

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

March 12, 2010

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

Re: SOAH Docket No. 582-08-3991; Executive Director of the Texas Commission on Environmental Quality v. Ray Drennan

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 April 1, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than April 11, 2010.

This matter has been designated **TCEQ Docket No. 2008-0124-PST-E; SOAH Docket No. 582-08-3991**. 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,


Henry D. Card
Administrative Law Judge

HDC/lh
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

**300 West 15th Street Suite 502
Austin, Texas 78701
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: RAY DRENNAN
SOAH DOCKET NUMBER: 582-08-3991
REFERRING AGENCY CASE: 2008-0124-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ HENRY D. CARD**

REPRESENTATIVE / ADDRESS

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TCEQ EXECUTIVE DIRECTOR

RAY DRENNAN
1114 WEST BLOODWORTH ST.
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RAY DRENNAN

xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-08-3991
TCEQ DOCKET NO. 2008-0124-PST-E**

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V.		
RAY DRENNAN, Respondent		

PROPOSAL FOR DECISION

Petitioner, the Executive Director of the Texas Commission on Environmental Quality (TCEQ or the Commission), seeks corrective action and an administrative penalty from Respondent Ray Drennan regarding two underground petroleum storage tanks on property Mr. Drennan owns. Mr. Drennan requests that no action be required and states that he is financially unable to pay for either the corrective action or the proposed penalty. The Administrative Law Judge (ALJ) recommends the TCEQ require Mr. Drennan to take the corrective action proposed by the Executive Director, that it impose an administrative penalty of \$11,550, and that it defer all but \$3,600 of that penalty pending the corrective action, with the \$3,600 to be paid in monthly increments of \$100 over 36 months.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter under TEX. WATER CODE ANN. §7.054 and Chapter 26. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. Chapter 2003.

The Executive Director sent Mr. Drennan his Preliminary Report and Petition in this matter on April 10, 2008. The Commission received Mr. Drennan's reply to that notice and request for a

hearing on April 21, 2008, after which the matter was referred to SOAH. Notice of the hearing was sent to Mr. Drennan and to the Office of Public Interest Counsel on July 31, 2008, which was more than ten days before the hearing, as required by TEX. GOV'T CODE ANN. §§ 2001.051. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, pursuant to TEX. GOV'T CODE ANN. §2001.052. The notice complied with those sections of the Government Code and the relevant sections of the Texas Water Code and the Commission's rules.

After a preliminary hearing and some continuances, the hearing on the merits was convened January 11, 2010, before the undersigned ALJ. The Executive Director and Mr. Drennan participated in the hearing and offered testimony, documentary evidence, and arguments. The hearing was adjourned and the record closed the same day, January 11, 2010.

II. DISCUSSION

Mr. Drennan owns a building and real property at 125 South Avenue C, Olney, Young County, Texas. He uses the building as a location for his hair salon. Two out-of-service underground storage tanks (USTs) are located on the property.

On January 30, 2007, Darla Ward, who was a TCEQ Abilene Regional Office investigator, conducted an investigation of the property. She determined that the USTs had not been removed or upgraded as required by TCEQ's rules. Because the USTs were still registered to the previous owner of the property, George Medlin, she further determined that Mr. Drennan had failed to update the registration information for the USTs. In her Investigation Report, Ms. Ward alleged Mr. Drennan therefore had violated 30 TAC §§334.47(a)(2) and 334.7(d)(3). She recommended corrective action in the form of permanent removal or upgrading of the USTs and updating of the registration. A Notice of Violation (NOV) was issued to Mr. Drennan on February 20, 2007.

Mr. Drennan replied to the NOV in a letter sent to TCEQ on March 7, 2007. In that letter, he stated he had bought the property in 1998 without being aware it had been used for a gas station approximately 50 years ago. He stated he could not afford to take the corrective action sought by TCEQ.

On November 26, 2007, Ms. Ward conducted a follow-up investigation. That investigation determined that the violations she had identified earlier had not been corrected. TCEQ sent a Notice of Enforcement to Mr. Drennan on January 4, 2008, followed by a Preliminary Report and Petition on April 10, 2008. The Preliminary Report and Petition reiterated the proposed corrective actions and recommended assessment of an administrative penalty of \$11,550, consisting of \$10,500 for the failure to remove the USTs and \$1,050 for the failure to update the registration. Mr. Drennan then requested a hearing on the matter, as described above.

At the hearing, TCEQ regional investigator Patty Gough¹ testified that Mr. Drennan had failed to remove or upgrade the USTs, in violation of 30 TAC §334.47(a)(2). She stated the provisions of that rule are mandatory and apply to the owner of the USTs. She further testified that Mr. Drennan had failed to update the registration for the USTs, in violation of 30 TAC §334.7(d)(3), despite having been made aware of the requirement.

Thomas Greimel, TCEQ Enforcement Coordinator, discussed the administrative penalty calculation. He explained the Penalty Calculation Worksheet (PCW) from which the proposed administrative penalty was derived, and stated the worksheet was used to apply consistent penalties for violations of the Commission's rules. The Commission's penalty policy implements the factors set out to be considered in TEX. WATER CODE ANN. §§7.053. That section states:

¹ Ms. Ward, who conducted the investigations, is no longer with TCEQ.

Sec. 7.053. FACTORS TO BE CONSIDERED IN DETERMINATION OF PENALTY AMOUNT. In determining the amount of an administrative penalty, the commission shall consider:

- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- (2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
- (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
- (4) any other matters that justice may require.

Under the matrix, Mr. Drennan's lack of culpability did not reduce the proposed penalty; culpability could have increased it. Mr. Greimel also did not consider Mr. Drennan's financial situation as another matter "that justice may require" pursuant to Section 7.053(4). That was reviewed by Financial Analyst Donna Chaffin, as discussed below. With regard to the registration violation, Mr. Greimel stated the Commission does not update registrations itself, even when it has become aware of a change in ownership.

Ms. Chaffin reviewed Mr. Drennan's ability to pay the proposed administrative penalty. She testified that Mr. Drennan's salon was an ongoing business; under the TCEQ financial review policy, the minimum amount payable by an ongoing business was \$3,600. She further determined that Mr. Drennan was unable to pay more than that amount. Therefore, she recommended that Mr. Drennan be ordered to pay an administrative penalty of \$3,600, in payments of \$100 per month

for 36 months, with the remaining \$7,950 to be deferred pending compliance with the corrective actions. She testified that recommendation was in accordance with the Executive Director's financial review policy.

Mr. Drennan testified that he was 54 years old and had a limited income of about \$10,000 a year from his business. He stated he lived with his mother, who owned the house in which they live, and that he owed her approximately \$50,000. He testified he could not afford either the administrative penalty or the proposed corrective action of removing the USTs.

Mr. Drennan stated he had been misled when he purchased the property. When he entered into the contract for deed to purchase the property, in 1998, neither he nor Mr. Medlin knew the USTs were there. Later, after Mr. Medlin registered the USTs, Mr. Drennan was led to believe that no corrective action would be required. He observed that there were numerous abandoned storage tanks in the area and believed he was being unfairly singled out for enforcement action. He requested the Commission at least to reduce his fine and exempt him from corrective action, in recognition of his financial condition and lack of culpability in installing or even being aware of the USTs.

30 TAC §334.47(a) (2) requires an owner or operator to remove a UST system from service if it has not been upgraded to the technical standards required by the Commission. By failing to do so, Mr. Drennan violated that rule as alleged by the Executive Director.

30 TAC §334.7(d)(4) requires an owner to register USTs. By failing to do so, Mr. Drennan violated that rule as alleged by the Executive Director.

The ALJ sympathizes with Mr. Drennan's plight and recognizes that he is not at fault in this matter, except perhaps in his failure to register the USTs after being informed he was required to do so. At the same time, however, the Executive Director correctly pointed out that the statutes and

rules require a property owner to be responsible for corrective action, regardless of culpability. The Executive Director emphasized that the Commission's penalty matrix was designed to provide equal treatment for property owners who are found to be in violation of the Commission's rules. Ms. Chaffin reduced the proposed penalty to the minimum allowable under the Executive Director's policy. Given the legal restrictions, the ALJ reluctantly concludes that the Commission should impose the corrective actions and the administrative penalty proposed by the Executive Director. The penalty should be reduced to \$3,600, payable over 36 months, as recommended by Ms. Chaffin, with the remainder deferred pending the corrective action. The record does not identify any mechanism for the Commission to assist in the removal of the USTs, but if there is such a means it should be considered in this case.

SIGNED March 12, 2010.



HENRY D. CARD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An ORDER Assessing Administrative Penalties Against Ray Drennan;
TCEQ Docket No. 2008-0124-PST-E and SOAH Docket No. 582-08-3991**

On _____, 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 Ray Drennan (Respondent). A Proposal for Decision (PFD) was presented by Henry D. Card, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on January 11, 2010, in Austin, Texas.

FINDINGS OF FACT

1. Mr. Drennan owns a building and real property at 125 South Avenue C, Olney, Young County, Texas. He uses the building as a location for his hair salon.
2. Two out-of-service underground storage tanks (USTs) are located on Mr. Drennan's property.
3. On January 30, 2007, Darla Ward, who was a TCEQ Abilene Regional Office investigator, conducted an investigation of the property. She determined that the USTs had not been removed or upgraded as required by TCEQ's rules. Because the USTs were still registered to the previous owner of the property, George Medlin, she further determined that Mr. Drennan had failed to update the registration information for the USTs. In her Investigation Report, Ms. Ward alleged Mr. Drennan therefore had violated

30 TAC §§334.47(a)(2) and 334.7(d)(3). She recommended corrective action in the form of permanent removal or upgrading of the USTs and updating of the registration. A Notice of Violation (NOV) was issued to Mr. Drennan on February 20, 2007.

4. On November 26, 2007, Ms. Ward conducted a follow-up investigation. That investigation determined that the violations she had identified earlier had not been corrected.
5. TCEQ sent a Notice of Enforcement to Mr. Drennan on January 4, 2008, followed by the Executive Director's Preliminary Report and Petition (EDPRP) on April 10, 2008. The EDPRP reiterated the proposed corrective actions and recommended assessment of an administrative penalty of \$11,550, consisting of \$10,500 for the failure to remove the USTs and \$1,050 for the failure to update the registration.
6. Mr. Drennan filed a timely request for a hearing, after which the matter was referred to the State Office of Administrative Hearings (SOAH).
7. Notice of the hearing was sent to Mr. Drennan and to the Office of Public Interest Counsel July 31, 2008, which was more than ten days before the hearing.
8. The notice contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
9. After a preliminary hearing and some continuances, the hearing on the merits was convened January 11, 2010, before ALJ Henry D. Card. The Executive Director and Mr. Drennan participated in the hearing and offered testimony, documentary evidence, and arguments. The hearing was adjourned and the record closed the same day, January 11, 2010.

10. Mr. Drennan has failed to remove or upgrade the USTs within 60 days of notification.
11. Mr. Drennan has failed to update the registration information for the USTs.
12. An administrative penalty of \$11,550, consisting of \$10,500 for the failure to remove the USTs and \$1,050 for the failure to update the registration is warranted under the Commission's penalty matrix.
13. Under the Commission's financial review policy, the minimum administrative penalty payable by an ongoing business is \$3,600.
14. The Commission's policy allows the minimum penalty of \$3,600 to be paid in monthly installments of \$100 over 36 months.
15. Mr. Drennan is 54 years old and had a limited income of about \$10,000 a year from his business. He lives with his mother, who owns the house in which they live, and owes her approximately \$50,000.
16. Mr. Drennan cannot afford either the administrative penalty or the proposed corrective action of removing the USTs.

CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. (Texas Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Texas Water Code § 7.052(c), a penalty for the violations alleged in this case may not exceed \$10,000 per violation, per day.
3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.

4. As required by Texas Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, the 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. (Texas Government Code) §§ 2001.051 and 2001.052; Texas Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties.
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 Texas Government Code, chapter 2003.
7. Mr. Drennan violated 30 TAC § 334.47(a) (2) by failing to remove the UST system from service.
8. Mr. Drennan violated 30 TAC § 334.7(d)(4) by failing to update the registration.
9. Mr. Drennan should be ordered to remove the USTs from service in accordance with 30 TAC § 334.55.
10. Mr. Drennan should be ordered to update the registration for the UST system in accordance with 30 TAC § 334.7.
11. Pursuant to TEX. WATER CODE ANN. § 7.053 and the Commission's Penalty Calculation Worksheet, Mr. Drennan should be assessed an administrative penalty of \$11,550 for the two violations, consisting of a penalty of \$10,500 for the failure to remove the USTs and \$1,050 for the failure to update the registration for the USTs.
12. Because of Mr. Drennan's inability to pay, all but \$3,600 of the administrative penalty should be deferred pending the corrective action.

13. Mr. Drennan should be allowed to pay the \$3,600 in \$100 increments over a period of 36 months, as provided in the Commission's financial review policy.

ORDERING PROVISIONS

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

1. Within 30 days after the effective date of this Commission Order, Ray Drennan shall permanently remove the UST system from service in accordance with 30 TEX. ADMIN. CODE § 334.55.
2. Within 45 days after the effective date of this Commission Order, Ray Drennan shall submit an amended registration to indicate the current ownership information in accordance with 30 TEX. ADMIN. CODE § 334.7 to:

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

3. Within 60 days after the effective date of this Commission Order, Mr. Drennan shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Paragraphs 1 and 2.

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 submitted to:

Order Compliance Team
Enforcement Division, MC149A
Texas Commission on Environmental quality
P.O. Box 13087
Austin, Texas 78711-3087

and

Mike Taylor, Waste Section Manager
Texas Commission on Environmental Quality
Abilene Regional office
1977 Industrial Blvd.
Abilene, Texas 79602-7833

4. Within 60 days after the effective date of this Order, Ray Drennan shall begin paying an administrative penalty in the amount of \$3,600, in increments of \$100 for 36 months, for the violations set forth above. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Ray Drennan TCEQ Docket No.2008-0124-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

5. Ray Drennan may be required to pay an additional administrative penalty of \$7,950 if he does not comply with the corrective actions set out in paragraphs 1 and 2 of this Order.
6. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas 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.
7. 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.
8. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code §2001.144.
9. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. 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, Ph D., Chairman
For the Commission**