

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 3, 2010

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

Re: SOAH Docket No. 582-10-0729; TCEQ Docket No. 2008-1748-PST-E
In Re: Executive Director of the Texas Commission on Environmental Quality,
Petitioner v. Jamal Alshaafi d/b/a Quick Stop, 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 **May 24, 2010**. Any replies to exceptions or briefs must be filed in the same manner no later than **June 3, 2010**.

This matter has been designated **TCEQ Docket No. 2008-1748-PST; SOAH Docket No. 582-10-0729**. 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, appearing to read "Steven D. Arnold".

Steven D. Arnold
Administrative Law Judge

SDA/sb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: JAMALAH ALSHAAFI dba QUIK STOP

SOAH DOCKET NUMBER: 582-10-0729

REFERRING AGENCY CASE: 2008-1748-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ STEVEN ARNOLD**

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JAMAL ALSHAAFI
JAMAL ALSHAAFI D/B/A QUIK STOP
1510 EAST AVENUE H
LONGVIEW, TX 75601

JAMAL ALSHAAFI D/B/A QUIK STOP

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-10-0729
TCEQ DOCKET NO. 2008-1748-PST-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
v.	§	OF
	§	
JAMAL ALSHAAFI D/B/A QUIK STOP,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

On May 8, 2009, the Executive Director (Executive Director) of the Texas Commission on Environmental Quality (Commission or TCEQ) filed a Preliminary Report and Petition, and on February 12, 2010, the Executive Director filed an Amended Preliminary Report and Petition (Amended EDPRP), in which the Executive Director alleges violations for failing to permanently remove from service an out-of-compliance underground storage tank (UST) system and for failing to provide an updated UST registration form to the TCEQ. The USTs are located at a former retail gasoline service station at 1510 East Avenue H, Temple, Bell County, Texas (Facility). In the Amended EDPRP, the Executive Director sought an order directing Jamal Alshaafi d/b/a Quik Stop (Respondent) to permanently remove the UST system from service, to submit an amended UST registration to the TCEQ, and to pay an administrative penalty. The matter was referred to the State Office of Administrative Hearings (SOAH) on October 6, 2009.

The Administrative Law Judge recommends that the Commission find that the violations occurred, assess a penalty of \$3,500 for them, and order the corrective actions recommended by the Executive Director.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law without further discussion here.

The hearing convened on March 2, 2010, before Administrative Law Judge Steven D. Arnold in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Attorney Kari L. Gilbreth represented the Executive Director. Respondent appeared *pro se*. The hearing concluded and the record closed that day.

III. DISCUSSION

A. Ownership of the USTs

The material facts in the case are not in dispute. Respondent does not dispute that he owns the property located at 1510 East Avenue H, Temple, Bell County, Texas, nor does he dispute that there are USTs located on that property. Respondent does, however, dispute that he owns the USTs, claiming that they were excluded from his purchase of the property when he bought it in 1997. Jason Neumann, investigator for the Commission, testified on behalf of the Commission. The ED offered ten exhibits, all of which were admitted into evidence (in addition to the four exhibits that were admitted into evidence for the limited purpose of notice and jurisdiction at the preliminary hearing).

Under Section 26.342(9) of the Texas Water Code, the fee simple owner of the surface estate is presumed to own USTs at that location unless the owner shows otherwise. Mr. Neumann testified that the USTs had been located on the Facility since before 1997, and that in 1997 Respondent acquired the Facility by Warranty Deed from Eli Weddington. The Warranty Deed pursuant to which Respondent acquired the Facility contained no reservations what would exclude the USTs from the conveyance. Respondent testified that when he acquired the Facility, the USTs were owned by the entity that was supplying gasoline to the Facility and that entity permitted him to continue using the USTs. Respondent presented no documentary evidence to support this contention.

B. Failure to Timely Remove USTs.

The Texas Water Code and TCEQ rules require that all existing UST systems that are not brought into timely compliance with the minimum upgrade requirements be permanently removed from service.¹

On October 9, 2008, a TCEQ Waco regional office investigator documented that Respondent's USTs were not in compliance with the upgrade requirements. Specifically, there was no evidence of corrosion or cathodic protection, which are required upgrades under 30 TEX. ADMIN. CODE §§ 334.47(a)(2) and 334.49. Respondent did not dispute that the USTs were in violation of these requirements.

Based on TCEQ's evidence and Respondent's failure to contest that evidence, there is no genuine issue of material fact regarding Respondent's UST system. Therefore, the Executive Director is entitled to judgment as a matter of law that Respondent 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, an existing UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

C. Failure to Amend UST Registration.

The Texas Water Code and TCEQ rules require that the owner of an UST system must notify the TCEQ of any change or additional information regarding the UST system within thirty days from the date of the occurrence of the change or admission or within thirty days from the date on which the owner or operator first became aware of the change or addition.²

The TCEQ investigator also documented that Respondent had not updated the UST registration to reflect the correct ownership information, as required by 30 TEX. ADMIN. CODE § 334.7(d)(3). As with the other alleged violation, Respondent did not dispute this violation.

¹ 30 TEX. ADMIN. CODE § 334.47(a)(2); *see* TEX. WATER CODE § 26.347.

² 30 TEX. ADMIN. CODE § 334.7(d)(3); *see* TEX. WATER CODE § 26.346.

Based on TCEQ's evidence and Respondent's failure to contest that evidence, there is no genuine issue of material fact regarding Respondent's UST registration. Therefore, the Executive Director is entitled to judgment that Respondent violated 30 TEX. ADMIN. CODE § 334.7(d)(3) by failing to provide an amended UST registration to the Commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition.

D. Reasonableness of the penalty assessed.

The Texas Water Code § 7.053 requires the TCEQ to consider certain factors when calculating an administrative penalty. In considering those factors and using an established Penalty Policy, the Executive Director recommended a penalty of \$3,500.00 for Respondent's violations.

Based on TCEQ's evidence and Respondent's failure to contest that evidence, there is no genuine issue of material fact regarding the calculation and assessment of the penalty. Therefore, the Executive Director is entitled to judgment that the penalty amount of \$3,500.00 is reasonable and justified.

E. Necessity of Corrective Action

The Texas Water Code and TCEQ rules require that all existing UST systems that are not brought into timely compliance with the minimum upgrading requirements be permanently removed from service and that the owner or operator of a UST system must notify the TCEQ of any change or additional information regarding the UST system within 30 days from the date of the occurrence of the change or admission or within 30 days from the date on which the owner or operator first became aware of the change or addition.³

Based on TCEQ's evidence and Respondent's failure to contest that evidence, there is no genuine issue of material fact regarding the corrective action ordering provisions. Therefore, the Executive Director is entitled to judgment that the corrective action as set forth in the Amended

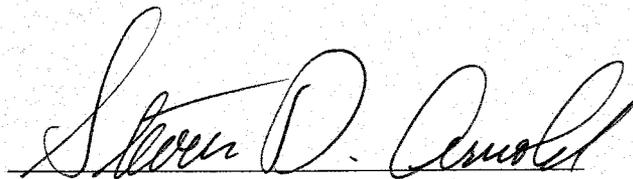
³ 30 TEX. ADMIN. CODE §§ 334.7(d)(3) and 334.47(a)(2); *see* TEX. WATER CODE § 26.351(b).

EDPRP is necessary and appropriate. That includes permanently removing from service all USTs for which any component is not in compliance with upgrade requirements in accordance with 30 TEX. ADMIN. CODE § 334.55 and submitting an amended registration to correctly reflect the operational status of all USTs and the correct current owner information in accordance with 30 TEX. ADMIN. CODE § 334.7(d)(3).

IV. RECOMMENDATION

Based on the record and for the reasons stated above, the ALJ recommends that the Commission find the Respondent has violated state laws and regulations as alleged by the Executive Director, and adopt the attached proposed Order, which assesses the Respondent \$3,500.00 in administrative penalties, and requires it to undertake specified actions necessary to bring its facility into compliance with state law.

ISSUED May 3, 2010.



STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against
and Ordering Corrective Action by Jamal
Alshaafi d/b/a Quik Stop; TCEQ Docket No.
2008-1748-PST-E; SOAH Docket No. 582-10-
0729

On _____, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Amended Preliminary Report and Petition (Amended EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Jamal Alshaafi d/b/a Quik Stop (Respondent). A Proposal for Decision (PFD) was presented by Steven D. Arnold, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's 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 at 1510 East Avenue H, Temple, Bell County, Texas (Facility).
2. Three inactive underground storage tanks (UST) that are not exempt or excluded from regulation exist beneath the Facility.

3. The USTs were located on the Facility at the time of Respondent's purchase of the Facility in 1997.
4. The deed pursuant to which Respondent purchased the Facility did not exclude the USTs from the conveyance of the Facility.
5. Section 26.342(9) of the Texas Water Code provides that "[i]f the actual ownership of an underground storage tank system or an aboveground storage tank is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the tank system is located is considered the owner of the system unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, or bill of sale, or by other legally acceptable means that the underground storage tank system or aboveground storage tank is owned by another person."
6. On October 9, 2008, a TCEQ Waco Regional Office investigator documented that Respondent had violated the following:
 - 30 TEX. ADMIN. CODE §334.7(d)(3) by failing to notify TCEQ of any change or additional information regarding the UST's within 30 days of the occurrence of the change or addition; specifically, the registration was not updated to reflect the correct ownership information and current operational status of the USTs at the Facility; and
 - 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.
7. On October 21, 2008, Respondent was served with a Notice of Violation letter.

8. On May 8, 2009, the Executive Director filed a Preliminary Report and Petition, and on February 12, 2010, the Executive Director filed an Amended Preliminary Report and Petition (Amended EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054. The Amended EDPRP alleged that:
 - (a) Respondent 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, a UST for which any applicable component of the system was not brought into timely compliance with the upgrade requirements; and
 - (b) Respondent violated 30 TEX. ADMIN. CODE § 334.7(d)(3) by failing to provide an amended UST registration to the Commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition.
9. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$3,500 against Respondent and that the Commission order Respondent to take certain corrective actions.
10. The \$3,500 administrative penalty sought in the Amended EDPRP is an accumulation of the different penalties assessed for each violation.
11. The Executive Director mailed a copy of the original EDPRP and the Amended EDPRP to Respondent at 1510 East Avenue H, Temple, Texas, on the same dates that they were filed.
12. Respondent filed an answer to the original EDPRP and requested a hearing.

13. On October 6, 2009, the TCEQ referred this matter to SOAH for a contested case hearing.
14. On October 29, 2009, the TCEQ Chief Clerk mailed notice to Respondent of the preliminary hearing scheduled for December 3, 2009.
15. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the Executive Director alleged Respondent violated.
 - Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
16. On December 3, 2009, the Executive Director and Respondent appeared at a preliminary hearing and agreed to a procedural schedule leading to an evidentiary hearing on March 2, 2010.
17. The hearing on the merits was held on March 2, 2010. All parties appeared and participated in the hearing. The record closed that same day

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 the USTs located on 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 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the Amended EDPRP 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 TEX. ADMIN. CODE § 155.27; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
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:
 - (a) Respondent violated 30 TAC § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST for which any applicable component of the

system is not brought into timely compliance with the upgrade requirements;
and

- (c) Respondent violated 30 TAC § 334.7(d)(3) by failing to provide an amended UST registration to the Commission for any change or additional information regarding USTs within 30 days from the date of the occurrence of the change or addition.

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 \$3,500 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 that the Executive Director recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Jamal Alshaafi d/b/a Quik Stop is assessed an administrative penalty in the amount of \$3,500 for violations of 30 TAC §§334.7(d)(3) and 334.47(a)(2). The payment of this administrative penalty and Jamal Alshaafi d/b/a Quik Stop's compliance 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: Jamal Alshaafi d/b/a Quik Stop; Docket No. 2008-11748-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, Jamal Alshaafi d/b/a Quik Stop shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 30 days after the effective date of this Order, Jamal Alshaafi d/b/a Quik Stop 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 45 days after the effective date of this Order, Jamal Alshaafi d/b/a Quik Stop 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:

Frank Burleson, Waste Section Manager
Waco Regional Office
Texas Commission on Environmental Quality
6801 Sanger Avenue, Suite 2500
Waco, TX 76710-7826

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**