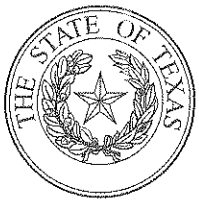
State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge
December 3, 2010

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

Re: SOAH Docket No. 582-10-0598; TCEQ Docket No. 2008-1641-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality, Petitioner vs. Odessa Corporation, DBA Signature Mart 2; RN10235760, 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 **December 23, 2010**. Any replies to exceptions or briefs must be filed in the same manner no later than **January 3, 2011**.

This matter has been designated **TCEQ Docket No. 2008-1641-PST-E ; SOAH Docket No. 582-10-0598**. 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,

Thomas H. Walston
Administrative Law Judge

THW:nl
Enclosures
cc: Mailing List

300 West 15th Street Suite 502 Austin, Texas 78701 / P.O. Box 13025 Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.475.4994 (Fax)
www.soah.state.tx.us

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: ODESSA CORP.

SOAH DOCKET NUMBER: 582-10-0598

REFERRING AGENCY CASE: 2008-1641-PST-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ THOMAS H. WALSTON

REPRESENTATIVE / ADDRESS	PARTIES
BLAS J. COY, JR. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF PUBLIC INTEREST COUNSEL P.O. BOX 13087, MC-103 AUSTIN, TX 78711-3087 (512) 239-6363 (PH) (512) 239-6377 (FAX) bcoy@tceq.state.tx.us	OFFICE OF PUBLIC INTEREST COUNSEL
JENNIFER N COOK ATTORNEY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY MC-175 P.O. BOX 13087 AUSTIN, TX 78711-3087 (512) 239-1873 (PH) (512) 239-3434 (FAX)	EXECUTIVE DIRECTOR
MUHAMMAD NADEEM 3910 I 20 WILLOWPARK, TX 76087 (817) 594-2184 (PH) (817) 594-2170 (FAX)	ODESSA CORP. DBA SIGNATURE MART 2

xc: Docket Clerk, State Office of Administrative Hearings

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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
VS.	§	**OF**
ODESSA CORPORATION DBA SIGNATURE MART 2; RN10235760, Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION ON SUMMARY DISPOSITION

I. INTRODUCTION

On April 13, 2009, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) filed the Executive Director's First Amended Preliminary Report and Petition (EDFAPRP). The EDFAPRP alleged that Respondent Odessa Corporation dba Signature Mart 2 (Respondent or Odessa Corporation) violated certain statutes and Commission rules concerning underground petroleum storage tanks (USTs). The ED requested administrative penalties totaling $31,475.00[1] and such corrective actions as necessary to bring Respondent's operations into compliance with the applicable statutes and rules. The USTs are located on the East Interstate 20 service road in Willow Park, Parker County, Texas.

At the evidentiary hearing, the parties announced that they had reached a settlement, but they needed additional time to prepare a written settlement agreement and agreed order. However, in the event the parties could not conclude the settlement, Respondent stipulated that the alleged violations occurred and that an administrative penalty and corrective action were appropriate. In addition, the ED's exhibits were admitted into the record.

[1] The EDFARP requested penalties totaling $32,397.00. However, the parties stipulated to $31,475.00 as the correct amount at the evidentiary hearing, and that amount is supported by Ex. ED-11.

The parties were not able to complete their written settlement. Therefore, the ED subsequently requested summary disposition in its favor based on the stipulations and the exhibits admitted into evidence. The Administrative Law Judge (ALJ) granted the ED's motion for summary disposition and recommends that the Commission find that the violations occurred, assess an administrative penalty of $31,475.00, and order Respondent to complete the corrective actions recommended by the ED.

II. PROCEDURAL HISTORY

The procedural history of this case is set forth below:

November 12, 2009	Preliminary Hearing held.
December 3, 2009	Procedural schedule established leading to a hearing on the merits on April 9, 2010.
April 9, 2010	Hearing on the merits convened. The parties 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 a penalty and corrective action, in the event the parties did not complete the settlement. Also, ED Exhibits A, B, 1 through 18, and 20 were admitted into the record without objection.
July 30, 2010	The ED filed a status report stating that Respondent had not returned executed settlement documents. Therefore, the ED also moved for summary disposition and requested the ALJ to issue a Proposal for Decision (PFD) based on the stipulations made by Respondent on the record at the time of the hearing on the merits.
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 ED.
September 27, 2010	The ALJ requested the ED to respond to the statements in Respondent's status report.
October 11, 2010	The ED responded to Respondent's status report. The ED reported that further investigation confirmed that eight fill ports for underground tanks

existed at Respondent's facility. The ED noted that Respondent had provided no documentation that only seven underground storage tanks existed at the facility. Therefore, the ED again requested summary disposition against Respondent.

October 19, 2010 By Order No. 6, the ALJ granted the ED's motion for summary disposition and closed the record.

III. BACKGROUND FACTS

As summary disposition evidence, the ED relies on ED Exhibits 1-8 and 20, which were admitted into evidence, as well as Respondent's oral stipulations made on the record when the evidentiary hearing convened. This evidence established that Respondent owns and operates a convenience store with retail sales of gasoline located at 3910 East Interstate 20 Service Road, in Willow Park, Parker County, Texas.[2]

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

[2] ED Ex. 1.

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.

The proposed administrative penalty totaling $31,475.00 is broken out by violation below. The total recommended penalty includes a downward adjustment of $625.00 for good faith efforts to comply and an upward adjustment of $2,100.00 for economic benefit. These items a. through e. correspond to the violations described above:

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;
e.	$2,679.00	30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b)
	$31,475.00	Total

Respondent did not file any evidence to contest the ED's motion for summary disposition, although Respondent did file a status report on July 30, 2010, contending that only seven underground storage tanks existed at the facility, rather than eight underground tanks as alleged by the ED. The ED filed a reply to this response on October 11, 2010, in which the ED provided documentation received from Respondent which stated that eight underground storage tanks existed at the facility. Further, the investigator returned to Respondent's facility and confirmed that eight fill ports existed. The ED stressed that all documentation in this case, including documentation received from Respondent, states that eight underground storage tanks are at the facility and the investigator has confirmed that eight fill ports are there as well. In contrast, Respondent has provided no evidence that only seven tanks exist at the facility. Under these circumstances, the ED argued that no material fact issues exist concerning the number of tanks at the facility.

IV. STANDARD OF REVIEW

A motion for summary disposition may be granted if the moving party shows that it is entitled to relief as a matter of law. The Commission's at 30 TAC § 80.137(c) sets forth criteria for granting summary disposition. This rule provides, in pertinent part, that:

> Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records if any, on file in the case at the time of hearing, or filed thereafter and before disposition with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

V. DISCUSSION

This case was decided by summary disposition. The ED's Motion for Summary Disposition was based on nineteen exhibits submitted by the ED as summary disposition evidence,[3] as well as Respondent's stipulations when the hearing on the merits convened. Each of the charges against Respondent is discussed below.

A. Failure to Inspect the Cathodic Protection System.

30 TAC § 334.49(c)(2)(C) requires the owner or operator of an impressed current cathodic protection system to inspect the system at least once every 60 days to ensure that the rectifier and other system components are operating properly. Likewise, § 334.49(c)(4) requires an owner or operator to test the cathodic protection system for operability and adequacy of protection at least once every three years. In addition, TEX. WATER CODE § 26.3475(d) provides that an underground storage tank system must comply with Commission requirements for tank integrity assessment and corrosion protection.

The ED's summary disposition evidence showed that at the time of the investigation on August 11, 2008, the TCEQ investigator found that inspections of the impressed current cathodic protection system were not being conducted every 60 days.[4] In addition, the investigator found that an operability test had not been performed within the past three years and that no record was available of the last operability test.[5] Respondent offered no summary disposition evidence to contest this charge, and Respondent stipulated to all violations at the hearing on the merits. Therefore, the ED is entitled to summary disposition as a matter of law that Respondent violated 30 TAC § 334.49(c)(2)(C) and (c)(4) and TEX. WATER CODE § 26.3475(d).

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[3] ED Exs. 1-18 and 20.

[4] ED Ex. 1, Investigation Report at 5.

[5] ED Ex. 1, Investigation Report at 3.

B. Failure to Monitor and Test for Leaks.

30 TAC § 334.50(b)(1)(A) requires an owner or operator to monitor USTs for releases at a frequency of at least once every month and not to exceed 35 days between each monitoring. Subsections (b)(2), and (b)(2)(A)(i)(III) also require an owner or operator to provide proper release detection for the piping associated with the USTs, and to test the line leak detectors at least once per year for performance and operational reliability. Further, TEX. WATER CODE § 26.3475(a) and (c)(1) requires UST systems to comply with Commission requirements for pressurized piping release detection equipment.

The ED's summary disposition evidence showed that at the time of the investigation on August 11, 2008, the TCEQ investigator found that Respondent's USTs were not being monitored for releases on a monthly basis. The facility had elected to us the "statistical inventory reconciliation" (SIR) method to check for releases. The SIR method requires that inventory control records be completed and submitted to an SIR vendor at the end of every month, after which the SIR vendor should complete a leak detection report. No SIR leak detection reports were available during the investigation and none were made available to the investigator.[6] Further, the ED's evidence showed that at the time of the investigation, the line leak detectors at the facility had not been performance tested within the past twelve months, and the last successful line leak detector performance test was not available from Respondent. Finally, the evidence established that the pressurized underground product piping was not being monitored for release.[7] Respondent offered no summary disposition evidence to contest this charge, and Respondent stipulated to all violations at the hearing on the merits.

Based on the undisputed evidence, the ED is entitled to summary disposition in its favor that Respondent violated 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).

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[6] ED Ex. 1, Investigation Report at 4.

[7] ED Ex. 1, Investigation Report at 3.

C. Failure to Remove a UST From Service.

30 TAC § 334.47 requires owners and operators of USTs to make certain upgrades to UST systems. Also, § 334.47(a)(2) requires an owner or operator 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.

The ED's summary disposition evidence showed that at the time of the investigation on August 11, 2008, the TCEQ investigator found that Respondent's facility had one UST that was out of service and had not been upgraded with cathodic protection or with spill and overfill protection.[8] Respondent offered no summary disposition evidence to contest this charge, and Respondent stipulated to all violations at the hearing on the merits. Based on the undisputed evidence, the ED is entitled to summary disposition in its favor that Respondent violated 30 TAC § 334.47(a)(2).

D. Failure to Register a UST.

30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346 require the owner or operator of a UST to register with the Commission any UST in existence on or after September 1, 1987. The ED's summary disposition evidence showed that at the time of the investigation on August 11, 2008, the TCEQ investigator found that one gasoline UST at Respondent's facility had not been registered with the TCEQ.[9] Respondent offered no summary disposition evidence to contest this charge, and Respondent stipulated to all violations at the hearing on the merits. Based on the undisputed evidence, the ED is entitled to summary disposition in its favor that Respondent violated 30 TAC § 334.7(a)(1) and TEX. WATER CODE § 26.346.

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[8] ED Ex. 1, Investigation Report at 4.

[9] ED Ex. 1, Investigation Report at 4.

E. Failure to Install Pressure-Vacuum Relief Valves.

Under 30 TAC § 115.10(10), Parker County, where Respondent's facility is located, is a "covered attainment county." For such counties, 30 TAC § 115.222(6) provides that the only allowed atmospheric emission during gasoline transfer into a storage container is through vapor balance system vent lines equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch. Further, TEX. HEALTH & SAFETY CODE § 382.085(b) prohibits allowing an emission of any air contaminant in violation of any Commission rule.

The ED's summary disposition evidence showed that at the time of the investigation on August 11, 2008, the TCEQ investigator found that Respondent had failed to ensure that each vapor balance system vent line at its facility was equipped with a pressure-vacuum relief valve set to open at a pressure of no more than eight ounces per square inch. Specifically, no pressure-vacuum relief valves were installed.[10] Respondent offered no summary disposition evidence to contest this charge, and Respondent stipulated to all violations at the hearing on the merits. Based on the undisputed evidence, the ED is entitled to summary disposition in its favor that Respondent violated 30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b).

F. Reasonableness of the penalty assessed.

TEXAS WATER CODE §7.053 requires the Commission to consider certain factors when calculating an administrative penalty. After considering those factors and using the Commission's Penalty Policy, the ED recommended a penalty of $31,475.00. Respondent stipulated to the proposed penalty at the hearing on the merits. Further, the ED's summary disposition evidence included a Penalty Calculation Worksheet, which established that the penalty was properly calculated for each violation.[11] Based on the ED's summary disposition evidence and Respondent's stipulation, the ED is entitled to summary disposition that the penalty amount of $31,475.00 is reasonable and justified.

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[10] ED Ex. 1, Investigation Report at 4.

[11] ED Ex. 11.

G. Necessity of Corrective Action

Texas Water Code § 7.073 authorizes the Commission to order a respondent who has violated any statute or rule to take appropriate corrective action. The ED's summary disposition evidence includes the corrective action recommended by the Commission's investigator,[12] and Respondent stipulated at the hearing on the merits that the ED's requested corrective action was appropriate. Based on the summary disposition evidence and Respondent's stipulation, the corrective action requested by the ED should be ordered as set forth in the proposed order accompanying this PFD.

VI. RECOMMENDATION

Based on the record and for the reasons stated above, the ALJ recommends that the Commission approve the summary disposition granted to the ED; find that Respondent violated the statutes and rules as alleged by the ED; and adopt the attached proposed order, which assesses an administrative penalty of $31,475.00 and requires Respondent to complete specified corrective actions necessary to bring its facility into compliance with state law.

ISSUED December 3, 2010.

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

[12] ED Ex. 1, Investigation Report at 3-5.

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 sought in the EDFAPRP 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

e. $2,679.00 30 TAC § 115.222(6) and TEX. HEALTH & SAFETY CODE § 382.085(b).

$31,475.00 Total

9. The Executive Director mailed a copy of the EDFAPRP to Respondent at 3910 E. Interstate 20 Service Road South, Willow Park, Texas, on the same date it was filed.

10. Respondent filed an answer to the EDFAPRP and requested a hearing.

11. On October 5, 2009, the TCEQ referred this matter to SOAH for a contested case hearing.

12. On October 6, 2009, the TCEQ Chief Clerk mailed to Respondent notice of the preliminary hearing scheduled for November 12, 2009.

13. 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 EDFAPRP 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 showed how the penalty was calculated for the alleged violations.

14. On November 12, 2009, the Executive Director and Respondent appeared at a preliminary hearing and requested additional time to work out a procedural schedule.

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 No. 2. 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

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Bryan W. Shaw, Chairman
For the Commission