

SOAH DOCKET NO. 582-09-1616
TCEQ DOCKET NO. 2008-0776-PST-E

2009 JUL 14 PM 2:15

CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Petitioner

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BEFORE THE STATE OFFICE

V.

OF

MARY AUTOMOTIVE INC. DBA
MARY'S SERVICE CENTER
Respondent

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.

I.

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

1. That in the Order caption, and in all other instances, "Mary's Automotive, Inc." be replaced with "Mary Automotive Inc."
2. That in the Introduction, Paragraph 2, "the Commission's Public Interest Council" be added as a party to the proceeding.
3. That in Section I, Paragraph 1, "March 28, 2009" be replaced with "March 28, 2008".
4. That in Section I, Paragraph 1, "convenience store and gas station" be replaced with "convenience store, gas station, and automotive repair shop".
5. That in Section I, Paragraph 2, "On April 17, 2008," be replaced with "On or about April 22, 2008".
6. That in Section I, Paragraph 3, "and ch. 26" be added after "§ 7.054".
7. That in Section I, Paragraph 3, a space be added in "§ 26.3475(a) and(c)" and (1) be added so it reads "§ 26.3475(a) and (c)(1)".

8. That in Section I, Paragraph 3, the space after "334.50" be removed so that it reads "334.50(b)(1)(A)".
9. That in Section I, Paragraph 3, "(d)(1)(B)(ii)," be added after "(b)(2)".
10. That in Section I, Paragraph 3, "Commission personnel" be replaced with "agency personnel".
11. That in Section I, Paragraph 3, "notify the Commission" be replaced with "notify the agency".
12. That in Section I, Paragraph 3, "the occurrence of the change" be replaced with "the occurrence of the change or addition".
13. That in Section I, Paragraph 3, "(not to exceed 35 days between each monitoring)" be added after "at a frequency of at least once every month".
14. That in Section I, Paragraph 3, "sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus 130 gallons" be added after "inventory control records at least once a month".
15. That in Section I, Paragraph 3, "for regulated substances each operating day" be replaced with "for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day".
16. That in Section I, Paragraph 5, "Water" be added before "Code § 7.053".
17. That in Section I, the Paragraph beginning "On November 3, 2008" be renumbered as Paragraph 6.
18. That in Section I, Paragraph 11, "Ghuman" be replaced with "Ghulam".
19. That in Section II, Paragraph 1, "or the Health and Safety Code" be added after "the Water Code".
20. That in Section II, Paragraph 3, a space be added in "WaterCode" so that it reads "Water Code".
21. That in Section II, Paragraph 5, the extra space in "§§ 2001. 051(1)" be removed so it reads "§§ 2001.051(1)".
22. That in Section II, Paragraph 5, "1 TAC § 155.27" be replaced with "1 TAC § 155.401".
23. That in Section II, Paragraph 7, "(d)(1)(B)(ii)," be added after "(b)(2)".

24. That in Section II, Paragraph 8, the extra line after "including:" be removed.
25. That in Section II, Paragraph 8, "Its" be replaced with "The violation's".
26. That in Section II, Paragraph 10, "Water" be added before "Code § 7.053".
27. That in Section II, Paragraph 10, the period in "\$6.850.00" be replaced with a comma so that it reads "6,850.00".
28. That in the Final Section, Paragraph 1, the space after "334.50" be removed so that it reads "334.50(b)(1)(A)".
29. That in the Final Section, Paragraph 1, ", (d)(1)(B)(ii)," be added after "(b)(2)".
30. That in the Final Section, the extra lines between Paragraphs 5 and 6 be removed.

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.

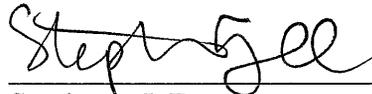
Respectfully Submitted,

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
Mary Automotive Inc. dba Mary's Service Center
SOAH Docket No. 582-09-1616
TCEQ Docket No. 2008-0776-PST-E

I hereby certify that on this 14th day of July, 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 Richard R. Wilfong
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

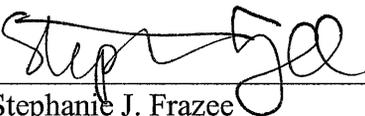
Via Certified Mail, Postage Prepaid

Mr. Ghulam M. Hashmani, President
Mary Automotive Inc. dba Mary's Service Center
2400 Rock Island Road
Irving, Texas 75060

Article No. 70022030000570578949

Via electronic mail

Blas Coy, Public Interest Counsel



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

2009 JUL 14 PM 2:15
CHIEF CLERKS OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
Mary Automotive Inc. d/b/a Mary's Service Center
TCEQ DOCKET NO. 2008-0776-PST-E
SOAH DOCKET NO. 582-09-1616**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Mary Automotive Inc. d/b/a Mary's Service Center (Respondent). Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on June 25, 2009, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Commission's Public Interest Council.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. On March 28, 2008, an Environmental Investigator for TCEQ conducted an investigation of Respondent's convenience store, gas station, and automotive repair shop located at 2400 Rock Island Road, Irving, Dallas County, Texas. The investigator observed several violations of the TCEQ rules regarding underground storage tanks.
2. On or about April 22, 2008, Respondent received the TCEQ Notice of Enforcement.
3. On October 16, 2008, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054 and ch. 26, alleging that Respondent violated Water Code § 26.3475(a) and (c)(1), and TEX. HEALTH & SAFETY CODE § 382.085(b), and 30 TEX. ADMIN. CODE (TAC) §§ 115.222(1), 334.7(d)(3), 334.10(b) and 334.50(b)(1)(A), (b)(2), (d)(1)(B)(ii), and (d)(1)(B)(iii)(I), specifically for failing to ensure that each UST is equipped with a submerged fill pipe that extends from the top of the tank to have a maximum clearance of six inches from the bottom of the UST; failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; failing to notify the agency of any change or additional information regarding the USTs within thirty days of the occurrence of the change or addition; failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); failing to provide proper release detection for the product piping associated with the UST system; failing to conduct reconciliation of detailed inventory control records at least once each month sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the month plus

- 130 gallons; and failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day.
4. The ED recommended the imposition of an administrative penalty in the amount of \$6,850.00.
 5. An administrative penalty of \$6,850.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Water Code § 7.053 and in the Commission's 2002 Penalty Policy.
 6. On November 3, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP.
 7. On December 5, 2008, the case was referred to SOAH for a hearing.
 8. On December 23, 2008, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
 9. On February 17, 2009, the parties filed a Joint Motion to Waive Appearance at the Preliminary Hearing and Submission of Agreed Hearing Schedule. The Joint Motion requested that Exhibits ED-A through ED-D be admitted into evidence to establish jurisdiction to proceed. The Joint Motion was granted by Order No. 1 issued by the ALJ the same day.
 10. The hearing on the merits was conducted on June 25, 2009, in Austin, Texas, by ALJ Richard R. Wilfong.
 11. Respondent was represented at the hearing by Ghulam Hashmani, its President. The ED was represented by Stephanie J. Frazee, attorney in TCEQ's Litigation Division.

12. Although Respondent was in violation as alleged at the time of the inspection, it has corrected the violations.
13. Because Respondent is now in compliance, corrective action is not requested.

II. CONCLUSIONS OF LAW

1. Under WATER Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or the Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Water Code § 7.002.
4. As required by Water Code § 7.055 and 30 TAC §§ 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 and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401; and 30 TAC §§ 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.
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 Respondent violated Water Code § 26.3475(a) and

(c)(1); TEX. HEALTH & SAFETY CODE § 382.085(b); and 30 TAC §§ 115.222(1), 334.7(d)(3), 334.10(b), 334.50 (b)(1)(A), (b)(2), (d)(1)(B)(ii), and (d)(1)(B)(iii)(1).

8. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors including:

- 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.

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 Water Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$6,850.00 is justified and should be assessed against Respondent.

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. Mary Automotive Inc. d/b/a Mary's Service Center, is assessed an administrative penalty in the amount of \$6,850.00 for violation of 30 TEX. WATER CODE § 26.3475(a) and (c)(1);

TEX. HEALTH & SAFETY CODE § 382.085(b); and TEX. ADMIN. CODE §§ 115.222(1), 334.7(d)(3), 334.10(b), 334.50(b)(1)(A), (b)(2), (d)(1)(B)(ii), and (d)(1)(B)(iii)(I). The payment of this administrative penalty and Mary Automotive Inc. d/b/a Mary's Service Center's compliance with all the terms and conditions set forth in this Order, completely resolve the matters set forth by this Order in this action. 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: Mary Automotive Inc. d/b/a Mary's Service Center; Docket No. 2008-0776-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. 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.
3. 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.
4. 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. .

5. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
6. 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