

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 30, 2009

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 JUL 31 AM 10:30
CHIEF CLERKS OFFICE

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

Re: SOAH Docket No. 582-09-1255; TCEQ Docket No. 2008-0232-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v. Nida,
Inc. d/b/a Lawndale Chevron, Respondent RN10278888

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 August 19, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than August 31, 2009.

This matter has been designated **TCEQ Docket No. 2008-0232-PST-E; SOAH Docket No. 582-09-1255**. 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,

A handwritten signature in cursive script that reads "Rebecca S. Smith".

Rebecca S. Smith

Administrative Law Judge

RSS/Ls
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: NIDA, INC / LAWNDALE CHEVRON

SOAH DOCKET NUMBER: 582-09-1255

REFERRING AGENCY CASE: 2008-0232-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ THOMAS H. WALSTON**

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)
bcoy@tceq.state.tx.us

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
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
P.O. BOX 13087
AUSTIN, TX 78711
(512) 239-0974 (PH)
(512) 239-3434 (FAX)

EXECUTIVE DIRECTOR

MOHAMMED AHMED
REGISTERED AGENT
NIDA, INC. DBA LAWNDALE CHEVRON
8001 LAWNDALE
HOUSTON, TX 77012
(281) 827-5707 (PH)
(281) 272-5690 (FAX)

NIDA, INC. DBA LAWNDALE CHEVRON

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-1255
TCEQ DOCKET NO. 2008-0232-PST-E

2009 JUL 31 AM 10:30

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

V.

**NIDA, INC.
DBA LAWNDAL CHEVRON,
Respondent
RN102788882**

§
§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) brings this enforcement action against NIDA, Inc. d/b/a Lawndale Chevron (Respondent). The ED alleges that Respondent violated the Commission's rules by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks (USTs). Respondent contends that the lack of financial assurance was not its fault and alternatively that its general liability and umbrella insurance policies provided sufficient financial assurance. The Administrative Law Judge (ALJ) finds that Respondent committed the violation and recommends that the Commission assess a \$4,224 penalty against Respondent.

I. JURISDICTION AND NOTICE

Respondent does not dispute the Commission's jurisdiction or notice, so no further discussion regarding notice or jurisdiction is included here. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law concerning jurisdiction and notice.

II. BACKGROUND AND PROCEDURAL HISTORY

Respondent owns a convenience store that sells gasoline at 8001 Lawndale St., Houston, Harris County, Texas. This facility contains two USTs.

On January 28, 2008, the ED issued a notice of enforcement (NOE) to Respondent, alleging that Respondent did not have a delivery certificate and failed to demonstrate acceptable financial assurance for its USTs.¹ On August 8, 2008, the ED issued a preliminary report and petition (Petition) alleging three violations (the two in the NOE plus an allegation that Respondent failed to renew its delivery certificate) and mailed a copy of it to Respondent.² On August 18, 2008, Respondent filed a request for a contested case hearing.³

On November 6, 2008, the ED requested the Commission's Chief Clerk to refer this dispute to the State Office of Administrative Hearings (SOAH) for hearing,⁴ which the Chief Clerk did on November 18, 2008. On November 25, 2008, the Chief Clerk mailed notice of a January 22, 2009 preliminary hearing to the Respondent, the ED, and the Public Interest Counsel (PIC).⁵ The preliminary hearing was held, and the parties agreed to a schedule, which included a March 30, 2009 deadline to respond to discovery requests. This agreed schedule was incorporated into Order No. 1.

The ED mailed discovery requests, including requests for admission, to Respondent on February 27, 2009.⁶ Despite the response deadline in Order No. 1, Respondent failed to answer or object to the requests. On April 27, 2009, the ED moved for sanctions.⁷ ALJ Thomas H. Walston granted that motion, and ordered that:

¹ ED Ex. 2.

² ED Ex. A.

³ ED Ex. B.

⁴ ED Ex. C.

⁵ ED Ex. D.

⁶ ED Ex. 1.

⁷ ED Ex. 1.

- the ED's requests for admissions to Respondent were deemed admitted as true;
- Respondent could not introduce evidence at the hearing on the merits that would contradict the deemed admissions, unless Respondent filed a motion to set aside the deemed admissions and explained in writing by May 21, 2009, any good cause that Respondent had for not timely answering the ED's requests for admissions;
- Respondent was to provide written responses to the ED's interrogatories and requests for production no later than May 21, 2009; and
- Respondent could not introduce evidence at the hearing on the merits containing any information that was not provided to the ED in response to the ED's interrogatories and request for production.

Respondent never provided written responses to the interrogatories and requests for production, nor did Respondent file a motion to set aside the deemed admissions.

The hearing on the merits convened on June 5, 2009, before ALJ Rebecca S. Smith. The ED was represented by Anna Treadwell. Respondent was represented by its president, Mohammed Ahmed. The record closed that day.

Once the hearing began, the ED dropped two of the allegations against Respondent. Only the financial assurance claim remained for hearing. This action changed the penalty calculation worksheet from the one that had originally been provided to Respondent, reducing the proposed penalty from \$10,035 to \$4,224.

At the hearing, Mr. Ahmed contended that although he did not respond to the discovery requests, he provided the ED with some information at the preliminary hearing and again in a letter he sent two days before the hearing. The ALJ ruled that Mr. Ahmed would be permitted to testify, but that Respondent could not introduce documents it had not provided to the ED either in response to the requests for production or at the preliminary hearing. Mr. Ahmed stated that he did not want to introduce any documents.

In light of the circumstances, the ALJ finds good cause to release Respondent from the deemed admissions. Not releasing Respondent would cause the presentation on the merits to suffer.

III. DISCUSSION

Owners and operators of petroleum USTs must demonstrate financial assurance, in a specified per-occurrence amount, for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the USTs.⁸

To show that Respondent did not have this financial assurance, the ED presented the testimony of an investigator, Joaquin Garcia, who testified that he inspected Respondent's facility on November 28, 2007. During that inspection, Mr. Garcia determined that Respondent did not have financial assurance for two USTs that were installed on October 15, 2007. He testified that an insurance policy covering the tanks did not become effective until January 22, 2008.

At the hearing, Respondent presented three arguments against the ED's allegations. The first was that its general liability and umbrella insurance policies provided sufficient coverage. Respondent's second contention was that it could not get the tank policy because the contractors installing the tanks made a clerical error, which delayed the insurance agent's ability to issue the policy. Finally, Respondent contended that at the time of the inspection, it was within a grace period, during which it did not need to demonstrate financial assurance for the USTs. Respondent never contended that it had specific tank policies for these USTs before January 22, 2008.

Examining the first of these contentions, the ALJ cannot conclude that the general liability and umbrella policies provided acceptable financial assurance because Respondent did not provide a copy of them.⁹ Respondent offered nothing but Mr. Ahmed's testimony that other policies provided coverage, and the fact that Respondent later obtained separate tank policies casts doubt on this assertion. Additionally, although he testified that this insurance provided some coverage, he did not

⁸ 30 TEX. ADMIN. CODE § 37.815(a) and (b).

⁹ Respondent originally attempted to offer an insurance agent—not the one from whom he obtained the policy—to testify as an expert regarding policies. This witness was not permitted to testify because, despite the specific discovery request on this point, he had not been identified to the ED until two days before trial. Additionally, he would not offer relevant testimony as a fact witness because he had nothing to do with obtaining Respondent's policies.

testify about the specific amount of the coverage, other than to say that he viewed it as more than enough. Respondent did not establish that these policies covered what the rule requires, nor that they provided the required amount of coverage per occurrence.¹⁰

Respondent's testimony about why he did not have tank insurance for a few months, although credible, does not excuse him from the violation. Specifically, Mr. Ahmed testified that the tank installer listed the wrong size for the USTs on a form he completed. This meant that the size of the USTs on the form was different from the size provided by the manufacturer, which caused a delay. Mr. Ahmed testified that he had paid the insurance agent for the policy, but that the policy could not be issued until the tank-size issue had been resolved. But whatever the reason, Respondent chose to have a functioning gasoline station without having adequate financial assurance for its USTs, in violation of the Commission's rule.

Respondent's final position is that the inspection occurred during a grace period because its temporary delivery certificate authorized it to operate for 90 days without having to demonstrate financial assurance. Although the Commission's rules provide a 90-day grace period for operating with a temporary delivery certificate,¹¹ they do not provide a grace period for operating without financial assurance.¹² Respondent's ability to operate with a temporary delivery certificate did not excuse him from having to comply with the financial assurance requirement.

In short, the ED established that Respondent violated the Commission's rules by not having acceptable financial assurance for its two USTs.

IV. ADMINISTRATIVE PENALTY

¹⁰ For owners or operators of USTs at petroleum marketing facilities or that handle an average of more than 10,000 gallons per month, the assurance must provide \$1 million per occurrence; for all other owners or operators, the amount is \$500,000. 30 TEX. ADMIN. CODE § 37.815(a).

¹¹ 30 TEX. ADMIN. CODE § 334.8 (c)(5)(D), ED Ex. 12.

¹² 30 TEX. ADMIN. CODE § 37.815 (not mentioning any grace period).

Texas Water Code § 7.053 requires the Commission to consider the following factors when determining the amount of an administrative penalty:

- The violation's 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.

Additionally, the Commission has adopted a penalty policy to guide the computation and assessment of administrative penalties.¹³

The ED supported its requested penalty by presenting the testimony of Rajesh Acharya, an enforcement coordinator with the Commission. Mr. Acharya described how he used the penalty policy to perform the calculations in the penalty calculation worksheet and reach the penalty amount. He testified that the violation base penalty was \$5,000, which was calculated by first taking the \$10,000 base penalty for the financial assurance violation¹⁴ and then reducing it by \$7,500 (or 25%) as a major programmatic violation. This left a base amount of \$2,500. The \$2,500 was then multiplied by two, to reflect the two USTs that lacked financial assurance, for a total of \$5,000. That \$5,000 was reduced by 25% (\$1,250) based on Respondent's good faith effort to comply. Mr. Acharya added a 2% enhancement (\$100) for compliance history¹⁵ and an additional \$374 to account for the money Respondent saved by not complying.¹⁶ After these calculations, the total penalty is \$4,224.

¹³ ED Ex. 7.

¹⁴ Mr. Garcia testified that, by averaging the total delivery records, he determined that Respondent's facility had a total throughput of more than 50,000 gallons per month. This throughput qualifies Respondent's facility as a major source under the penalty policy. ED Ex. 7 at 9.

¹⁵ ED Ex. 9 reflects one previous Notice of Violation at the facility.

¹⁶ Mr. Acharya placed this enhancement in the category of "other factors as justice may require."

Mr. Acharya's calculation appears accurate and the requested penalty appropriate. The ALJ recommends that the Commission assess Respondent a \$4,224 penalty.

V. CONCLUSION

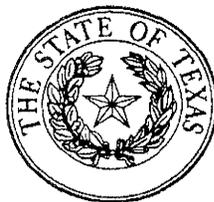
The ALJ recommends that the Commission find Respondent liable for the violation of 30 TEX. ADMIN. CODE § 37.815(a) and (b) and assess Respondent a penalty of \$4,224 for this violation. A draft order incorporating these recommendations is attached to this Proposal for Decision.

SIGNED July 30, 2009.



REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**ASSESSING ADMINISTRATIVE PENALTIES AGAINST
NIDA, INC. DBA LAWNDALE CHEVRON
SOAH DOCKET NO. 582-09-1255
TCEQ DOCKET NO. 2008-0232-PST-E**

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 Nida, Inc. d/b/a Lawndale Chevron (Respondent). A Proposal for Decision (PFD) was presented by Rebecca S. Smith, 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 owns a convenience store that sells gasoline and that is located at 8001 Lawndale Street, Houston, Harris County, Texas (Facility).
2. Respondent owns two underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

3. On November 28, 2007, Joaquin Garcia, a TCEQ investigator, conducted an inspection of Respondent's Facility and found that, in violation of 30 TEX. ADMIN. CODE § 37.815(a) and (b), Respondent did not have acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs.
4. On January 28, 2008, the ED issued a notice of enforcement (NOE) to Respondent.
5. On August 8, 2008, the ED filed the EDPRP with the Commission's Chief Clerk and mailed a copy of it by U.S. first class mail and certified mail, return receipt requested, to Respondent through its registered agent at the last address of record with the Commission, 14110 Telege Road, Cypress, Texas 77429.
6. On August 18, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP, and on November 18, 2008, the Chief Clerk referred this dispute to SOAH for hearing.
7. A Notice of Hearing was issued on November 25, 2008.
8. A preliminary hearing was held on January 22, 2009 before ALJ Thomas H. Walston at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas
9. From the time when the USTs were installed on October 15, 2007, until January 22, 2008, Respondent did not have acceptable financial assurance.
10. The ED proposed a total base penalty of \$2,500 per UST, which was calculated by taking the \$10,000 base penalty for a financial assurance violation at a major facility, and reducing it by \$7,500 (or 25%) as a major programmatic violation. This left a base amount of \$2,500. This \$2,500 was then multiplied by two, to reflect the two USTs that lacked financial assurance, for a total of \$5,000.

11. The \$5,000 base penalty was subject to three adjustments: a reduction by 25% (\$1,250) based on Respondent's good faith effort to comply, an enhancement of 2% (\$100) for compliance history, and the addition of \$374 under the category of "other factors as justice may require" to account for the money Respondent saved by not complying with the financial assurance requirement.
12. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$4,224.
13. An administrative penalty of \$4,224 takes into account the factors contained in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the enforcement authority of the Commission pursuant to TEX. WATER CODE ANN. § 7.051.
2. According to TEX. WATER CODE ANN. §§ 7.056 and 7.058 and the Commission's procedural rules, Respondent has a right to a hearing on the occurrence of the violations, the amount of the proposed penalty, or both.
3. Respondent was notified of the alleged violations, the proposed penalties, and the opportunity to request a hearing, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.
4. Respondent was notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6.
5. 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.

6. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 37.815(a) and (b) by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs.
7. Based on the above Findings of Fact and Conclusions of Law, the Commission should assess Respondent an administrative penalty of \$4,224.

III. 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 Order, Nida, Inc. d/b/a Lawndale Chevron shall pay an administrative penalty in the amount of \$4,224 for the violation of 30 TEX. ADMIN. CODE § 37.815(a) and (b).
2. The payment of this administrative penalty will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here.
3. 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: Nida, Inc. d/b/a Lawndale Chevron, TCEQ DOCKET NO. 2008-0232-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

4. 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 Nida, Inc., if the Executive Director determines that Nida, Inc., has not complied with one or more of the terms or conditions in this Order.
5. 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.
6. 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.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Nida, Inc.
8. 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**