

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
June 30, 2009

2009 JUN 30 PM 4:16
CHIEF CLERKS OFFICE
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

Re: SOAH Docket No. 582-09-1616; TCEQ Docket No. 2008-0776-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v. Mary's
Automotive, Inc. d/b/a Mary's Service Center

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 original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 20, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than July 30, 2009.

This matter has been designated **TCEQ Docket No. 2008-0776-PST-E; SOAH Docket No. 582-09-1616**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Richard R. Wilfong".

Richard R. Wilfong
Administrative Law Judge

RRW/sb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: MARY AUTOMOTIVE INC / MARY'S SERVICE CENTER
SOAH DOCKET NUMBER: 582-09-1616
REFERRING AGENCY CASE: 2007-0776-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

REPRESENTATIVE / ADDRESS

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EXECUTIVE DIRECTOR

GHULAM HASHMANI
PRESIDENT AND DIRECTOR
MARY AUTOMOTIVE INC., DBA MARYS SERVICE
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MARY AUTOMOTIVE INC., DBA MARYS SERVICE
CENTER

xc: Docket Clerk, State Office of Administrative Hearings

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

2009 JUN 30 PM 4: 16

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

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**BEFORE THE STATE OFFICE
OF THE CLERKS OFFICE**

v.

OF

**MARY'S AUTOMOTIVE, INC. D/B/A
MARY'S SERVICE CENTER,
Respondent**

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$6,850.00 in administrative penalties against Mary's Automotive, Inc. d/b/a Mary's Service Center (Respondent) for violations of TEX. WATER CODE (Water Code) § 26.3475(a) and (c)(1), 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) and (d)(1)(B)(iii)(I). Simply stated, the ED alleges that Respondent failed (1) to ensure that underground petroleum storage tanks (UST) were equipped with submerged fill pipes having a maximum clearance of six inches from the bottom of the USTs; (2) to maintain records and make them readily available for inspection; (3) to notify the Commission of changes or additional information regarding the USTs within thirty days; (4) to monitor USTs for releases at a frequency of at least once each month; to conduct reconciliation of detailed inventory control records at least once each month; and to record inventory volume measurement each operating day (release detection).

The Administrative Law Judge (ALJ) concludes that the ED established that Respondent violated provisions of the statutes as alleged, and adopts the ED's proposed administrative penalty. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$6,850.00.

II. PROCEDURAL HISTORY AND JURISDICTION

The hearing convened on June 25, 2009, before ALJ Richard R. Wilfong in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ED was represented by Stephanie J. Frazee, Attorney, TCEQ Litigation Division. Ghulam Hashmani appeared on behalf of Respondent. The record closed on the date of the hearing.

Because there are no issues concerning jurisdiction or notice, those matters are addressed in the findings in the Proposed Order.

III. EVIDENCE PRESENTED

The ED offered Exhibits ED-1 through ED-16 which were admitted and presented two witnesses: Michaelle Sherlock, Investigator, who testified in detail regarding her inspection on March 28, 2008, and Wallace Myers, Enforcement Coordinator, who testified regarding the penalty calculation.

The Respondent offered Mary's Exhibits 1 through 5 which were admitted and presented the testimony of its President, Ghulam Hashmani, who testified regarding Respondent's compliance efforts.

IV. DISCUSSION

A. Violations

Respondent owns and operates a convenience store and gasoline station (Facility) located at 2400 Rock Island Road, Irving, Dallas County, Texas. On March 28, 2008, TCEQ Investigator Michaelle Sherlock conducted an inspection of the Facility and discovered that Respondent had violated rules and statutes within the Commission's jurisdiction as follows:

Respondent failed to install fill pipe drop tubes within six inches of the UST bottom;

Respondent failed to have UST records readily accessible and available for inspection;

Respondent failed to provide amended registration information regarding USTs within thirty days following a change, and

Respondent failed (1) to monitor for releases at least once per month; (2) to provide release detection for product piping; and (3) to conduct daily inventory control and monthly reconciliation for all USTs.¹

Under Water Code § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Water Code.² Additionally, the Commission may order the violator to take corrective action.³

In this case, Respondent is alleged to have violated Water Code § 26.3475(a) and (c)(1); 30 TAC §§ 115.222(1), 334.7(d)(3), 334.10(b), and 334.50(b)(1)(A), (b)(2), (d)(1)(B)(iii)(1); and Tex. Health & Safety Code § 382.085(b). which are statutes and rules within the Commission's authority. Thus, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Proposed Order.

¹ Combined as one violation.

² Code § 7.052(c).

³ Code § 7.073.

Respondent does not rigorously dispute the currently alleged violations. But it points out that no violations were found when it was inspected in 2001; it promptly took necessary compliance efforts following an inspection in 2003⁴; and it has now come into compliance regarding all the current alleged violations.

B. Penalties

The total administrative penalty sought for the four violations is \$6,850.00. The penalty amount for two of the violations is \$2,500.00 each, and the penalty amount for the other two violations is \$1,000.00 each, for a total base penalty of \$7,000.00. The base penalty is further adjusted to reflect a \$700.00 reduction for good faith effort to comply, and a \$550.00 increase for avoided cost of compliance resulting in a net payable penalty of \$6,850.00. The proposed penalty was calculated in accordance with the Commission's 2002 Penalty Policy.⁵ Because Respondent has shown subsequent compliance, corrective action is not being sought by the ED. Respondent did not dispute the overall accuracy of the ED's calculation of the penalty, but argued that consideration should be given to (1) the fact that it came into compliance once the violations were brought to its attention and (2) Respondent's prior compliance history. As discussed above, the ED adjusted the penalty downward for the Respondent's good faith effort in coming into compliance. Moreover, no upward adjustment for poor compliance was made and the Penalty Policy does not call for a downward adjustment for good compliance.

⁴ Mary's Exhibits 4 and 5.

⁵ ED Ex.7, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

Based on the above analysis, the ALJ concludes that a penalty of \$6,850.00 is consistent with the factors in TEX. WATER CODE ANN. § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.⁶ The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

V. RECOMMENDATION

The ALJ recommends that the Commission adopt the attached Proposed Order finding that the alleged violations occurred and imposing a \$6,850.00 penalty on Respondent for them.

SIGNED June 30, 2009.



**RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

⁶ Under Water Code § 7.053, the Commission must consider the following factors:

- the history and extent of previous violations;
- 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;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
Mary's 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's 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 and the Commission's Executive Director (ED).

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, 2009, an Environmental Investigator for TCEQ conducted an investigation of Respondent's convenience store and gas station 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 April 17, 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, alleging that Respondent violated Water Code § 26.3475(a) and(c), 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), 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 Commission personnel; failing to notify the Commission of any change or additional information regarding the USTs within thirty days of the occurrence of the change; failing to monitor USTs for releases at a frequency of at least once every month; 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; and failing to record inventory volume measurement for regulated substances 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 Code § 7.053 and in the Commission's 2002 Penalty Policy.
7. 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 Ghuman 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 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 § 155.27; 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) 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:

- 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 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's 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) and (d)(1)(B)(iii)(I). The payment of this administrative penalty and Mary's 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's 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