

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 2, 2010

The Honorable Cassandra Church
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

Re: Executive Director's Exceptions to the Administrative Law Judge's Proposed Order;
TCEQ Docket No. 2009-0959-PST-E; SOAH Docket No. 582-10-1882

Dear Judge Church:

Enclosed is a true and correct copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Goodwin".

Phillip M. Goodwin, P.G.
Attorney
Litigation Division

Enclosure

cc: Ameer Ali Jasani, P.O. Box 877, Newton, Texas 75966
Blas Coy, Public Interest Counsel, TCEQ

**SOAH DOCKET NO. 582-10-1882
TCEQ DOCKET NO. 2009-0959-PST-E**

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

VS.

**AMEER ALI JASANI,
RESPONDENT**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Executive Director" or "ED") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

Ameer Ali Jasani ("Respondent") owns property that formerly contained four inactive underground storage tanks ("USTs") located at 539 North Pine Street, Woodville, Tyler County, Texas. At the time of the record review performed on April 3, 2009, the inactive USTs were not properly registered and were required to be permanently removed from service. Respondent subsequently removed the USTs from the ground, but did not "permanently remove the USTs from service" as that term is used in 30 Tex. Admin. Code § 334.55. Accordingly, the Executive Director is seeking administrative penalties and certain corrective actions.

II. Exceptions

The Executive Director agrees with and supports the adoption of all of the Administrative Law Judge's proposed Order, with suggested Modifications to the proposed Order as outlined below.

1. The Executive Director recommends that Finding of Fact No. 1 be modified from "Respondent owns and operates a convenience store located at..." to "Respondent owns property that formerly contained four inactive underground storage tanks located at..."
2. The Executive Director recommends that Finding of Fact No. 5 be modified from "Between 2003 and April 2003, the ED pursued enforcement action..." to "Between 2003 and April 2009, the ED pursued enforcement action..."
3. The Executive Director recommends that Finding of Fact No. 6 be modified as follows:
 - a. Modify first sentence from "On April 3, 2009, a TCEQ investigator reviewing Respondent's records..." to "On April 3, 2009, a TCEQ investigator reviewed Respondent's records."
 - b. Remove 3rd bulleted paragraph, noting violation of 30 TEX. ADMIN. CODE § 334.72, in its entirety, as the Executive Director stated during the evidentiary hearing that this violation is

no longer being pursued as part of this case and introduced into evidence a modified Penalty Calculation Worksheet (Exhibit ED-6) without this violation as the final penalty calculation for this case.

- c. Remove 4th bulleted paragraph, noting violation of 30 TEX. ADMIN. CODE § 334.77, in its entirety, as the Executive Director stated during the evidentiary hearing that this violation is no longer being pursued as part of this case and introduced into evidence a modified Penalty Calculation Worksheet (Exhibit ED-6) without this violation as the final penalty calculation for this case.
 - d. Modify 5th bulleted paragraph from "30 TEX. ADMIN. CODE § 334.815(a) and (b)" to "30 TEX. ADMIN. CODE § 37.815(a) and (b)" and change "correcting action" to "corrective action".
4. The Executive Director recommends that Finding of Fact No. 8 be modified to change one of the two references of "334.47(a)(2)" to "334.7(d)(3)".
 5. The Executive Director recommends that Findings of Fact Nos. 10 and 11 be modified to change the penalty amount sought to the amount included in the modified Penalty Calculation Worksheet introduced into evidence at the hearing as Exhibit ED-6 (\$20,230.00).
 6. The Executive Director recommends that Finding of Fact No. 25 be modified from "Respondent's removal on March 26, 2010 of the four USTs at the Facility complied with applicable Commission statutes and rules regarding the removal of USTs from service" to "Respondent's removal on March 26, 2010, of the four USTs at the Facility and subsequent removal of the associated piping and dispensers did not comply with applicable Commission statutes and rules regarding the removal of USTs from service."
 7. The Executive Director recommends modifying references from "TEX. WATER CODE ANN." to "TEX. WATER CODE" and "TEX. GOV'T CODE ANN." to "TEX. GOV'T CODE" in Conclusions of Law Nos. 1, 2, 3, 5, 7, and 8, and Ordering Provision No. 6.
 8. The Executive Director recommends that Conclusion of Law No. 6 be modified to change one of the two references of "334.47(a)(2)" to "334.7(d)(3)" and to remove reference to violations of 30 TEX. ADMIN. CODE §§ 334.72 and 334.77, as these violations were not pursued by the Executive Director at the evidentiary hearing.
 9. The Executive Director recommends that Conclusions of Law Nos. 8 and 9 be modified to reflect the penalty amount sought by the Executive Director as summarized in Exhibit ED-6 (\$20,230.00).
 10. The Executive Director recommends that Conclusion of Law No. 10 be modified to insert the word "penalty".
 11. The Executive Director recommends that Conclusion of Law No. 11 be modified to reflect compliance with the technical requirement sought in the Amended EDPRP for the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2), specifically to read: "Based on the Findings of Fact above, Respondent should be required to take the corrective action that the ED recommends in regard to permanently removing the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55."

12. The Executive Director recommends that Ordering Provision No. 1 be modified to reflect timeframe in which the penalty amount is due to be paid, specifically to change the first sentence from "Respondent is assessed an administrative penalty in the amount of..." to "Within 30 days after the effective date of this Commission Order, Respondent shall pay an administrative penalty in the amount of..." The Executive Director also recommends that Ordering Provision No. 1 be modified to change the penalty amount sought by the Executive Director as provided for in Exhibit ED-6 (\$20,230.00), to change one of the two references of "334.47(a)(2)" to "334.7(d)(3)", and to remove reference to violations of 30 TEX. ADMIN. CODE §§ 334.72 and 334.77, as these violations were not pursued by the Executive Director at the evidentiary hearing.

13. The Executive Director recommends that Ordering Provision No. 2 be modified to read as follows: "Within 30 days after the effective date of this Order, Respondent shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55." The Executive Director interprets this ordering provision and the language of 30 TEX. ADMIN. CODE § 334.55, specifically 30 TEX. ADMIN. CODE § 334.55(a)(6), to include more than merely removing underground storage tanks ("USTs") from the ground – the rule also requires a site assessment to determine if any release(s) occurred from the system and compliance with any required corrective action as a result of such release(s). Though the Respondent did submit some documentation in an attempt to resolve this violation, the documentation submitted was incomplete and no corrective action has been performed.

The Executive Director's Exceptions to the Administrative Law Judge's Proposed Order

Ameer Ali Jasani

SOAH Docket No. 582-10-1882

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WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is included as Attachment "A".

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  _____

Phillip M. Goodwin, P.G.
State Bar of Texas No. 24065309
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0675
(512) 239-3434 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2010, an original and seven (7) copies of the foregoing "Exceptions to Administrative 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 sent via electronic mail to Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.

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 sent Via Facsimile (409) 379-2022 to:

Ameer Ali Jasani
P.O. Box 877
Newton, Texas
75966

CM/RRR No. **7010 0290 0002 7775 5310**

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Interoffice Mail and sent via Facsimile (512) 475-4994 to:

The Honorable Cassandra Church
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701



Phillip M. Goodwin, P.G.
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT "A"

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against and Ordering Corrective Action by Ameer Ali Jasani; TCEQ Docket No. 2009-0959-PST-E; SOAH Docket No. 582-10-1882

On _____, 2010, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED's) First Amended Preliminary Report and Petition (Amended EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Ameer Ali Jasani (Respondent). A Proposal for Decision (PFD) was presented by Cassandra J. Church, 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 property that formerly contained four inactive underground storage tanks located ~~and operates a convenience store~~ at 539 North Pine Street, Woodville, in Tyler County, Texas (the Facility).
2. On April 3, 2009, four out-of-service underground storage tanks (USTs) that are not exempt or excluded from regulation existed beneath the Facility.
3. The USTs were located on the Facility at the time Respondent purchased the Facility on

September 1, 2007; Respondent acquired ownership of them at the time he purchased the Facility.

4. In January 2003, a TCEQ environmental investigator found a mixture of petroleum product and water in two of the four USTs, and found that none of the USTs were properly secured from tampering.
5. Between 2003 and April 2009~~3~~, the ED pursued enforcement action against several interim owners, none of whom took corrective action in regard to the USTs at the Facility.
6. On April 3, 2009, a TCEQ investigator ~~reviewing~~reviewed Respondent's records and documented that Respondent had violated the following Commission rules:
 - 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;
 - 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; and
 - ~~30 TEX. ADMIN. CODE §334.72 by failing to report a suspected release to the TCEQ;~~
 - ~~30 TEX. ADMIN. CODE §334.77 by failing to submit a report regarding initial abatement measures within 20 days after confirmation of a release of regulated substances, in regard to the release of regulated substances from USTs confirmed during a 2003 environmental investigation; and~~

- 30 TEX. ADMIN. CODE §~~37~~34.815(a) and (b) by failing to demonstrate acceptable financial assurance for taking ~~correcting~~ corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs.
7. On June 7, 2009, the ED sent Respondent a notice of violation in regard to the above-listed violations.
 8. On November 13, 2009, in accordance with TEX. WATER CODE ANN. § 7.054, the ED filed his Amended EDPRP, in which he alleged that Respondent violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2), ~~334.47(a)(2)~~334.7(d)(3), 344.72, 334.77, and 37.815(a) and (b), based on the records review conducted on April 3, 2009.
 9. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
 10. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of ~~\$23,130.00~~20,230.00 against Respondent, and that the Commission order Respondent to take certain corrective actions.
 11. The ~~\$23,130.00~~20,230.00 administrative penalty sought in the ~~Amended~~ modified ~~EDPRP~~ Penalty Calculation Worksheet is an accumulation of the penalties assessed for each violation, calculated in the manner provided by the Penalty Policy.
 12. On November 13, 2009, the ED mailed the Amended EDPRP to Respondent at P.O. Box 877 in Newton, Texas 75966.
 13. On November 22, 2009, Respondent filed an answer to the Amended EDPRP and requested a hearing.
 14. On December 28, 2009, the ED referred this matter to SOAH for a contested case hearing.

15. On January 4, 2010, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for January 28, 2010, to Respondent at P.O. Box 877, Newton, Texas 75966.
16. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and 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 attached Amended EDPRP, being deemed as true, and the relief sought in the notice possibly being granted by default.
17. On January 28, 2010, the ED and Respondent appeared at a preliminary hearing and the ALJ subsequently set a procedural schedule.
18. After two continuances, the hearing on the merits was held on June 24, 2010, in Austin, Texas. Both parties appeared and participated in the hearing.
19. Respondent did not dispute that any of violations alleged in the Amended EDPRP had occurred.
20. Respondent did not dispute that the proposed administrative penalty, as set forth in the modified Penalty Calculation Worksheet, as included in the Executive Director's Exhibit ED-6, ~~with the Amended EDPRP~~, was correctly calculated in accordance with the Penalty Policy.
21. Respondent asserted that he was unable to pay the proposed administrative penalty.
22. On January 1, 2010, Respondent submitted a sufficient UST Registration and Self-Certification Form documenting his ownership of the Facility, his acquisition—effective

January 15, 2010—of financial assurance for corrective action and liability, and the status of the USTs at the Facility.

23. The record was held open through August 13, 2010, to provide for the submission and review of Respondent's financial records and also submission of a UST closure report.
24. On March 26, 2010, Tyler Pump Services removed four USTs from the Facility.
25. Respondent's removal on March 26, 2010, of the four USTs at the Facility and subsequent removal of the associated piping and dispensers did not comply with applicable Commission statutes and rules regarding the removal of USTs from service.
26. Respondent did not investigate the release of petroleum substances from the USTs at the Facility, nor remediate for any release.
27. Respondent did not submit any financial records to the ED for evaluation of his ability to pay the proposed administrative penalty.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ~~ANN.~~ §§ 7.051 and 7.073, 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 who violates a Commission administrative rule, order, or permit, and also may order the violator to take corrective action.
2. 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.

3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to TEX. WATER CODE ~~ANN-~~§ 5.013.
4. Respondent timely requested a contested case hearing, pursuant to 30 TEX. ADMIN. CODE § 70.105.
5. Respondent received sufficient notice of the hearing on the alleged violations and the proposed penalties and corrective actions, pursuant to TEX. GOV'T CODE ~~ANN-~~ §§ 2001.051(1) and 2001.052; TEX. WATER CODE ~~ANN-~~ § 7.058; and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, 70.104, and 80.6(c).
6. Based on the Findings of Fact above, Respondent violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2), ~~334.47(a)(2)~~334.7(d)(3), ~~344.72, 334.77,~~ and 37.815(a) and (b), in regard to the operation of USTs.
7. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE ~~ANN-~~ § 7.053, 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.
8. Based on consideration of the Findings of Fact above, the elements set forth in TEX. WATER CODE ~~ANN-~~ §§ 7.052 and 7.053, and the Commission's Penalty Policy, the ED

correctly calculated the penalties for each of the alleged violations, resulting in a total administrative penalty of ~~\$23,100.00~~20,230.00.

9. The ED met his burden of proof to show an administrative penalty of ~~\$23,100.00~~20,230.00 is warranted for the violations found and should be assessed against Respondent.
10. Respondent failed to meet his burden of proof to establish his inability to pay the proposed administrative penalty, pursuant to 30 TEX. ADMIN. CODE 70.8.
11. Based on the Findings of Fact above, Respondent should be required to take the corrective action that the ED recommends in regard to ~~certification and documentation of compliance and to investigation and remediation of a release of regulated substances~~permanently removing the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.

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 this Commission Order, Respondent shall pay ~~Respondent is assessed an administrative penalty in the amount of \$23,130.00~~20,230.00 for violations of 30 TEX. ADMIN. CODE §§ 334.7(a)(2), ~~334.47(a)(2)~~334.7(d)(3), ~~344.72, 334.77,~~ and 37.815(a) and (b). The payment of this administrative penalty and Respondent'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: Ameer Ali Jasani;

Docket No. 2009-0959-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 45 days after the effective date of this Order, Respondent shall permanently remove the UST system from service, submit a report regarding the nature, cause, and estimated quantity of a release of regulated substances, in accordance with 30 TEX. ADMIN. CODE § 334.7755.
3. Within 45 days after the effective date of this Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision 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:

Derek Eades, Waste Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway
Beaumont, Texas 77703-1892

4. The ED 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 ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. 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, Ph. D., Chairman
For the Commission**