SOAH DOCKET NO. 582-09-4949
TCEQ DOCKET NO. 2008-1170-MLM-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE**
VS.	§	**STATE OFFICE OF ADMINISTRATIVE HEARINGS**
PETROLEUM WHOLESALE, L.P. D/B/A SUNMART 363, RESPONDANT	§	

PETROLEUM WHOLESALE'S RESPONSE TO THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

Petroleum Wholesale, L.P. d/b/a Sunmart 363 ("PWI") submits this response to the exceptions to the proposed order of the Administrative Law Judge filed by the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ).

I. Introduction

On January 25 and 26, 2011 an evidentiary hearing was held in Austin, Texas before the Honorable William G. Newchurch regarding various alleged violations of the Texas Administrative and Water Codes at Sunmart 363 located at 333 Lutcher Drive in Orange County, Texas. During this hearing, several witnesses testified and numerous documents were admitted into evidence. After considering all of the evidence, Judge Newchurch determined that many of the violations did in fact occur and recommended corrective actions and a penalty of nearly $64,000. Unsatisfied with this considerable award, the ED filed several Exceptions to Judge Newchurch's proposed order in which

the ED again forgets who has the burden of proof and attempts to shift that burden onto PWI.

II. Violations Nos. 1 and 2

January 22, 2007

With regard to the alleged unauthorized discharge from the PWI facility on January 22, 2007, the ED argues that Judge Newchurch erred in his conclusions that the discharge should be classified as a moderate (instead of a major) discharge, that approximately five (5) gallons of product was discharged from the facility rather than the 25 gallons alleged by the ED, and that the discharge was not shown to have caused the death of fish. The ED further claims that Judge Newchurch incorrectly determined that PWI did not fail to contain and immediately clean up the diesel spill.

The ED argues that a letter from the Deputy Fire Chief of the Orange Fire Department, indicating that approximately 100 gallons of diesel were discharged from the facility, is sufficient evidence to conclude that PWI discharged more than 25 gallons from the facility. There is no evidence that either the 100 gallon or the 25 gallon amounts are remotely accurate. Instead, the ED has decided to disregard the only credible evidence, which indicates that only five (5) gallons of product were found in the 3,000 gallons of water recovered. The ED claims that the letter from Allen Barron stating that only five (5) gallons of product was found does not disprove the TCEQ's allegation, but the ED fails to grasp the fact that the letter from the Deputy Fire Chief does not prove that 100 gallons, 25 gallons, or any more than 5 gallons were in fact discharged. The ED simply argues that additional product could have migrated beyond the facility, without providing any evidence whatsoever of this occurring.

The ED argues that dead fish found in Cypress Lake are related to a discharge from the PWI facility, yet provided no causal connection between the dead fish and a release from the PWI facility. Gregory Goode, the former Emergency Response Coordinator for the Beaumont office of the TCEQ, admitted that the dead fish were never linked to any hydrocarbon exposure[1] and further testified that the location where the dead fish were photographed was well away from the location where any possible discharge from the PWI facility might enter into Cypress Lake.[2] He also acknowledged that there is an RV park, with a boat dock, on the adjacent property near where the dead fish were found, which means that boat fuels, vehicle fuels, various oils, and charcoal lighter fluid were possible products that could have been used in the area where the dead fish were found.

The TCEQ argues that the purported presence of petroleum product in the lake two days after the January 22 discharge is conclusive of PWI's failure to contain and immediately clean the spill. However, the chemical classifier strips used to determine presence of hydrocarbons in the lake were inadequate to determine the exact source of the sample or even the type of substance involved. The ED ignores the fact that the PWI Environmental team was dispatched to the location and arrived within a few hours of the Fire Department. Also ignored is the fact that Action Oil was hired by PWI to help with the clean-up efforts. Judge Newchurch's conclusion that the ED failed to meet its burden of proof with regard to PWI not containing and immediately cleaning up the spill is correct and should be followed.

July 2, 2007

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[1] Goode testimony, vol. 2, p. 42, line 5.
[2] Goode testimony, vol. 2, p. 46, line 3.

The claim that PWI failed to contain and immediately clean the July 2, 2007 discharge is completely baseless and contrary to the evidence. PWI immediately responded to the discharge and had its Environmental Manager on site within a few hours of learning about it. PWI also immediately contacted Action Oil Services to come to its facility with a Vac truck in order to assist with the cleanup. The TCEQ attempts to hold PWI to an unattainable standard by requiring immediate resolution to the discharge rather than the immediate commencement of the clean-up process. Remediation efforts are not instantaneous and it takes time to arrange and implement an organized approach to effectively carry out a comprehensive clean-up.

The ED further implies that the alleged discharge from the PWI facility caused the death of an alligator that was found floating in Cypress Lake. Although the alligator was removed from the lake and testing could have been done to determine the cause of death, such was never done.[3] Thus, to suggest that the death of the alligator resulted from a PWI discharge of fuel is disingenuous and completely unsupported. Judge Newchurch's statement that the ED failed to meet its burden of proof is correct and his conclusion stating that no violation of 30 TAC §§ 327.5 and 334.75(a)(i) occurred should remain.

July 27, 2007

Here again, the ED attempts to place the burden on PWI to prove that it did not fail to contain and immediately clean up the diesel spill on July 27, 2007 rather than accept that the burden lies with the TCEQ. The undisputed evidence from the Fire

[3] Goode testimony, vol. 2, p. 42, line 5.

Department suggests that PWI did in fact contain and immediately clean up the spill.[4] Despite the evidence indicating that PWI was immediately remedying the situation, the ED disregards this substantiation and insists that PWI must disprove the allegations made against it. The ED argues that a lack of affirmative proof indicating adherence to the statue is affirmative proof of PWI's failure to comply with it. This reasoning is unsound and contrary to the rules.

In addition, the TCEQ argues that there is no evidence that PWI began an extensive clean-up and remediation effort when the evidence shows that over $350,000 was paid to Milstead Environmental for its clean up and remediation efforts. For the ED to claim that PWI somehow failed to properly respond and remedy the situation is disingenuous. Judge Newchurch's conclusion that no violation of 30 TAC §§ 327.5(a) and 334.75(a)(i) occurred should remain.

III. Violation Nos. 3 and 6

With regard to the ED's allegations that PWI failed to investigate and report suspected releases in August and September of 2007, these claims are unfounded, ignore common sense and the undisputed testimony, and disregard the clear intent of the statute. Following the release in early July, 2007, PWI had independent third parties on site 24 hours a day, seven days a week looking for any sign of a release. No signs were found and no releases were suspected.

Testimony from Ms. Costner illustrates the disregard for common sense displayed by the TCEQ in assessing fines against PWI for the alleged releases in August and September of 2007. Ms. Costner stated that she would expect to see a leak

[4] ED Ex. 13, at Bates page 000003.

manifested by small and continuing shortages in fuel as opposed to an initial 488 gallon discharge, followed by periodic 25 and/or 50 gallon releases.[5] Despite this rational testimony, though, the ED continues to irrationally argue that PWI should have ignored the around-the-clock monitoring being conducted at the station, ignored common sense, and should have suspected actual releases nevertheless. Bear in mind, the pumps at the location were, at the time, even closed for the selling of fuel to the public.

In reaching its conclusion that PWI should have suspected releases, the TCEQ attempts to impose a burden that no facility owner could withstand. If a determination as to when a release should be suspected is allowed to be made by TCEQ, who is largely unfamiliar with a location and its operations, a station owner would find itself at the mercy of the whims of the TCEQ. If the legislature intended for the TCEQ to be the empowered authority to determine when a release should be "suspected", that power would certainly have been set out in the statute. There is, however, no such language giving the TCEQ the power of such determinations. The clear meaning of the statute is that the facility owner must "suspect" a release before the requirements of reporting same arise.

The ED has come up with no explanation as to where the 488 gallons, and periodic 25 to 50 gallons, identified as "shortages," went, and ignores the obvious evidence explaining the purported "shortages" on the inventory records. If the ED had any rational theory at all as to where the supposed missing fuel went, it certainly would state such theory in its briefing. It does not. Instead, the ED ignores all logic and wrongly concludes that "releases" should have been suspected, despite there being (1)

[5] Costner testimony, vol. 1, p. 185, lines 21-25.

no evidence of a release actually occurring, (2) around-the-clock monitoring of the station, and (3) reliable evidence supporting PWI's explanation as to where the fuel went.

The TCEQ calls into question the MTI Environmental document which indicates that on August 9, 2007, MTI removed diesel and water from the tank and tank hold, claiming that such document does not mention a specific facility customer name or location other than "Orange, TX (Mobil)". The evidence at trial, though, was that MTI had come to the location at issue on August 9, 2007. Further, PWI only has one station in Orange, Texas, a Mobil station, so there can be no meaningful doubt about Sunmart 363 being the facility referenced in the MTI document. Moreover, the 488 gallon alleged shortage shows up in the immediate aftermath of (i.e., the first tank reading after) MTI's removal of fuel.

The ED attempts to place the burden on PWI to prove PWI's compliance with State regulations, as opposed to coming forth with credible evidence to demonstrate a "shortage."

IV. Conclusion

With regard to Violations 1, 2, 3, and 6, and/or any portion thereof, the TCEQ failed to meet its burden of proof to establish violations of the Texas Administrative and/or Water Codes. Judge Newchurch applied solid legal reasoning and relied upon both common sense and evidence in reaching his conclusions in this matter. As such, Judge Newchurch's Proposal for Decision should be followed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RANDY L. FAIRLESS, do hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to the following attorneys of record by either E-filing and/or facsimile, on this 10th day of June, 2011:

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