

**SOAH DOCKET NO. 582-09-5318
TCEQ DOCKET NO. 2009-0156-PST-E**

**IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST
J. D. MARTIN, III,
RESPONDENT**

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§
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§
§

**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

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

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by Sharesa Y. Alexander, attorney in the Litigation Division, after having reviewed the Administrative Law Judge's Proposal for Decision, and files the following exceptions before the State Office of Administrative Hearings ("SOAH"):

While the Executive Director agrees with the substance of the Proposed Order, these suggested exceptions are intended to clarify the provisions of the Order and correct typographical errors. These suggested exceptions are proposed pursuant to 30 TEX. ADMIN. CODE § 80.257.

Findings of Fact No. 2

The Executive Director respectfully recommends that in Findings of Fact No. 2, an "s" is added to the "UST" acronym.

Findings of Fact No. 5

The Executive Director recommends that in Findings of Fact No. 5, the acronym "(M C M)" be added after "Martin-Mathews Oil Co." to reflect the full name of the company. Additionally, there is a letter "T" after the second sentence that should be removed.

Findings of Fact No. 22

The Executive Director recommends that in Findings of Fact No. 22 that the initial "Y." is added to "Sharesa Alexander".

Executive Director's Exceptions to the Administrative Law Judge's Proposal For Decision
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Ordering Provision No. 1

The Executive Director recommends that the first sentence of Ordering Provision No. 1 be changed as follows: "Within 30 days after the effective date of the Commission Order, Respondent shall pay an administrative penalty in the amount of \$15,600 for violations of 30 TAC §§ 334.7(a)(2) and 334.47(d)(3)."

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended exceptions, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended exceptions 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, Division Director
Litigation Division

by 

Sharesa Y. Alexander
State Bar of Texas No. 24064197
Litigation Division, MC 175
P.O. Box 13087
Austin, TX 78711-3087
(512) 239-3503
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2010, the original and 7 copies of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposal For Decision" ("Exceptions") were 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 Exceptions was mailed via Certified Mail, Return Receipt Requested and Via Facsimile to:

J. D. Martin III, Owner
3108 Broadmoor
Bryan, Texas 77802

Via Certified Mail
70091680000223233831

J. D. Martin III, Owner
P.O. Box 4124
Bryan, TX 77805-4124

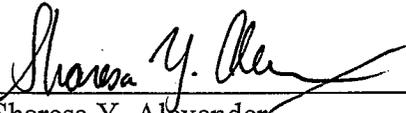
Via Certified Mail
70091680000223233848

I further certify that on this day a true and correct copy of the foregoing Modifications was mailed via Inter-Agency Mail and Via Facsimile to:

The Honorable Roy G. Scudday
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Facsimile No. (512) 475-4994

I further certify that on this day a true and correct copy of the foregoing Exceptions was delivered via electronic mail to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Sheresa Y. Alexander
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Requiring Corrective Action by
J. D. Martin, III
TCEQ DOCKET NO. 2009-0156-PST-E
SOAH DOCKET NO. 582-09-5318**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and seeking corrective action from J. D. Martin, III (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on May 6, 2010, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. South East Texas Mini Markets, Inc. (SETMM) owned three convenience store and gasoline stations located at 3410 Highland Ave., Beaumont, Jefferson County, Texas (Facility 1);

5125 Gulfway Dr., Port Arthur, Jefferson County, Texas (Facility 2); and 2409 Magnolia St., Beaumont, Jefferson County, Texas (Facility 3).

2. On December 3, 2008, TCEQ Investigator Charmaine Costner, following up on a Notice of Violation issued for Facility 1 on January 17, 2007, for failing to permanently remove a UST from service, conducted a Petroleum Storage Tank (PST) Record Review of Facility 1 followed by an inspection of Facility 1 on March 27, 2009. As a result of her inspection, Investigator Costner determined that SETMM had committed two violations of the TCEQ rules regarding underground storage tanks (USTs).
3. On June 12, 2009, Investigator Costner, following up on a Notice of Violation issued for Facility 2 on June 17, 2008, for failing to permanently remove a UST from service, conducted a PST Record Review of Facility 2. As a result of her review, Investigator Costner determined that SETMM had committed one violation of the TCEQ rules regarding USTs.
4. On March 12, 2010, Investigator Costner, following a request by Respondent to combine the investigation of Facility 3 with the other two Facility actions, conducted a PST Out of Service Investigation of Facility 3. As a result of her investigation, Investigator Costner determined that SETMM had committed two violations of the TCEQ rules regarding USTs.
5. The UST Registrations for Facilities 1 and 2 dated May 5, 1986, were signed by J. D. Martin III, Chairman of the Board of Martin-Mathews Oil Co. (M C M). The UST Registration for Facility 3 was in the name of SETMM.
6. In a General Warranty Deed dated July 25, 1987, M C M Oil Company conveyed five tracts, including the three Facilities, to SETMM.

7. The Articles of Incorporation for SETMM filed with the Secretary of State of Texas on February 21, 1985, name Respondent as its registered agent and sole director. Articles of Dissolution of SETMM, purportedly signed by Respondent and filed with the Secretary of State of Texas on November 2, 1993, state that Respondent was president, sole director, and 100% shareholder of the corporation, and provide that all properties and assets of the corporation had been distributed to its sole shareholder.
8. Respondent is an owner of the three Facilities and responsible for their compliance with the rules of TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) §§ 334.1(b)(3) and 334.2(73).
9. On January 9, 2009, the ED issued a Notice of Enforcement for Facility 1 to Respondent. On June 29, 2009, the ED issued a Notice of Enforcement for Facility 2 to Respondent. On March 12, 2010, the ED issued a Notice of Enforcement for Facility 3 to Respondent.
10. On May 14, 2009, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated 30 TAC §§ 334.7(d)(3), 334.47(a)(2), and 334.22(a), specifically for failing to notify TCEQ of any changes in the UST systems, failing to permanently remove UST systems from service, and failing to timely pay annual fees.
11. The ED recommended the imposition of an administrative penalty in the total amount of \$15,600, and corrective action to bring the sites into compliance.
12. The penalty amount for Facility 1 for the first violation, failing to permanently remove UST systems from service, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. The penalty amount for the second violation, failing to notify TCEQ of any changes in the UST systems, comprises a penalty of \$1,000. Because Respondent had two previous Notices of Violation

for the same or similar violations, the penalty was enhanced by 10% or \$600, for a total of \$6,600.

13. The penalty amount for Facility 2 for the one violation failing to permanently remove UST systems from service, comprises a penalty of \$2,500 for each violation event, one for each of two monthly periods that Respondent was in violation, for a total of \$5,000. Because Respondent had two previous Notices of Violation for the same or similar violations, the penalty was enhanced by 10% or \$500, for a total of \$5,500.
14. The penalty amount for Facility 3 for the first violation, failing to notify TCEQ of any changes in the UST systems, comprises a penalty of \$1,000. The penalty amount for the second violation, failing to permanently remove UST systems from service, comprises a penalty of \$2,500, for a total of \$3,500.
15. Respondent did not provide sufficient records for a determination to be made as to whether Respondent is able to pay the proposed administrative penalty, outstanding fees, and cost of removal of the USTs.
16. An administrative penalty of \$15,600 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
17. On June 1, 2009, Respondent requested a contested case hearing on the allegations in the EDPRP.
18. On July 6, 2009, the case was referred to SOAH for a hearing.
19. On August 6, 2009, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority

under which the hearing was being held, and the violations asserted.

20. At the preliminary hearing that was held on November 12, 2009, the ED established jurisdiction to proceed.
21. The hearing on the merits was conducted on May 6, 2010, in Austin, Texas, by ALJ Roy G. Scudday.
22. Respondent represented himself at the hearing, appearing by telephone. The ED was represented by Sharesa Y. Alexander and Jennifer Cook, attorneys in TCEQ's Litigation Division.

II. CONCLUSIONS OF LAW

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002. Additionally, the Commission may order the violator to take corrective action, pursuant to Code § 7.073.
4. As required by Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, or the penalties and the corrective actions proposed therein.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 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.
6. 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.
7. Based on the above Findings of Fact Respondent violated 30 TAC §§ 334.47(a)(2) and 334.7(d)(3).
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
 - The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the

penalties for the alleged violations and a total administrative penalty of \$15,600 is justified and should be assessed against Respondent.

11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures 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. Within 30 days after the effective date of the Commission Order, Respondent shall pay an administrative penalty in the amount of \$15,600 for violations of 30 TAC §§ 334.7(a)(2) and 334.47(d)(3). The payment of this administrative penalty and J. D. Martin, III's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. 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: J. D. Martin, III; Docket No. 2009-0156-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 from the effective date of the Commission Order, Respondent shall:
 - a. Permanently remove the UST systems located at Facility 1, Facility 2, and Facility 3 from service, in accordance with 30 TAC § 334.55; and

- b. Submit payment for all outstanding fees, including any associated interest and penalties with the notation, "J. D. Martin, III, TCEQ Financial Administration Account No. 0003683U 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

3. Within 45 days after the effective date of the Commission Order, Respondent shall submit a completed registration to indicate the current operational status and the current ownership information of the UST systems for Facility 1, Facility 2, and Facility 3, in accordance with 30 TAC § 334.7 to:

Registration and Reporting Section
Permitting & Registration Support Division, MC 138
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

4. Within 60 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 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 fine and imprisonment for knowing violations."

The certification shall be submitted to:

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

with a copy to:

Mr. Derek Eades, Waste Section, Manager
Beaumont Regional Office
Texas Commission on Environmental Quality
3870 Eastex Freeway
Beaumont, Texas 78711-1892

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the 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 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by Code. § 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, PhD, Chairman
For the Commission**