

**SOAH DOCKET NO. 582-09-1363
TCEQ DOCKET NO. 2008-0873-PST-E**

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

VS.

**AGILE INVESTMENTS, LLC DBA
STARS AND STRIPES USA 1;
RN101660082
RESPONDENT**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct the typographical error in the citation 30 TEX. ADMIN. CODE § 334.39(c)(4) to read 30 TEX. ADMIN. CODE § 334.49(c)(4) in Findings of Fact paragraph 5, Conclusions of Law paragraph 7(a) and Ordering Provision paragraph 1.
2. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct the typographical error "EDPR" to "EDPRP" in Finding of Fact paragraph 5.
3. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct the typographical error in the citation 30 TEX. ADMIN. CODE § 334.45(b)(2)(C) to read 30 TEX. ADMIN. CODE § 334.51(b)(2)(C) in Conclusions of Law paragraph 7(e) and Ordering Provision paragraph 1.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Purdue, Deputy Director
Office of Legal Services

Kathleen C. Decker
Litigation Division

By



Tammy L. Mitchell
State Bar of Texas No. 24058003
Litigation Division, MC-175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0107
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 2009, the original and 7 copies of the foregoing "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed 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 Proposed Modifications were sent to the following:

The Honorable Rebecca S. Smith
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 504
Austin, Texas 78701-1649

Via Facsimile to 475-4994 Without
Attachments and Via Interagency Mail
With Attachments

Mr. Rashid Dara
Agile Investments, LLC
1500 E. Main Street
Itasca, Texas 76055

Via Certified Mail Article No. 7009 1680
0002 2319 4811 and First Class Mail With
Attachments

Les Trobman
TCEQ General Counsel

MC 101

Blas Coy
TCEQ Public Interest Counsel

Via Electronic Mail With Attachments



Tammy L. Mitchell

Attorney

Litigation Division

Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

ASSESSING ADMINISTRATIVE PENALTIES AGAINST
AGILE INVESTMENTS, LLC, DBA STARS AND STRIPES USA 1
SOAH DOCKET NO. 582-09-1363
TCEQ DOCKET NO. 2008-0873-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 Agile Investments, LLC, d/b/a Stars and Stripes USA 1 (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, located at 1500 East Main St., Itasca, Hill County, Texas (Facility).
2. Respondent owns four 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 April 15, 2008, Michaele Sherlock, a TCEQ investigator, conducted an inspection of Respondent's Facility and observed several violations of the TCEQ rules relating to underground storage tanks.
4. On May 7, 2008, the ED issued a Notice of Enforcement (NOE) to Respondent.
5. On September 18, 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, 13221 Harkness Drive, Dallas, Texas 75243. The EDPRP alleged that Respondent violated TEX. WATER CODE ANN. § 26.3475(a), (c)(1), (c)(2), and (d) and 30 TEX. ADMIN. CODE §§ 334.49(c)(4); 334.49(a)(4) and (c)(2)(C); 334.50(b), (b)(1)(A), and (b)(2)(A)(i)(III); 334.51(b)(2)(C), and 334.45(c)(3)(A) and (e)(2)(D).
6. On October 7, 2008, Respondent requested a contested case hearing on the allegations in the EDPRP, and on November 25, 2008, the Chief Clerk referred this dispute to SOAH for hearing.
7. A Notice of Hearing was issued on December 10, 2008.
8. A preliminary hearing was held on February 12, 2009, before ALJ William G. Newchurch at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
9. The evidentiary hearing convened on September 10, 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 Tammy Mitchell. Respondent was represented by its director and managing member, Rashid Dara, who appeared by telephone. The record closed that day.

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10. Respondent failed to perform an operability test on a cathodic protection system once every three years.
11. Respondent was not conducting an inspection of the impressed current cathodic protection system every 60 days.
12. Respondent failed to test a line leak detector at least once per year for performance and operational reliability.
13. Respondent failed to provide proper release detection for the product piping associated with UST systems.
14. Respondent failed to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reached no higher than 95% capacity.
15. Respondent failed to install an emergency shut-off valve (aka shear or impact valve) on each pressurized delivery or product line and ensure that it was securely anchored at the base of the dispenser.
16. Respondent failed to provide corrosion protection to all underground metal components of an UST system which was used to convey or contain regulated substances.
17. Respondent failed to ensure that all fill pipes (including any connected fittings) were equipped with a removable or permanent factory-constructed drop tube that extended to within 12 inches of the tank bottom.
18. Respondent failed to ensure that all tanks were monitored for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring).
19. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$9,819.

20. An administrative penalty of \$9,819 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 EDPRP 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 § 155.27; 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 § ~~334.49(c)(4)~~ by failing to perform

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- an operability test on a cathodic protection system once every three years;
- (b) Respondent violated 30 TEX. ADMIN. CODE § 334.49(c)(2)(C) by not conducting an inspection of the impressed current cathodic protection system every 60 days;
 - (c) Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(III) by failing to test a line leak detector at least once per year for performance and operational reliability;
 - (d) Respondent violated 30 TEX. ADMIN. CODE § 334.50(b) by failing to provide proper release detection for the product piping associated with UST systems;
 - (e) Respondent violated 30 TEX. ADMIN. CODE § ~~334.51(b)(2)(C)~~ by failing to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reached no higher than 95% capacity;
 - (f) Respondent violated 30 TEX. ADMIN. CODE § 334.45(c)(3)(A) by failing to install an emergency shut-off valve (aka shear or impact valve) on each pressurized delivery or product line and ensure that it was securely anchored at the base of the dispenser;
 - (g) Respondent violated 30 TEX. ADMIN. CODE § 334.49(a)(4) by failing to provide corrosion protection to all underground metal components of an UST system which was used to convey or contain regulated substances;
 - (h) Respondent violated 30 TEX. ADMIN. CODE § 334.45(e)(2)(D) by failing to ensure that all fill pipes (including any connected fittings) were equipped with a removable or permanent factory-constructed drop tube that extended to within 12 inches of the tank bottom; and

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- (i) Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(1)(A) by failing to ensure that all tanks were monitored for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring).
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 \$9,819 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, Agile Investments, LLC, d/b/a Stars and Stripes USA 1 shall pay an administrative penalty in the amount of \$9,819 for the violations of 30 TEX. ADMIN. CODE §§ ~~334.49(c)(4), 334.49(c)(2)(C), 334.50(b), 334.50(b)(2)(A)(i)(III), 334.51(b)(2)(C), 334.45(c)(3)(A), 334.49(a)(4), 334.45(e)(2)(D),~~ and 334.50(b)(1)(A). 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: Agile Investments, LLC, d/b/a Stars and Stripes USA 1, TCEQ DOCKET NO. 2008-0873-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, Agile Investments, LLC shall do the following:
- a. implement a corrosion protection method for the UST system including the metal fittings around the submersible turbine pump and conduct bimonthly inspection and triennial testing of the corrosion protection system, in accordance with 30 TEX. ADMIN. CODE § 334.49;

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- b. install and implement a release detection method for all USTs and the piping associated with the USTs, in accordance with 30 TEX. ADMIN. CODE § 334.50;
 - c. install an overfill prevention device on the westernmost diesel tank, in accordance with 30 TEX. ADMIN. CODE § 334.51; and
 - d. install fuel drop tubes extending to within twelve inches of the tank bottom to the westernmost diesel tank and the regular unleaded tank, in accordance with 30 TEX. ADMIN. CODE § 334.45.
3. 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 Agile Investments, LLC if the Executive Director determines that Agile Investments, LLC has not complied with one or more of the terms or conditions in this Order.
 4. 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.
 5. 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.
 6. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Agile Investments, LLC.
 7. 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**

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**ASSESSING ADMINISTRATIVE PENALTIES AGAINST
AGILE INVESTMENTS, LLC, DBA STARS AND STRIPES USA 1
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13. Respondent failed to provide proper release detection for the product piping associated with UST systems.
14. Respondent failed to equip each tank with a valve or other device designed to automatically shut off the flow of regulated substances into the tank when the liquid level in the tank reached no higher than 95% capacity.
15. Respondent failed to install an emergency shut-off valve (aka shear or impact valve) on each pressurized delivery or product line and ensure that it was securely anchored at the base of the dispenser.
16. Respondent failed to provide corrosion protection to all underground metal components of an UST system which was used to convey or contain regulated substances.
17. Respondent failed to ensure that all fill pipes (including any connected fittings) were equipped with a removable or permanent factory-constructed drop tube that extended to within 12 inches of the tank bottom.
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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 EDPRP 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 § 155.27; 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 § 334.49(c)(4) by failing to perform

- an operability test on a cathodic protection system once every three years;
- (b) Respondent violated 30 TEX. ADMIN. CODE § 334.49(c)(2)(C) by not conducting an inspection of the impressed current cathodic protection system every 60 days;
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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 \$9,819 is justified and should be assessed against Respondent.
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OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Within 30 days after the effective date of this Order, Agile Investments, LLC, d/b/a Stars and Stripes USA 1 shall pay an administrative penalty in the amount of \$9,819 for the violations of 30 TEX. ADMIN. CODE §§ 334.49(c)(4), 334.49(c)(2)(C), 334.50(b), 334.50(b)(2)(A)(i)(III), 334.51(b)(2)(C), 334.45(c)(3)(A), 334.49(a)(4), 334.45(e)(2)(D), and 334.50(b)(1)(A). 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: Agile Investments, LLC, d/b/a Stars and Stripes USA 1, TCEQ DOCKET NO. 2008-0873-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
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2. Within 30 days after the effective date of this Order, Agile Investments, LLC shall do the following:
 - a. implement a corrosion protection method for the UST system including the metal fittings around the submersible turbine pump and conduct bimonthly inspection and triennial testing of the corrosion protection system, in accordance with 30 TEX. ADMIN. CODE § 334.49;

- b. install and implement a release detection method for all USTs and the piping associated with the USTs, in accordance with 30 TEX. ADMIN. CODE § 334.50;
 - c. install an overfill prevention device on the westernmost diesel tank, in accordance with 30 TEX. ADMIN. CODE § 334.51; and
 - d. install fuel drop tubes extending to within twelve inches of the tank bottom to the westernmost diesel tank and the regular unleaded tank, in accordance with 30 TEX. ADMIN. CODE § 334.45.
3. 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 Agile Investments, LLC if the Executive Director determines that Agile Investments, LLC has not complied with one or more of the terms or conditions in this Order.
4. 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.
5. 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.
6. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Agile Investments, LLC.
7. 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**