

6. That in Section I, Paragraph 11, "regarding the USTs" be added after "additional information."
7. That in Section I, Paragraph 11, "to" be added after "he failed."
8. That in Section II, Paragraph 4, "EDPRP" be replaced with "EDTARP."
9. That in Section II, Paragraph 5, "1 TEX. ADMIN. CODE § 155.27" be replaced with "1 TEX. ADMIN. CODE § 155.401."
10. That in Section II, Paragraph 7, "a UST" be replaced with "an UST."
11. That in Section III, Paragraph 4, "Derek Eads" be replaced with "Derek Eades."

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 clean copy and a redlined copy of the Proposed Order with the recommended modifications are 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



Peipey Tang
State Bar of Texas No. 24060699
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0654
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE
Randall Wayne Lykins
SOAH Docket No. 582-09-2077
TCEQ Docket No. 2008-0763-PST-E

I hereby certify that on this 19th day of November, 2009, the original and 7 copies of the foregoing "Executive Director's 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 Rebecca S. Smith
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via Certified Mail Article No. 7003 1680 0000 4274 0769, Postage Prepaid

Mr. Randall Wayne Lykins
P.O. Box 969
DeQuincy, LA 70633

Via electronic mail

Blas Coy, Public Interest Counsel



Peipey Tang
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**ASSESSING ADMINISTRATIVE PENALTIES AGAINST
RANDALL WAYNE LYKINS
SOAH DOCKET NO. 582-09-2077
TCEQ DOCKET NO. 2008-0763-PST-E**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Third Amended Report and Petition (EDTARP) recommending that the Commission enter an order assessing administrative penalties and requiring corrective action against Randall Wayne Lykins (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 land that used to be a gas station with Newton County Appraisal District legal description of A330 – John A McInahan, TRACT 35-1, Acres 0.4195, located at Hwy 190 E., Bon Wier, Newton County, Texas (Facility).
2. Respondent owns five 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 October 17, 2006, TCEQ investigators Garry Tidwell and Nathan Norman conducted an inspection of Respondent's Facility and observed several violations of the TCEQ rules relating to underground storage tanks.
4. On March 27, 2008, the ED issued a Notice of Enforcement (NOE) to Respondent.
5. On October 28, 2008, Respondent requested a contested case hearing on the allegations in the Executive Director's Preliminary Report and Petition, and on January 15, 2009, the Chief Clerk referred this dispute to SOAH for hearing.
6. A Notice of Hearing was issued on January 30, 2009.
7. On April 21, 2009, the ED filed a Third Amended Report and Petition 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 at P.O. Box 969, DeQuincy, Louisiana 70633. The Third Amended Report and Petition alleged that Respondent violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.7(d)(3).
8. A preliminary hearing was held on March 19, 2009, before ALJ Rebecca S. Smith at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
9. The evidentiary hearing convened on September 17, 2009, before ALJ Rebecca S. Smith also at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas. The ED was represented by Staff Attorney Peipey Tang. Respondent was represented by his attorney, Matt Morones, who appeared by telephone. Respondent was not present and could not be reached by telephone. The record closed that day.

10. Respondent failed to remove from service, no later than 60 days after the prescribed upgrade implementation date, an UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements.
11. Respondent failed to notify the Commission of any change or additional information regarding the USTs within 30 days of the occurrence of the change, specifically, he failed to update the registration to reflect correct ownership information and the current operational status of the USTs.
12. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$3,675.
13. An administrative penalty of \$3,675 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. 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 EDTARP 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 § 155.401; 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 above Findings of Fact and Conclusions of Law:
 - (a) Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to remove from service, no later than 60 days after the prescribed upgrade implementation date, an UST system for which any applicable component of the system was not brought into timely compliance with the upgrade requirements;
 - (b) Respondent violated 30 TEX. ADMIN. CODE § 334.7(d)(3) by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change;
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 out 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.

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, Randall Wayne Lykins shall pay an administrative penalty in the amount of \$3,675 for the violations of 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.7(d)(3). The payment of this administrative penalty and compliance with all the terms and conditions set forth in this Order 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. 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: Randall Wayne Lykins, TCEQ DOCKET NO. 2008-0763-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, Randall Wayne Lykins shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.
3. Within 45 days after the effective date of this Order, Randall Wayne Lykins shall submit an amended registration to reflect the correct ownership information and the current operational status of the UST system, in accordance with 30 TEX. ADMIN. CODE § 334.7

to:

Registration and Reporting Section
Permitting & Remediation Support Division, MC138
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

4. Within 60 days after the effective date of this Order, Mr. Lykins shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision paragraphs 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 fine or imprisonment for knowing violations."

The certification shall be submitted 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:

Derek Eades, Waste Section Manager
Beaumont Regional Office
Texas Commission on Environmental Quality
3870 Eastex Freeway
Beaumont, Texas 77703-1830

5. 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 Randall Wayne Lykins if the Executive Director determines that Mr. Lykins has not complied with one or more of the terms or conditions in this 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 Randall Wayne Lykins.
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**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

ASSESSING ADMINISTRATIVE PENALTIES AGAINST
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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