

SOAH DOCKET NO. 582-10-0598
TCEQ DOCKET NO. 2008-1641-PST-E

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

VS. §

ODESSA CORPORATION DBA §
SIGNATURE MART 2; §
RN102353760, §
RESPONDENT §

BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE THOMAS H. WALSTON:

The Executive Director ("ED") of the Texas Commission on Environmental Quality, after reviewing the Administrative Law Judge's (ALJ's) Proposal for Decision, files the following exceptions.

Finding of Fact No. 8

1. The ED respectfully recommends that the words "sought in the EDFAPRP" be omitted because the ED sought a lower penalty at the hearing (\$31,475.00) than in the EDFAPRP (\$32,397). This was because at the hearing, the ED recommended a good faith reduction that was not contained in the EDFAPRP. (Exhibit ED-11: Penalty Calculation Worksheet in evidence with recommended Payable Penalty of \$31,475.)

Ordering Provision No. 4

2. The ED respectfully recommends that this Ordering Provision be revised to include a certification from the Respondent regarding Ordering Provision No. 3, and not only Ordering Provision No. 2. The certifications of all corrective actions are for tracking purposes and are generally standard in Commission orders. With this change, the ED recommends that the Ordering Provision contain the following change (underlined and in bold) to the first sentence:

Within 60 days after the effective date of this Order, Odessa Corporation, dba Signature Mart 2 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**.

Prayer

For these reasons, the ED respectfully requests the ALJ consider the ED's exceptions above. A copy of the Proposed Order with the recommended modifications is attached.

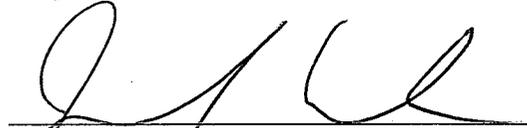
Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division



Jennifer Cook
State Bar of Texas No. 00789233
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-1873
(512) 239-3434 (Fax)
Attorney for the Executive Director

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2010, the original and seven (7) copies of the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas. The document was also filed electronically.

I further certify that on this day a true and correct copy of the foregoing document was served as follows:

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

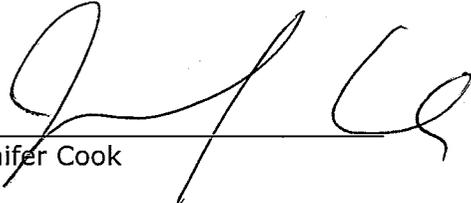
Via Facsimile

Mr. Kazim M. Khan, Director
Odessa Corporation dba Signature Mart 2
3910 I-20 E
Willow Park, Texas 76087
(817) 594-2184
(817) 594-2170 (fax)
kazkh9@aol.com

Facsimile, Electronic Delivery,
First Class Mail, and Certified Mail
Article No. 7010 0290 0002 7775 6638

Office of the Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via Electronic Delivery


Jennifer Cook

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Ordering Corrective Action by Odessa
Corporation, dba Signature Mart 2;
TCEQ Docket No. 2008-1641-PST-E;
SOAH Docket No. 582-10-0598**

On _____, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Preliminary Report and Petition (EDFAPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Odessa Corporation, dba Signature Mart 2 (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).

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

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with retail sales of gasoline located at 3910 East Interstate 20 Service Road South, in Willow Park, Parker County, Texas. (the Facility).
2. On August 11, 2008, the facility had a total of eight underground storage tanks (USTs). Six USTs were active and were registered with the TCEQ; one tank was inactive and was

registered with the TCEQ; and one tank was inactive and was not registered with the TCEQ. The eight USTs are not exempt or excluded from regulation.

3. Respondent's USTs contain regulated petroleum substances as defined by the rules of the Commission.
4. On August 11, 2008, a TCEQ Dallas/Fort Worth (DFW) Regional Office investigator inspected Respondent's facility and documented that the facility violated the following requirements:
 - a. 30 TEX. ADMIN. CODE (TAC) § 334.49(c)(2)(C) and (c)(4) and TEX. WATER CODE § 26.3475(d) by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly, and by failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years.
 - b. 30 TAC § 334.50(b)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a) and (c)(1) by failing to monitor USTs for releases at a frequency of at least once every month (and not to exceed 35 days between each monitoring), by failing to provide proper release detection for the piping associated with the USTS, and by failing to test the line leak detectors at least once per year for performance and operational reliability.
 - c. 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 system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

- d. 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346 by failing to register with the Commission a UST in existence on or after September 1, 1987. Specifically, one gasoline UST at Respondent's facility had not been registered with the TCEQ.
 - e. 30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch. Specifically, pressure-vacuum relief valves were not installed.
- 5. On or about October 5, 2008, Respondent was served with a Notice of Violation letter.
 - 6. On April 13, 2009, the Executive Director filed a First Amended Preliminary Report and Petition (EDFAPRP), in accordance with TEX. WATER CODE ANN. § 7.054. The EDFAPRP alleged that Respondent violated the following requirements:
 - a. 30 TAC § 334.49(c)(2)(C) and (c)(4) and TEX. WATER CODE § 26.3475(d) by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly, and by failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years.
 - b. 30 TAC § 334.50(b)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a) and (c)(1) by failing to monitor USTs for releases at a frequency of at least once every month (and not to exceed 35 days between each monitoring), by failing to provide proper release detection for the piping associated with the USTS, and by failing to test the line leak detectors at least once per year for

performance and operational reliability.

- c. 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 system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.
 - d. 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346 by failing to register with the Commission a UST in existence on or after September 1, 1987. Specifically, one gasoline UST at Respondent's facility had not been registered with the TCEQ.
 - e. 30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch. Specifically, pressure-vacuum relief valves were not installed.
7. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$31,475.00 against Respondent and that the Commission order Respondent to take certain corrective actions.
8. The \$31,475.00 administrative penalty is an accumulation of the different penalties assessed for each violation as follows:
- a. \$5,357.00 30 TAC § 334.49(c)(2)(C) and (c)(4) and TEX. WATER CODE § 26.3475(d);
 - b. \$5,357.00 30 TAC § 334.50(b)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a) and (c)(1);
 - c. \$16,072.00 30 TAC § 334.47(a)(2);
 - d. \$2,009.00 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346; and

15. On December 3, 2009, the ALJ issued Order No. 2, which established a procedural schedule leading to a hearing on the merits on April 9, 2010.
16. The hearing on the merits convened on April 9, 2010. All parties appeared, announced a settlement, and requested an abatement to allow them to complete a written settlement. The Respondent stipulated on the record to the alleged violations and agreed to the Executive Director's proposed penalty and corrective action, in the event the parties did not complete the settlement. Executive Director Exhibits A, B, 1 through 18, and 20 were admitted into the record without objection. The hearing concluded the same day.
17. On July 30, 2010, the Executive Director filed a status report stating that Respondent had not returned executed settlement documents. Therefore, the Executive Director moved for summary disposition and requested the ALJ to issue a PFD based on the stipulations made by Respondent at the hearing on the merits.
18. On July 30, 2010, Respondent filed a status report stating that further investigation revealed that its facility had only seven USTs, rather than eight USTs as alleged by the Executive Director.
19. On September 27, 2010, the ALJ requested the Executive Director to respond to the statements in Respondent's status report.
20. On October 11, 2010, the Executive Director responded to Respondent's status report. The Executive Director reported that further investigation confirmed that eight fill ports for underground tanks existed at Respondent's facility. Therefore, the Executive Director again requested summary disposition against Respondent.
21. On October 19, 2010, the ALJ issued Order No. 6, granting the Executive Director's motion for summary disposition and closing the record.

22. The corrective action requested by the Executive Director is necessary, justified, and appropriate given the violations established by the Executive Director.
23. Assessing an administrative penalty of \$31,475.00 against Respondent is reasonable and justified given the violations committed by Respondent and considering the factors set fourth in TEX. WATER CODE ANN. § 7.053.

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. Respondent owns and operates the USTs located at the Facility.
3. 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.
4. 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.
5. As required by TEX. WATER CODE ANN. §7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDFAPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 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 and corrective actions.

7. 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.
8. Based on the Findings of Fact and Conclusions of Law, Respondent violated the following:
 - a. 30 TAC § 334.49(c)(2)(C) and (c)(4) and TEX. WATER CODE § 26.3475(d) by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly, and by failing to inspect and test the cathodic protection system for operability and adequacy of protection at a frequency of at least once every three years.
 - b. 30 TAC § 334.50(b)(1)(A), (b)(2), and (b)(2)(A)(i)(III) and TEX. WATER CODE § 26.3475(a) and (c)(1) by failing to monitor USTs for releases at a frequency of at least once every month (and not to exceed 35 days between each monitoring), by failing to provide proper release detection for the piping associated with the USTS, and by failing to test the line leak detectors at least once per year for performance and operational reliability.
 - c. 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 system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

- d. 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346 by failing to register with the Commission a UST in existence on or after September 1, 1987. Specifically, one gasoline UST at Respondent's facility had not been registered with the TCEQ.
 - e. 30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to ensure that each vapor balance system vent line is equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch. Specifically, pressure-vacuum relief valves were not installed.
9. 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.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. 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 \$31,475.00 is justified and should be assessed against Respondent.

12. Based on the above Findings of Fact, Respondent should be required to take the corrective action recommended by the Executive Director.

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. Odessa Corporation, dba Signature Mart 2 is assessed an administrative penalty in the amount of \$31,475.00 for violations of 30 TAC §§ 115.222(6); 334.7(a)(1); 334.47(a)(2); 334.49(c)(2)(C) and (c)(4); 334.50(b)(1)(A), (b)(2), and (b)(2)(A)(i)(III); TEX. WATER CODE §§ 26.346 and 26.3475(a), (c)(1), and (d); and TEX. HEALTH & SAFETY CODE § 382.085(b). The payment of this administrative penalty and compliance by Odessa Corporation dba Signature Mart 2 with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. 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: Odessa Corporation, dba Signature Mart 2; Docket No. 2008-1641-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, Odessa Corporation, dba Signature Mart 2 shall:
 - a. Begin conducting bimonthly inspections of the cathodic protection system and ensure that the rectifier and other system components are functioning as designed, and conduct the required triennial testing of the cathodic protection system, in accordance with 30 TEX. ADMIN. CODE § 334.49;
 - b. Install and implement a release detection method for the USTs and the piping associated with the USTs, and test the line leak detectors for performance and operational reliability, in accordance with 30 TEX. ADMIN. CODE § 334.50;
 - c. Permanently remove the two inactive USTs from service, in accordance with 30 TEX. ADMIN. CODE § 334.55; and
 - d. Install a pressure-vacuum relief valve in each vent line, in accordance with 30 TEX. ADMIN. CODE § 115.222.
3. Within 45 days after the effective date of this Order, Odessa Corporation, dba Signature Mart 2 shall submit an amended registration to indicate the current ownership and operational status of the UST system, 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 13087
Austin TX 78711-3087

4. Within 60 days after the effective date of this Order, Odessa Corporation, dba Signature Mart 2 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:

Waste Section Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951

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**