

SOAH DOCKET NO. 582-10-0209  
TCEQ DOCKET NO. 2008-1814-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY,  
Petitioner

V.

IRA BETTS,  
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO IRA BETTS' EXCEPTIONS, BRIEFS, AND/OR  
REPLIES RESPONDING TO THE PROPOSAL FOR DECISION AND ORDER**

TO THE HONORABLE JUDGE WILFONG:

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, and files this "Executive Director's Reply to Ira Betts' Exceptions, Briefs, and/or Replies Responding to the Proposal for Decision and Order" ("ED's Reply").

The Executive Director ("ED") respectfully disagrees with Ira Betts' ("Respondent's") Exceptions, Briefs, and/or Replies Responding to the Proposal for Decision and Order ("Respondent's Exceptions") as outlined below.

**I. UNTIMELY FILING OF RESPONDENT'S EXCEPTIONS**

On October 27, 2010, Respondent filed a Motion for Extension requesting that the November 1, 2010 exception deadline be extended until November 8, 2010 and the November 11, 2010 reply deadline be extended through November 18, 2010. Respondent's Motion for Extension was granted by the TCEQ's Office of the General Counsel ("OGC") on October 29, 2010. In a letter dated November 5, 2010, OGC established a deadline of 5:00 p.m., Monday, November 8, 2010 for filing of all exceptions to the ALJ's Proposal for Decision in this matter and a deadline of 5:00 p.m. Thursday, November 18, 2010 for receipt of any responses.

Respondent's Exceptions were untimely filed with the TCEQ's Office of the Chief Clerk. According to Texas Commission on Environmental Quality rule 30 TEX. ADMIN. CODE § 1.10(e), "The time of filing is upon receipt by the chief clerk as evidenced by the date stamp affixed to the document by the chief clerk...." According to the Office of the Chief Clerk ("Chief Clerk"), the time of the e-filing of the Respondent's Exceptions with the Chief Clerk was at 5:10 p.m. on November 8, 2010. Since the e-filing was received after business hours, the Chief Clerk time stamped the e-filing as having been received on November 9, 2010. Rule 30 TEX. ADMIN. CODE § 1.10(g), says, "If the requirements of this section are not followed, the commission, or a judge in a State Office of Administrative Hearings (SOAH) proceeding, may choose not to consider the documents." For this reason, the Executive Director objects to the filing of Respondent's Exceptions as untimely and, respectfully, recommends that the document not be considered by either the Commission or the Administrative Law Judge.

## **II. REPLY TO RESPONDENT'S "RELEVANT FACTS"**

In his Relevant Facts section on page 3, the Respondent states, in his second sentence, "While Holiday [sic, prior owner was Bobby L. Holliday] owned the property he operated a retail gas station, and to facilitate the gas station's operation Holiday installed an underground storage tank at least 7 feet from his property's boundary line and on property (a right of way) owned by the Grimes County or the State of Texas Highway Department." While the ED appreciates the Respondent's admission, potentially against his interest, that the Facility property had been used for a retail gas station, there was no testimony during the August 31, 2010 evidentiary hearing about Mr. Holliday having owned a retail gas station nor was there testimony to the effect that he had a UST installed seven (7) feet outside his property line. Thus, Respondent's statements are not supported by the evidence in the record and cannot be considered.

It is also wholly inappropriate for the Respondent to attempt to introduce discussion of Exhibit K in his "Relevant Facts". Exhibit K was not even created until November 8, 2010, the date that Respondents Exceptions were due to be submitted to the Chief Clerk. As a result, Exhibit K is outside of the August 31, 2010 hearing record and cannot be considered. Further, the ED disagrees with Respondent's assertion that Mr. Riley, the Respondent's

surveyor, has (very recently) "determined that the Neches street right of way is 50 feet, and therefore the UST in question is *not* on Betts' property." Mr. Riley's statement at the bottom of Exhibit K is quite similar to the statement he made at the bottom of the Exhibit B plat. It reads, "This plat and the staking of the IRA BETTS 0.16 ACRE TRACT (50' x 140') and being part of the Iola Townsite, Joseph Baird Survey, A-116, Grimes County, Texas, was prepared under the *hypothesis* that the right-of-way of Neches Street is 50-feet (*There seems to be an argument as to the width of the right-of-way*" (emphasis added). This misstatement of Mr. Riley's conclusions, along with the Exhibit K plat, should not be considered.

### **III. EXECUTIVE DIRECTOR'S REPLY TO RESPONDENT'S EXCEPTIONS**

#### **A. Reply to Respondent's Exception Entitled "The TCEQ has not established jurisdiction nor is it not authorized to assess a penalty against Respondent because it has not established Respondent has violated a provision of the Texas Water Code or Texas Administrative Code within the TCEQ's jurisdiction."**

In his first Exception, Respondent argues that the TCEQ "has not established jurisdiction nor is it not [sic] authorized to assess a penalty against Respondent because it has not established Respondent has violated a provision of the Texas Water Code or Texas Administrative Code with the TCEQ's jurisdiction."

Jurisdiction was established by the ED through submission of a set of "jurisdictional documents" Exhibits ED-A through ED-D presented to the ALJ at a preliminary hearing held in Austin, Texas at SOAH on November 5, 2009. Those same exhibits were also introduced at the August 31, 2010 hearing on the merits. Exhibit ED-A, is the Executive Director's Preliminary Report and Petition ("EDPRP"), which is the statement of TCEQ's cause of action against the Respondent. The EDPRP included specific citations to the rules that were alleged to have been violated and it included: a citation to the authority in TEX. WATER CODE § 7.051 to assess administrative penalties, the penalty amount of \$6,300, and a citation to TEX. WATER CODE § 7.052 as the authority to assess a penalty up to a maximum of \$10,000 per day. Thus, Respondent was given fair notice of TCEQ's claims and of the penalties that would be assessed. Further, as regards jurisdiction, the Supreme Court of Texas in *Peek v.*

*Equipment Service Co. of San Antonio* stated, "In the absence of special exceptions or other motion, defendant waives the right to complain of such a defect if plaintiff establishes the trial court's jurisdiction before resting its case."<sup>1</sup> There were no such objections or motions made by Respondent's counsel at the preliminary hearing and the SOAH ALJ confirmed jurisdiction over the matter in Order No. 1 issued November 18, 2009. The opportunity for Respondent to raise jurisdictional arguments has long since passed and the Respondent did not avail himself of that opportunity at the time, although Respondent was represented by counsel at the time of the preliminary hearing (ref. Order No. 1).

Respondent reminds the ED that the burden of proof is on the plaintiff and, further, reminds the ED that the standard in a civil case is that the proof must be by a preponderance of the evidence. The Respondent, then, asserts that the Executive Director has not met the standard of proof in regard to the issue of ownership. The Executive Director firmly rebuts this assertion and points to evidence in the August 31, 2010 hearing record. The record establishes that the Respondent was deeded the property at issue on December 2, 1983 by means of a Warranty Deed filed in Grimes County. The Grimes County Appraisal District contains a record of the Respondent's Facility at the intersection of FM 39 and FM 244, Iola, Grimes County, Texas and the Appraisal District identifies the Facility as a gas station. The Facility, at the time of the first TCEQ investigation, in August 2007, had a canopy that extended from the building out to a point parallel with the location of the buried UST and the Facility had a dispenser island. Both the dispenser island and the canopy were removed by the Respondent some time after the first investigation. The Respondent also filled the UST with concrete after, apparently, misunderstanding information provided by the TCEQ investigator regarding the options for permanently removing a UST from service per the requirements of 30 TEX. ADMIN. CODE § 334.55. These actions taken by the Respondent are actions typical of an owner and, cumulatively, taken together with the deed showing fee simple ownership of the property and the Grimes County Appraisal District record, do prove by a preponderance of the evidence that the Respondent is the owner, as defined in TEX. ADMIN. CODE § 334.2(73).

Respondent goes on to state, "there is more appropriate documentation conclusively proving that the underground storage tank is ***not on Respondent's property. Id. cf. Exhibits A-K***" (emphasis in original). However, most of the exhibits attached to

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<sup>1</sup> Peek v. Equipment Service Co. of San Antonio, 779 S.W. 2d 802, 805 (Tex. 1989).

Respondent's Exceptions, with some noteworthy exceptions, were introduced by the ED during the August 31, 2010 hearing (e.g., Respondent's Exhibits A, C, F, H, I and J were introduced by the ED). As detailed in Sections III. B and C below, there is nothing in these exhibits that "conclusively" proves the UST is not on the Respondent's property.

Further, Respondent's Exhibit B, a plat, which was entered into evidence by the Respondent at the evidentiary hearing is not probative. A plat is not a survey because a plat lacks the specific measurements of a survey. There is no survey available of the Respondent's property nor is there a survey of Neches Road, the road behind the Respondent's property. Without the specific measurements a survey would provide, it is impossible to determine where the metes and bounds of Respondent's property start and end. This is borne out by the paragraph long set of qualifications the Respondent's surveyor, Mr. Riley, wrote at the bottom of Exhibit B in explanation of his plat, wherein he stated, in part, "If the right-of-way of Neches Street is 60-feet as indicated on the record plat of the Iola Townsite, the underground tank is on Mr. Betts Tract. I have studied the situation to a large degree and I am unable to make a call in either direction. It is open to interpretation." Exhibit B, instead of providing probative evidence in support of Respondent's position, distills the essence of the controversy without resolving it.

Finally, Respondent's Exceptions Exhibits D, E, and K have never been seen by counsel for the ED so to attempt to insert them into the record via the mechanism of the Respondent's brief is a serious breach of the rules and protocols for introduction of evidence. Exhibits D, E, and K are not a part of this hearing record so should not be considered. Similarly, although counsel for the ED have seen Exhibit G, it was not entered into evidence by the ED nor by the Respondent so it is outside the record and cannot be considered. Even if Exhibit G could be considered, it merely indicates Respondent's property is Tract No. 47 and is irrelevant to the ownership issue.

**B. Reply to Exception Entitled "Substantial evidence offered by both ED and Respondent in this case clearly establishes that Respondent does not hold legal possession or an ownership interest in the underground storage tank ("UST) that is the subject of this action."**

Respondent states in this Exception, "ED's own evidence conclusively shows that Respondent is not the owner of the tract where the subject UST is located." The ED disagrees with this statement, particularly since the evidence and testimony presented at the evidentiary hearing was persuasive on the issue of ownership. Therefore, the ED supports the ALJ's Finding of Fact No. 8, which states that Respondent is the owner of the property.

Respondent further states, "the attached exhibits all demonstrate that Respondent is not an "owner" within 30 TEX. ADMIN. CODE § 334.2(73)." But, as was stated above, in Section III. A., most of the exhibits attached to the Respondent's Exceptions are exhibits introduced at hearing by the ED, Exhibit B is not probative evidence, and Exhibits D and E should not be considered because they are outside of the record. Moreover, it is unclear why Respondent has even attempted to introduce Exhibits D and E at this late date since no explanation has been provided as to their import or relevance to consideration of this matter.

Finally, Respondent raises, again, the recently created Exhibit K. The ED has already established that Exhibit K also should not be considered because it was not drafted until November 8, 2010, well after the August 31, 2010 evidentiary hearing. Even if Exhibit K could be considered, Respondent mischaracterizes the content of Exhibit K in an effort to increase the weight of the evidence. The Respondent represents that Exhibit K contains the conclusions of a registered professional engineer and surveyor, "that based on the tax records, deed records, interviews with County officials and through his own investigation that the subject UST is not on Respondent's property, but on property belonging to the State of Texas Highway Department." Exhibit K, a plat, does not contain these assertions attributed to the surveyor, Mr. Riley.

**C. Reply to Exception Entitled "The Proposal for Decision's assertion that Respondent owns the UST through adverse possession is a major error in law and fact."**

While the ED is aware of court decisions relating to the impossibility of adversely possessing state property, the ED disagrees with Respondent's conclusion that no argument for adverse possession can be made. The UST is not located within the FM 39 right of way. The ED offered testimony during the August 31, 2010 hearing regarding the TxDOT 1940

Right of Way Map and several notations on that map show that the width of the right of way is 50 feet on each side of the center line of FM 39. Further, TCEQ Investigator, Jason Neumann, made a measurement from the shoulder of FM 39 to the east side of the UST on the Respondent's Facility and the distance was 47 feet, as seen on Bates page 00003 of Exhibit ED-5. When the distance from the shoulder to the center line of FM 39 (approximately 6 to 8 ft.), is added to the 47 feet, it is clear the UST is not in the County's (now City of Iola) 50 feet of right of way. Thus, the UST is located on property either owned by the Respondent or owned by an unknown person, which is subject to adverse possession, as defined in TEX. CIV. PRAC. & REM. CODE ANN. § 16.021. Ample testimony is in the hearing record of the Respondent's continuous use, since 1983, of the area between FM 39 and the location of the UST, a period of use of approximately 27 years that would enable adverse possession for the statutory 25-year period, as defined by TEX. CIV. PRAC. & REM. CODE ANN. § 16.027. Respondent either owns the property at issue or has occupied the property of another peaceably, under a claim of right, in hostility to or adversely to the claim of the owner, and has notoriously and continuously occupied the property for over 25 years.

**D. Reply to the Exception Entitled "Imposition of penalties upon Respondent by the TCEQ without the required proof of ownership as required by the Texas Administrative Code violates Respondent's due process rights under both the State and Federal Constitution."**

The ED cannot agree that there has been a violation of the Respondent's rights to due process. The ED filed his EDPRP containing a plain and concise statement of the cause of action against the Respondent on July 17, 2009, the Respondent's counsel answered the EDPRP on August 7, 2009, a SOAH hearing was requested on September 8, 2009, and a hearing notice was sent to the Respondent on October 6, 2009. The ED sent a set of Discovery Requests to the Respondent on December 11, 2009 and the Respondent chose not to respond. The ED sent a Motion to Compel to the Respondent on January 22, 2010 in order to obtain answers to the Discovery Requests sent in December 2009 and the Respondent chose not to respond. But the Respondent did appear at the preliminary hearing and did appear at the August 31, 2010 hearing on the merits. Thus, the record shows that Respondent was put on notice of the claims against him, but chose to participate only when interested. The Respondent ignored opportunities provided to him and when he

did participate was not persuasive regarding the critical issue of property ownership. This record in no way reflects a violation of due process rights and it is rhetorical excess to claim otherwise.

**E. Reply to the Exception Entitled, "Full consideration of the factors enumerated under Section 7.053 of the Texas Water Code warrants a decision imposing *no monetary fine or other sanctions.*"**

The ED disagrees with the contention that a consideration of the factors in TEX. WATER CODE § 7.053 would, in any way, lead one to the conclusion that an administrative penalty and/or the recommended corrective actions recommended in the EDPRP are unwarranted. The Respondent has not registered his UST nor has he completed the soil sampling required by 30 TEX. ADMIN. CODE § 334.55 in order to permanently remove the UST from service. There is, in fact, a continuing concern that there are potential environmental impacts to the public's health and safety, natural resources, or on other persons from this Facility. Therefore, the ED supports the ALJ's Conclusion of Law Nos. 10 and 11, which impose an administrative penalty against and require corrective actions of the Respondent.

**IV. PRAYER**

For the reasons set forth above, the ED respectfully requests that the ALJ deny the Respondent's Exceptions to the PFD and Proposed Order to take into consideration the arguments presented herein and adopt the ALJ's order, incorporating the ED's Exceptions filed on October 25, 2010.

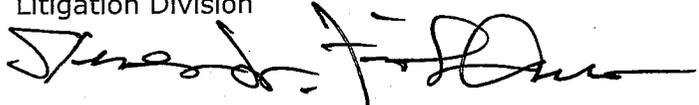
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
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**CERTIFICATE OF SERVICE**  
**Ira Betts**  
**SOAH Docket No. 582-10-0209**  
**TCEQ Docket No. 2008-1814-PST-E**

I hereby certify that on this 18<sup>th</sup> day of November, 2010, the original and 7 copies of the foregoing "Executive Director's Reply to Ira Betts' Exceptions, Briefs, and/or Replies Responding to the Proposal for Decision and Order ("ED's Reply") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing ED's Reply was sent to the following:

**Via Inter-Agency Mail and Via Facsimile to (512) 322-2061**

The Honorable Richard R. Wilfong  
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