

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 31, 2009

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG 31 AM 11:45
CHIEF CLERKS OFFICE

Re: SOAH Docket No. 582-09-2246; TCEQ Docket No. 2008-0901-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality,
Petitioner vs. Kandy King, Respondent

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 **September 21, 2009**. Any replies to exceptions or briefs must be filed in the same manner no later than **October 1, 2009**.

This matter has been designated **TCEQ Docket No. 2008-0901-PST-E; SOAH Docket No. 582-09-2246**. 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 black ink that reads "Thomas H. Walston".

Thomas H. Walston
Administrative Law Judge

THW:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: KANDY KING

SOAH DOCKET NUMBER: 582-09-2246

REFERRING AGENCY CASE: 2008-0901-PST-E

CHIEF CLERKS OFFICE

2009 AUG 31 AM 11:45

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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

REPRESENTATIVE / ADDRESS

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EXECUTIVE DIRECTOR

KANDY KING
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(361) 438-3576 (PH)
(361) 814-0598 (FAX)

KANDY KING

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2246
TCEQ DOCKET NO. 2008-0901-PST-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

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BEFORE THE STATE OFFICE

VS.

OF

KANDY KING,
RESPONDENT

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

2009 AUG 3 12 AM 11:45
CHIEF CLERK'S OFFICE
TEXAS COMMISSION
ON ENVIRONMENTAL
QUALITY

This enforcement action concerns an underground storage tank (UST) at a former retail gasoline station in Robstown, Texas. The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) requests a \$7,000.00 administrative penalty and certain corrective actions from Kandy King (Respondent) for violations pertaining to the UST. The ED alleges that Respondent failed to timely register the UST, failed to timely remove the UST from service, and failed to contain and clean up a spill of a petroleum substance from the UST. The Administrative Law Judge (ALJ) finds that the ED proved the alleged violations and recommends that the Commission approve the requested administrative penalty and corrective action.

I. JURISDICTION AND PROCEDURAL HISTORY

TEX. WATER CODE ANN. § 7.051 authorizes the Commission to assess an administrative penalty against a person who violates a provision of the Texas Water Code or the Texas Health and Safety Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. Pursuant to TEX. WATER CODE ANN. § 7.052(c), the penalty may not exceed \$10,000 per day of violation. Additionally, the Commission may order the violator to take corrective action pursuant to TEX. WATER CODE ANN. § 7.073.

The ED alleges that Respondent violated TEX. WATER CODE § 26.346(a) and 30 TEX. ADMIN. CODE (TAC) §§ 334.7(a)(1); 334.47(a)(2); and 334.75(a)(1), which are statutes and

rules within the Commission's authority. Thus, the Commission has jurisdiction over this case and authority to assess a penalty and order corrective action as requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as outlined in the Conclusions of Law set forth in the attached Order.

The procedural history of this case is summarized as follows:

- April 15, 2008 - As a result of an investigation, a TCEQ Corpus Christi Regional Office investigator concluded that Respondent had violated the provisions described above.
- May 7, 2008 - Respondent received notice of the violations.
- November 13, 2008 - The ED filed a Preliminary Report and Petition (EDPRP) with the TCEQ Office of Chief Clerk.
- December 8, 2008 - Respondent filed her answer.
- January 22, 2009 - The case was referred to SOAH for a contested case hearing.
- January 29, 2009 - The Chief Clerk issued a notice of hearing for April 16, 2009.
- March 31, 2009 - The ED filed a First Amended EDPRP.
- April 16, 2009 - The parties waived the preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on August 6, 2009.
- August 6, 2009 - The evidentiary hearing convened as scheduled. Mr. Phillip Goodwin, counsel for the ED, appeared and announced ready. Ms. Jessica Garcia, a friend of Respondent, appeared and requested a continuance. The ALJ denied the request for continuance, so the hearing proceeded and concluded the same day, at which time the record closed.

II. DISCUSSION

A. Introduction

Respondent owns a former retail gasoline station located at 101 South Upshaw Boulevard, Robstown, Nueces, County, Texas (the Facility). One UST that is not exempt or excluded from regulation exists beneath the property, and the UST contains a regulated

petroleum substance as defined in the Commission's rules. Based on an investigation by a TCEQ Corpus Christi Regional Office Investigator, the ED alleged that Respondent violated the following:

- a. 30 TAC § 334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the system is not brought into timely compliance with the upgrade requirements;
- b. 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a), by failing to register with the Commission a UST in existence on or after September 1, 1987; and
- c. 30 TAC § 334.75(a)(1), by failing to contain and immediately clean up a spill or overflow of any petroleum substance from a UST.

Based on these alleged violations, the ED requests an administrative penalty of \$7,000 and an order requiring Respondent to permanently remove the UST system from service, to submit a UST registration form indicating that the UST has been removed from service, and to submit additional supporting documentation to demonstrate compliance with these requirements.

B. ED's Evidence

The ED introduced various exhibits into evidence and presented testimony from the TCEQ investigator, enforcement coordinator, and financial analyst.

Mr. Michael Zwierzykowski is a TCEQ investigator assigned to the Corpus Christi Regional Office. Mr. Zwierzykowski primarily works on UST cases and estimated that he conducts 60-75 investigations per year. He first investigated the UST involved in this case on August 24, 2007. He visited the property, located in Robstown near the intersection of East Avenue A and South Upshaw Boulevard, and found a former gasoline station that is no longer in business. Based on fuel piping at the property, Mr. Zwierzykowski confirmed that one UST existed at the property, but he was not sure if additional USTs were present.

Further investigation by Mr. Zwierzykowski on August 29 and September 6, 2007, revealed that the Facility owner had failed to register the UST with the TCEQ, as required by 30 TAC § 334.7(a)(1), and had failed to either technically upgrade the UST or permanently remove it from service, as required by 30 TAC § 334.47(a)(2). In addition, Mr. Zwierzykowski found that the tank entry pipe had no spill/overflow prevention equipment, which allowed the tank to overflow a petroleum substance, particularly during rainy days, as he personally observed on August 29, 2007.

After extensive research, the TCEQ Waste Section determined that Respondent owns the Facility. Initially, Respondent claimed she had lost the property due to failure to pay taxes, but further investigation with the Nueces County Appraisal District revealed that Respondent continues to own the property.

Based on his investigation, Mr. Zwierzykowski concluded that Respondent owned the Facility with the UST, violated 30 TAC § 334.7(a)(2) by failing to permanently remove from service a UST that did not meet technical upgrade requirements, violated 30 TAC § 334.7(a)(1) by failing to register the UST with the TCEQ, and violated 30 TAC § 334.75(a)(1) by failing to contain and immediately clean up a petroleum-substance spill or overfill.

Mr. Thomas Edward Jecha is a TCEQ Enforcement Coordinator who has worked for the TCEQ for 17 years and has worked on more than 500 enforcement actions. Among other duties, Mr. Jecha reviews information submitted by investigators, calculates administrative penalties, and determines whether formal enforcement actions are appropriate. Mr. Jecha is very knowledgeable about the TCEQ's current Penalty Policy, adopted in 2002. Pursuant to the policy, he calculated a total penalty of \$7,000 for this case. This total penalty is comprised of a \$5,000 penalty for Respondent's violation of 30 TAC § 334.47(a)(2) (failing to remove the UST from service); a \$1,000 penalty for the violation of 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a) (failing to register the UST with the TCEQ); and a \$1,000 penalty for the violation of 30 TAC § 334.75(a)(1) (failing to contain and clean up a spill from the UST). Mr. Jecha testified that, pursuant to the Commission's Penalty Policy, a total penalty of \$7,000 is appropriate under the facts of this case.

Ms. Donna Chaffin is a TCEQ Financial Analyst for enforcement. She became involved in this case when Respondent requested relief from the ED's proposed administrative penalty by claiming an inability to pay. Ms. Chaffin stated that specific procedures and guidelines apply to such requests. She asked Respondent to send the required documents to support Respondent's claim of an inability to pay. Respondent sent some documents, but not the required documents that Ms. Chaffin requested. Further, Ms. Chaffin discovered that Respondent failed to disclose all of her assets and income. She telephoned Respondent at least three times to discuss the matter, but she never reached Respondent and Respondent never called back. Due to Respondent's failure to provide the proper supporting documents, Ms. Chaffin denied Respondent's request for relief from the proposed administrative penalty.

C. Respondent's Evidence

As mentioned previously, Ms. Jessica Garcia, a friend of Respondent, appeared at the hearing and requested a continuance. After the request was denied, Ms. Garcia left the hearing, and no evidence was offered on behalf of Respondent.¹

D. Analysis and Recommendation

The evidence presented by the ED was uncontroverted. It established that Respondent owns a former retail gasoline station located at 101 South Upshaw Boulevard in Robstown. One UST that is not exempt or excluded from regulation exists beneath the property, and the UST contains a regulated petroleum substance. Respondent has not registered the UST with the Commission as required by 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a), and she has not properly upgraded the UST or removed it from service as required by 30 TAC § 334.47(a)(2). In addition, the UST overflowed a petroleum substance during

¹ In addition, Respondent failed to answer the discovery requests sent to her by the ED. Therefore, Order No. 2 granted a Motion for Sanctions filed by the ED and prohibited Respondent from presenting evidence related to information requested in the ED's discovery.

a heavy rain on August 29, 2007, and Respondent took no action to contain or clean up the overflow, in violation of 30 TAC § 334.75(a)(1).

The ED's evidence further established that a \$7,000 administrative penalty is appropriate, and Respondent is not entitled to relief from the penalty based on her claimed inability to pay. Further, the ED's proposed corrective action, requiring Respondent to register the UST and permanently remove it from service, is appropriate and should be approved.

III. CONCLUSION

Based on the evidence presented, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law in the attached Order, assess an administrative penalty of \$7,000 against Respondent, and order Respondent to take the corrective actions requested by the ED.

SIGNED August 31, 2009.



THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against
and Ordering Corrective Action by Kandy
King; TCEQ Docket No. 2008-0901-PST-E;
SOAH Docket No. 582-09-2246

On _____, 2009, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Kandy King (Respondent). A Proposal for Decision (PFD) was presented by Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on August 6, 2009, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent Kandy King owns a former retail gasoline station located at 101 South Upshaw Boulevard, Robstown, Nueces County, Texas (Facility).
2. One underground storage tank (UST) that is not exempt or excluded from regulation exists beneath the Facility.
3. On August 24, August 29, and September 6, 2007, a TCEQ Corpus Christi Regional Office investigator inspected Respondent's Facility.

4. During December 2007 through April 2008, the TCEQ conducted a record review concerning Respondent's Facility.
5. Respondent has not registered the UST with the TCEQ.
6. Respondent has not upgraded the UST or permanently removed it from service.
7. The UST entry pipe has no spill/overflow prevention equipment.
8. On August 29, 2007, the UST overflowed a petroleum substance during a rain event, causing a sheen on the rainwater runoff.
9. Respondent did not contain or clean up the petroleum substance that overflowed from the UST on August 29, 2007.
10. On November 6, 2007, and on May 7, 2008, Notice of Enforcement letters were issued to Respondent.
11. On November 13, 2008, the Executive Director filed a Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, and on March 31, 2009, the Executive Director filed a First Amended EDPRP. Both the EDPRP and the First Amended EDPRP alleged that:
 - (a) Respondent violated 30 TAC § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the system is not brought into timely compliance with the upgrade requirements;
 - (b) Respondent violated 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a) by failing to register with the Commission a UST in existence on or after September 1, 1987; and

- (c) Respondent violated 30 TAC § 334.75(a)(1) by failing to contain and immediately clean up a spill or overflow of any petroleum substance from a UST.
12. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$7,000 against Respondent and that the Commission order Respondent to take certain corrective actions.
 13. The \$7,000 administrative penalty sought in the First Amended EDPRP is an accumulation of the different penalties assessed for each violation. It is comprised of a \$5,000 penalty for the alleged violation of 30 TAC § 334.47(a)(2) (failing to remove the UST from service); a \$1,000 penalty for the alleged violation of 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a) (failing to register the UST with the TCEQ); and a \$1,000 penalty for the alleged violation of 30 TAC § 334.75(a)(1) (failing to contain and clean up an overflow or spill of a petroleum substance from the UST).
 14. The Executive Director mailed a copy of the original EDPRP and the First Amended EDPRP to Respondent at 7711 Weber Road, Corpus Christi, Texas 78415, on the same date that each was filed.
 15. Respondent filed an answer to the EDPRP on December 9, 2008, and requested a hearing.
 16. On January 22, 2009, the TCEQ referred this matter to SOAH for a contested case hearing.
 17. On January 29, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for April 16, 2009.
 18. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;

- Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the Executive Director alleged Respondent violated.
 - Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
19. On April 16, 2009, the ED and Respondent jointly waived the preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on August 6, 2009.
20. On August 6, 2009, the ALJ convened the evidentiary hearing as scheduled. Mr. Phillip Goodwin, counsel for the ED, appeared and announced ready. Ms. Jessica Garcia, a friend of Respondent, appeared and requested a continuance. The ALJ denied the request for continuance, and the hearing proceeded and concluded the same day, at which time the record closed. At the hearing, the ED presented documentary evidence and testimony from three witnesses. Ms. Garcia left the hearing after the request for continuance was denied, and no evidence was presented on behalf of Respondent.

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 Findings of Fact and Conclusions of Law:
 - (a) Respondent violated 30 TAC § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the system is not brought into timely compliance with the upgrade requirements;
 - (b) Respondent violated 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346(a) by failing to register with the Commission a UST in existence on or after September 1, 1987; and
 - (c) Respondent violated 30 TAC § 334.75(a)(1) by failing to contain and immediately clean up a spill or overflow of any petroleum substance from a UST.

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 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 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 \$7,000 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.

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. Kandy King is assessed an administrative penalty in the amount of \$7,000 for violations of 30 TAC §§ 334.7(a)(1), 334.47(a)(2) and 334.75(a)(1), and TEX. WATER CODE § 26.346(a). The payment of this administrative penalty and Kandy King's compliance

with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this section. 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: Kandy King; docket No. 2008-0901-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, Kandy King shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of this Order, Kandy King shall submit a properly completed SUT registration form to the TCEQ indicating that the UST has been removed, in accordance with 30 TAC § 334.7, to:

Registration and Reporting Section
Permitting & Remediation Support Division, MC 138
Texas Commission on Environmental Quality
P.O. Box 12087
Austin TX 78711-3087

4. Within 75 days after the effective date of this Order, Kandy King shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions Nos. 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 fines and imprisonment for knowing violations."

The certification shall be sent to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

with a copy to:

Brad Genzer, Waste Section Manager
Corpus Christi Regional Office
Texas Commission on Environmental Quality
NRC Building, Suite 1200
6300 Ocean Drive, Unit 5839
Corpus Christi, TX 78412

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.
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 Respondent.
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**