTs. He did not submit a contract with a certified UST removal company, a notice of construction, or any other documentation to show that he was planning to remove the USTs. Therefore, the Executive Director has been unable to reach settlement with Respondent.

20. In Order No. 5 Continuing the Hearing on the Merits; Memorializing Deadlines, the ALJ ordered the Executive Director to file a status report on or before October 28, 2009, informing the ALJ of the status of the settlement plan and the need for further hearings in this matter. The Executive Director made the required filing on the deadline stated in Order No. 5, requesting that summary disposition issue as a result of the foregoing facts.
21. On November 23, 2009, the ALJ notified Respondent of his intent to issue a ruling on the Executive Director's Motion for Summary Disposition and notifying Respondent, pursuant to 30 TEX. ADMIN. CODE §80.137(b), that he would have until December 16, 2009, to file a response to the Motion for Summary Disposition. Respondent did not file a response to the Executive Director's Motion for Summary Disposition.

## **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 thereunder.
2. Under TEX. WATER CODE ANN. §7.052, a penalty may not exceed \$10,000.00 per violation, per day for the violations alleged in this 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 and the proposed penalties and corrective actions.
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 and corrective actions.
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 Findings of Fact and Conclusions of Law:
  - (a) Respondent violated 30 TAC §334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; and
  - (c) Respondent violated 30 TAC §334.7(d)(3) by failing to provide an amended UST registration to the Commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition.

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 Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$3,675 is justified and should be assessed against Respondent.

11. Based on the above Findings of Fact, Respondent should be required to take the corrective action 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. Juluis L. Brooks is assessed an administrative penalty in the amount of \$3,675 for violations of 30 TAC §§334.7(a)(1) and 334.47(a)(2). The payment of this administrative penalty and Juluis L. Brooks' compliance with all the terms and conditions

set forth in this Order will 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: Juluis L. Brooks; Docket No. 2007-1885-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 this Order, Juluis L. Brooks shall permanently remove the UST system from service, in accordance with 30 TAC §334.55.
3. Within 45 days after the effective date of this Order, Juluis L. Brooks shall submit a properly completed UST registration form to the TCEQ indicating that the UST system has been removed, in accordance with 30 TAC §334.7, to:

Registration and Reporting Section  
Permitting & Remediation Support Division, MC 138  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin TX 78711-3087

4. Within 75 days after the effective date of this Order, Juluis L. Brooks shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 2 and 3. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”

The certification shall be sent to:

Order Compliance Team  
Enforcement Division, MC 149  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

with a copy to:

Michael Edmiston, Waste Section Manager  
Midland Regional Office  
Texas Commission on Environmental Quality  
3300 North A Street, Building 4-107  
Midland, TX 79705-5406

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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**

---

**Bryan W. Shaw, Chairman**  
**For the Commission**