

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

December 17, 2009

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

Re: SOAH Docket No. 582-09-2813; TCEQ Docket No. 2008-1237-PST-E;
Texas Commission on Environmental Quality v. Kenneth W. Blevins

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 January 6, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than January 19, 2009.

This matter has been designated **TCEQ Docket No. 2008-1237-PST-E; SOAH Docket No. 582-09-2813**. 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 "Penny A. Wilkov" with a stylized flourish at the end.

Penny A. Wilkov
Administrative Law Judge

PAW/ap
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: KENNETH W. BLEVINS

SOAH DOCKET NUMBER: 582-09-2813

REFERRING AGENCY CASE: 2008-1237-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ PENNY WILKOV**

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

KENNETH BLEVINS
P.O. BOX 523
GEORGE WEST, TX 78022
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KENNETH BLEVINS

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2813
TCEQ DOCKET NO. 2008-1237-PST-E

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

V.

**KENNETH W. BLEVINS,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) brought this enforcement action against Kenneth W. Blevins (Respondent) seeking administrative penalties based on Respondent's alleged failure to permanently remove three long-abandoned underground storage tanks (USTs). The ED requested imposition of an administrative penalty of \$3,600.00, based on Respondent's financial circumstances, and corrective action of upgrading safety equipment or removing the USTs. The Administrative Law Judge (ALJ) finds that the violation occurred, but proposes a reduction in the requested penalty amount to \$1,000.00, as well as an order that Respondent take corrective action.

II. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

The hearing was convened on November 3, 2009, by ALJ Penny A. Wilkov at the hearing facilities of the State Office of Administrative Hearings (SOAH), William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. Phillip M. Goodwin, an attorney in TCEQ's Litigation Division, represented the ED. Respondent appeared *pro se*. The hearing adjourned and the record closed the same day. There were no contested issues of notice or jurisdiction in this case. Therefore those matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

III. DISCUSSION

A. Background

Respondent is the owner of property (the property) located at 407 Hwy 281, George West, Texas. When Respondent purchased the property in 1975, there were three USTs buried underground. The previous owner had operated a gas station on the property in the early 1970s, abandoning the tanks and removing the gasoline pump and dispenser fixtures prior to selling the property. The property is currently leased to a pizza restaurant, and Respondent still pays the purchase loan.

According to the TCEQ Petroleum Storage Tank Registration Database, three 3000-gallon tanks with associated steel piping system were installed in 1956 and registered as out-of-service on May 8, 1988.¹ In November 2006, TCEQ initiated an investigation into the long-abandoned USTs and requested documentation of either upgraded safety equipment or removal of the USTs.²

On December 2, 2008, the Executive Director filed the preliminary report and petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent had violated:

30 TEX. ADMIN. CODE § 334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable components of the system are not brought into timely compliance with the upgrade requirements.

B. Summary of Evidence and Argument

The ED presented several exhibits and the testimony of Michael Zwierzykowski, a TCEQ Environmental Investigator, Michael Pace, a TCEQ enforcement coordinator, and Donna Chaffin, a TCEQ financial analyst. Respondent presented brief testimony.

¹ ED Exhibit 3.

² ED Exhibit 2.

Michael Zwierzykowski: On November 17, 2006, Mr. Zwierzykowski, a chemical engineer in the Corpus Christi regional office, made an initial visit to the property, registered as an out-of-service facility, as part of an annual inspection plan. As a result of the investigation, Respondent was sent a notice of violation informing him that the USTs were not in compliance and that a corrective action plan must be submitted to TCEQ by December 30, 2006.³ On March 31, 2007, Staff sent a follow-up notice requesting a compliance plan and timeline, in response to Respondent's request for additional time to gather information.⁴

On June 12, 2008, Mr. Zwierzykowski made a follow-up visit to the property. He did not observe corrosion protection equipment upgrades such as a rectifier box, conduits or wires. He also requested, but did not receive, documentation of compliance.⁵ He noted that a potential environmental threat of contamination existed without UST upgrades or removal.

Michael Pace: TCEQ Enforcement Coordinator Michael Pace testified that the violation warranted a \$5,250.00 penalty based on the factors outlined in TEX. WATER CODE ANN. § 7.053, including, in pertinent part, the nature, circumstances, extent, duration, and gravity of the act, the impact of the violation on water quality and wildlife, the history and extent of previous violations, the degree of culpability, good faith efforts to comply, any economic benefit gained through the violation, the amount necessary to deter future violations, and any other factors that justice may require.

Mr. Pace prepared a Penalty Calculation Worksheet (PCW) analyzing the penalty factors found in the TCEQ Penalty Policy as it related to the Respondent's violation.⁶ According to Mr. Pace, since the TCEQ inspection established that Respondent had a monthly throughput of less

³ ED Exhibit 3.

⁴ ED Exhibit 4.

⁵ ED Exhibit 2.

⁶ TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PENALTY POLICY SECOND REVISION, Effective September 1, 2002.

than 50,000 gallons, the violation was classified as a “minor” source of potential harm to the environment or human health.⁷ The violation was also classified as “potential” rather than “actual,” which suggested a possibility of harm on a three-tier scale of major, moderate, or minor. The violation was classified as a “major” source of potential harm based on the risk to groundwater from aging and leaking USTs.

The maximum authorized penalty may not exceed \$10,000.00 for each day of violation under TEX. WATER CODE ANN. § 7.052. With a potential release, a typical downward adjustment of 25 percent of the maximum authorized penalty is made, or \$2,500.00 per event. Since two monthly events were noted, June and July 2008, a penalty of \$5,000.00 was then calculated. Lastly, a compliance history enhancement, based on the November 30, 2006 notice of violation letter, was made for an additional five percent upward adjustment to the penalty, or \$250.00. In summary, Mr. Pace testified that, consistent with the penalty policy, the appropriate penalty for the violation would be \$5,250.00.⁸

Donna Chaffin: Ms. Chaffin, an accountant in the Austin TCEQ office, performed a financial review of Respondent’s ability to pay the administrative penalty. Based on the documents provided and her financial review, she recommended imposition of the minimum penalty for the violation. This would be \$3,600.00, payable in monthly installments of \$100.00 per month.

Respondent: Respondent did not controvert the charges, but only that TCEQ staff was enforcing a violation that should have been the previous owner’s responsibility. He pointed out that the tanks had been there for 50 years, yet he had nothing to do with operating them. He reasoned that the Commission staff should have required the previous owner who abandoned the tanks to remove them when it occurred. Further, when he purchased the property, he understood that the tanks were well-secured and in full compliance with the law.

⁷ ED Exhibit 7.

⁸ *Id* at 3.

Respondent testified that he would not be able to remove the tanks if he were assessed a penalty, especially since he contacted a licensed environmental contractor who estimated a \$20,000.00 removal fee if no contamination had occurred. If contamination has occurred, the fee would be higher. He would be willing to pay per month to have the tanks removed, but he is working and has a large family. At present, the pizza restaurant pays rent of \$300.00 per month for the property.⁹ On cross-examination, however, the ED pointed out that if there were documentation of environmental contamination, a fund does exist for cleanup, but otherwise, no program exists to financially assist owners with removal of tanks.

C. Analysis

The ED has established that the alleged violation occurred and that the penalty was calculated in accordance with TEX. WATER CODE ANN. § 7.053 and the Commission's Penalty Policy. In the absence of mitigating circumstances, the ALJ would have accepted this amount. However, the ALJ finds that the "other matters that justice may require" subcategory, the deterrence of future violations, and Respondent's ability to pay, all impact the amount of the proposed penalty.

The Commission has adopted a Penalty Policy to guide the computation and assessment of administrative penalties. Furthermore, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider the following factors when determining the amount of an administrative penalty:

- 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 ED Exhibit 9.

The Penalty Policy provides guidance on what factors may be considered in adjusting a penalty. Under the subheading, "Other Factors that Justice May Require," the policy discusses a downward adjustment when a respondent purchases a non-compliant facility or when a respondent inherits the compliance history of a purchased facility.¹⁰ Here, when Respondent purchased the property, he was led to believe that the USTs were safely secured and compliant with applicable laws. This implicit understanding continued with Respondent's registration of the USTs as out-of-service in 1988, with no resultant investigation or enforcement action. Further, Respondent has never benefited financially from selling gasoline products.

Ms. Chaffin testified that based on her review of Respondent's financial condition, he qualified for the lowest penalty available. He not only works and supports a large family, but has years left on the loan for the property. The property generates \$300.00 in rent per month from the pizza restaurant. Given Respondent's financial means, a \$1000.00 penalty, payable in monthly installments, will act as a sufficient deterrent against further violations, but, hopefully, will also allow Respondent the financial resources to take corrective actions.

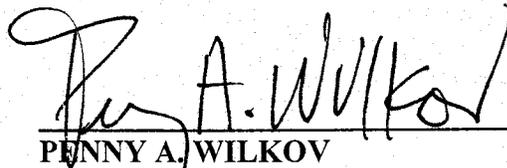
The ALJ is cognizant that Respondent has a heavy financial burden to remove three fifty-year-old USTs buried deep beneath a restaurant. Respondent testified that a certified contractor quoted \$20,000.00 to remove the tanks. An additional \$3,600.00 penalty combined with the high cost of removal and Respondent's financial means would have little effect on the ultimate goal which should be removal of a potential environmental hazard. A penalty should only be enough to deter future violations. The \$1,000.00 penalty in this case will have that effect yet allow sufficient funds for Respondent to take corrective action.

After a review of the evidence and for the reasons given, it is recommended that the Commission find Respondent liable for the violations asserted by the ED and assess a penalty of

¹⁰ ED Exhibit 6, Penalty Policy at 16.

\$1,000.00. It is also recommended that the corrective action sought by the ED be implemented. A draft order incorporating these recommendations is attached to this Proposal for Decision.

SIGNED December 17, 2009.



PENNY A. WILKOV
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

**Assessing Administrative Penalties and Requiring
Corrective Action Against
KENNETH BLEVINS and
Authorizing Installment Payment
SOAH DOCKET NO. 582-09-2813
TCEQ DOCKET NO. 2008-1237-PST-E**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring certain corrective actions of Kenneth Blevins (Respondent). Penny A. Wilkov, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on November 3, 2009, in Austin, Texas, and presented the Proposal for Decision.

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

I. FINDINGS OF FACT

1. In 1975, Respondent purchased property (the property) located at 407 Hwy 281, George West, Texas, with three underground storage tanks (USTs).
 2. The previous owner had operated a gas station on the property in the early 1970s, abandoning the tanks and removing the gasoline pump and dispenser fixtures prior to selling the property.
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3. The property is presently leased to a pizza restaurant, and Respondent has never operated a gas station on the property.
4. The TCEQ Petroleum Storage Tank Registration Database reflects that three 3000-gallon tanks with associated steel piping system were installed in 1956 and registered as out-of-service on May 8, 1988.
5. The USTs are not exempt or excluded from regulation under the Texas Water Code or the Commission's rules.
6. On November 17, 2006, Michael Zwierzykowski, a TCEQ environmental investigator, inspected the property. As a result, Respondent was sent a notice of violation letter informing him that the USTs were not in compliance and that a corrective action plan must be submitted to TCEQ staff by December 30, 2006.
7. On March 31, 2007, TCEQ staff sent a follow-up letter requesting a compliance plan and timeline, in response to Respondent's request for additional time to gather information.
8. On June 12, 2008, Mr. Zwierzykowski made a follow-up visit to the property and found no evidence of upgrades or removal of the USTs.
9. As documented in the TCEQ investigation of November 17, 2006, and June 12, 2008, Respondent failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs for which any applicable component of the system was not brought into timely compliance with the upgrade requirements as required by 30 TEX. ADMIN. CODE § 334.47(a)(2).
10. On December 2, 2008, the Executive Director filed the preliminary report and petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054, and mailed a copy of the EDPRP to Respondent.

11. The Respondent requested a hearing on the allegations contained in the EDPRP on January 12, 2009.
12. The case was referred to SOAH for a hearing on February 12, 2009, and on February 27, 2009, the Chief Clerk of the Commission mailed notice of the scheduled preliminary hearing to Respondent.
13. The hearing on the merits was conducted on November 3, 2009, and the record closed that day. Phillip M. Goodwin, an attorney in TCEQ's Litigation Division, represented the ED. Respondent appeared *pro se*.
14. Based on the Commission's 2002 Penalty Policy, the ED proposed a penalty of \$5,250.00, comprised of a base penalty of \$2,500.00 per event for a potential release, with two events noted in June and July 2009, and a five percent upward adjustment based on two notices of violation letters.
15. The TCEQ Financial Administration Division performed a financial review to determine Respondent's ability to pay the proposed administrative penalty and, the ED proposed a penalty of \$3,600.00, payable in monthly installments of \$100.00 per month, for the acts described in Finding of Fact No. 7.
16. The Commission's 2002 Penalty Policy provides that, in determining the penalty for violations, a downward adjustment may be made due to factors that justice may require.
17. A reduction in the amount of penalty to \$1,000.00, payable in monthly installments of \$100.00 per month, is appropriate based on several factors:
 - a. When Respondent purchased the property in 1975, he was unaware that the USTs were not in compliance with applicable laws;
 - b. Respondent has never benefited financially from selling gasoline products;

- c. Respondent works and supports a large family, and he has years left on the loan for the property;
 - d. The property is leased to the pizza restaurant for a monthly rental of \$300.00;
 - e. Based on Respondent's financial circumstances, removal of three fifty-year-old USTs beneath a restaurant will be a substantial financial burden;
 - f. The penalty will present a deterrent against further violations but still allows Respondent sufficient financial resources to undertake corrective actions.
18. An administrative penalty of \$1,000.00, payable in monthly installments of \$100.00 per month, takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in 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 TEX. WATER CODE ANN. or of the TEX. HEALTH & SAFETY CODE ANN. 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 each violation at issue in this case.
3. 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 or the penalties or corrective actions proposed therein.
4. 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, the proposed penalties, and proposed corrective actions.

5. 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.
6. Based on the above Findings of Fact, Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2).
7. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - a. The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - b. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - c. The history and extent of previous violations by the violator;
 - d. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - e. The amount necessary to deter future violations; and
 - f. Any other matters that justice may require.
8. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
9. Based on consideration of the above Findings of Fact and Conclusions of Law, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, a penalty of \$1,000.00 should be assessed against Respondent.
10. Pursuant to 30 TEX. ADMIN. CODE § 70.9, authorizing Respondent to pay out the proposed administrative penalty over a ten-month period is a reasonable exercise of the Commission's discretion.

11. Based on consideration of the above Findings of Fact and Conclusions of Law, the Respondent should be required to take the corrective action measures recommended by the ED in the EDPRP.

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 ten months after the effective date of this Commission Order, Respondent shall pay an administrative penalty in the amount of \$1,000.00 for the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2). The payment shall be made in equal monthly installments of \$100.00. The payment of the administrative penalty set out herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or 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: Kenneth Blevins, RN101783496, TCEQ Docket No. 2008-1237-PST-E."

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 the Commission Order, Respondent shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts,

and /or other records, to demonstrate compliance with this order. 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 fine and imprisonment for knowing violations.

Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

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

with a copy to:

Ben Genzer, Waste Section Manager
Texas Commission on Environmental Quality
Corpus Christi Regional Office
6300 Ocean Dr., Unit 5839
Corpus Christi, Texas 78412-5839

4. The ED 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 ED determines that the Respondent has not complied with one or more of the terms or conditions in this Order.
5. 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.

6. 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.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. 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, Ph.D., CHAIRMAN
FOR THE COMMISSION**