

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

April 6, 2011

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

Re: Executive Director's Exceptions and Suggested Modifications to the
Administrative Law Judge's Proposed Order;
TCEQ Docket No. 2009-1720-PST-E; SOAH Docket No. 582-10-5165

Dear Judge Seitzman:

Enclosed is a true and correct copy of the Executive Director's Exceptions and Suggested Modifications 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 cursive script that reads "Peipey Tang".

Peipey Tang
Attorney
Litigation Division

Enclosure

cc: Mr. Gary Lee Corpian and Ms. Marilu Lee Corpian, 70 Castle Drive, Abilene,
Texas 79602
Mr. Blas Coy, Public Interest Counsel, TCEQ (via electronic mail)

**SOAH DOCKET NO. 582-10-5165
TCEQ DOCKET NO. 2009-1720-PST-E**

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

VS.

**GARY LEE CORPIAN AND
MARILU LEE CORPIAN;
RESPONDENTS**

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**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

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

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

I. Introduction

Gary Lee Corpian and Marilu Lee Corpian (" Respondents") own three underground storage tanks ("USTs") and an out of service retail service station located at 1243 S. 1st St., Abilene, Taylor County, Texas (the "Facility"). On September 14, 2009, a TCEQ Abilene Regional investigator documented that Respondents 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 system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements. The Executive Director is seeking an administrative penalty of five thousand two hundred and fifty dollars (\$5,250.00) and corrective actions as outlined in the Executive Director's Preliminary Report and Petition ("EDPRP").

II. Exceptions

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJ") findings and conclusions. The ALJ concluded that the Executive Director established that Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2) and recommended the corrective actions outlined in the EDPRP. The Executive Director respectfully disagrees with the administrative penalty of one hundred five dollars (\$105.00) recommended by the ALJ.

Penalty Calculation: Minor Potential for Harm

The Executive Director respectfully disagrees with the ALJ's characterization of the violation as "minor potential for harm." Proposed Order, Findings of Fact No. 25. The violation for the failure to permanently remove a UST system from service is properly calculated in the Penalty Calculation Worksheet ("PCW") as a potential release with major harm under the Environmental, Property and Human Health matrix. See ED-A, EDPRP.

The ALJ states in his Proposal for Decision ("PFD") that "evidence in the record indicates the potential for harm is minimal at most" because the USTs were last used in 1996 and emptied and locked in 2001. PFD at 5. The ALJ refers to the minimal potential for a release of petroleum substance and concludes that "this is a minor source with a minor potential for harm." PFD at 6. The Executive Director agrees with the ALJ's assessment that this violation should be categorized as a potential release. The Penalty Policy of the Texas Commission on Environmental Quality ("Penalty Policy") categorizes two types of release: actual and potential. ED-11, Penalty Policy at 10. Because there is no evidence of an actual release, this violation is properly categorized as a potential release. The Penalty Policy further subcategorizes potential releases into three categories by degree of harm: major, moderate, and minor. ED-11 at 10.

Accordingly, the remoteness of the potential for a release cannot be considered under the Penalty Policy, only the degree of the harm of the release. The record clearly shows that petroleum substance is a pollutant that **would exceed** levels that are protective of human health or environmental receptors as a result of the release from the UST system. ED-11 at 11. TCEQ investigator, Patty Gough, testified that individuals could pour petroleum substance into USTs and create underground plumes because of the lack of corrosion protection in the UST system. Consequently, a potential release of petroleum substance from the UST system is correctly categorized as major harm.

Because the Penalty Policy does not categorize degrees of potential release based on the likelihood of an event actually occurring, the Executive Director respectfully disagrees with the ALJ's conclusion, which is based on this erroneous methodology. Any further categorization of potential release contradicts the Executive Director's established method of categorization of release pursuant to the Penalty Policy.

Penalty Calculation: Adjustments

The Executive Director also respectfully disagrees with the ALJ's adjustments to the penalty for culpability, economic benefit, good faith effort to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE § 7.052 and in the Penalty Policy. Proposed Order, Finding of Fact No. 27. The ALJ

recommends an administrative penalty of one hundred five dollars (\$105.00) but fails to elaborate on how he applied the adjustments from the Penalty Policy. Proposed Order, Findings of Fact Nos. 26 and 27. The Executive Director properly calculated the administrative penalty pursuant to the Penalty Policy and recommends an administrative penalty of five thousand two hundred fifty dollars (\$5,250.00). The Executive Director recommended administrative penalty of five thousand two hundred fifty dollars (\$5,250.00) takes into consideration all the adjustments available in the Penalty Policy. The Executive Director reviewed all the adjustments in the Penalty Policy and recommends one upward adjustment of 5% for compliance history. The Penalty Policy recommends an upward adjustment of 5% for a compliance history with one notice of violation ("NOV") with "same or similar violations as those in the current enforcement action." ED-11 at 16. Respondents' compliance history lists one NOV, dated January 27, 2009, with a citation to 30 TEX. ADMIN. CODE § 334.47(a)(2). ED-12, Compliance History.

Respondents failed to meet the Penalty Policy criteria for any downward adjustments. Pursuant to the Penalty Policy, culpability and economic benefit only enhance a penalty adjustment. ED-11 at 17 and 19. Consequently a downward adjustment for culpability and economic benefit is inappropriate. Respondents' compliance history is rated as average. ED-12. A downward adjustment for compliance history is appropriate for intended audits and disclosure of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; environmental management systems in place for one year or more; voluntary on-site compliance assessments conducted by the Executive Director under a special assistance program; participation in a voluntary pollution reduction program; and early compliance with, or offer of a product that meets future state of federal governmental environmental requirements. ED-11 at 17. Respondents fail to meet any of the downward adjustments for compliance history listed in the Penalty Policy. Thus, a downward adjustment for compliance history is also inappropriate. Further, Respondents failed to meet a downward adjustment for good faith effort to comply. This adjustment is applied when Respondents complete action to correct the violation before the issuance of the EDPRP or NOV. ED-11 at 18. Respondents fail to meet the criteria for good faith effort to comply because Respondents failed to correct the violation. Finally, the categorization of potential release and major harm in the PCW appropriately considers any adjustment for release potential and extent of possible harm.

Pursuant to the Penalty Policy, the Executive Director does not recommend a reduction in the penalty based on culpability, economic benefit, good faith efforts to comply, or compliance history because Respondents failed to meet the criteria for these downward adjustments. Respondents also failed to assert a claim for financial inability to pay during the hearing. Pursuant to 30 TEX. ADMIN. CODE § 70.8, Respondents possess the burden of proof for a financial inability to pay claim and waive this claim by failing to raise the claim. Further, pursuant to TCEQ policy, even if the Respondents had timely raised this claim, a finding of financial inability to pay

would only lower the administrative penalty to three thousand six hundred dollars (\$3,600.00). Any penalty reduction from the recommended administrative penalty of five thousand two hundred fifty dollars (\$5,250.00) contradicts the Executive Director's established method of applying adjustments to the administrative penalty pursuant to the Penalty Policy.

III. Other Suggested Modifications

The Executive Director suggests the following changes be made to the ALJ's Proposed Order:

1. The Executive Director recommends that Finding of Fact No. 10 be modified by deleting the last sentence, "This decision was communicated to Respondents." This paragraph refers to an internal TCEQ memo, dated March 26, 2001, regarding a follow-up record review conducted for the Facility. This internal memo was not communicated to the Respondents.
2. The Executive Director recommends that Finding of Fact No. 12 be modified by replacing the date January 13, 2009 with January 27, 2009.
3. The Executive Director recommends that Finding of Fact No. 25 be stricken.
4. The Executive Director recommends that Finding of Fact No. 26 be modified by replacing \$105 with \$5,250.
5. The Executive Director recommends that Finding of Fact No. 27 be stricken. This paragraph reduces the penalty assessed against the Respondent from five thousand two hundred fifty dollars (\$5,250.00) to one hundred five dollars (\$105.00).
6. The Executive Director recommends that Conclusion of Law No. 10 be modified to change the penalty amount from one hundred five dollars (\$105.00) to five thousand two hundred fifty dollars (\$5,250.00).
7. The Executive Director recommends that Ordering Provision No. 1 be modified to change the penalty amount from one hundred five dollars (\$105.00) to five thousand two hundred fifty dollars (\$5,250.00).

IV. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

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 hereby 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 Peipey Tang
Peipey Tang
State Bar of Texas No. 24060699
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0654
(512) 239-3434 (FAX)
Peipey.Tang@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2011, an original and seven (7) copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

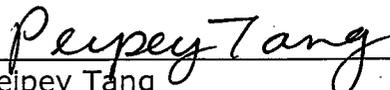
I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, Return Receipt Requested, Article No. 7010 3090.0000 7807 1841, and via First Class Mail, postage prepaid, to:

Gary Lee Corpian and Marilu Lee Corpian
70 Castle Drive
Abilene, Texas 79602

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via Facsimile Transmission (512) 322-2061, to:

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

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Mr. Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.



Peipey Tang
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Requiring Corrective Action by
Gary Lee Corpian and Marilu Lee Corpian
TCEQ DOCKET NO. 2009-1720-PST-E
SOAH DOCKET NO. 582-10-5165**

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 Gary Lee Corpian and Marilu Lee Corpian (Respondents). Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on January 20, 2011, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondents 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. Gary Lee Corpian and Marilu Lee Corpian (Respondents) currently own the property located at 1243 South First Street, Abilene, Taylor County, Texas (Facility), where they operate Good Times Auto, an auto sales business.
2. They purchased the property in 1996 at a tax foreclosure resale, a Sheriff's Sale.
3. The property contains three USTs used by a previous owner of the property for retail refueling as Fourfold Gulf. The previous owner installed two USTs in 1966 and one in 1981.

4. Respondents never operated a service station at the location and never used the USTs.
5. The USTs are secured against tampering and vandalism. The USTs are empty, in accordance with 30 Tex. Admin. Code (TAC) § 334.54(d). All dispensers were removed and the piping was securely capped off.
6. On February 14, 2001, Troy Jordan and Gary Burling conducted an investigation for the Texas Natural Resource Conservation Commission, the TCEQ's predecessor agency (collectively Commission), to determine whether the USTs complied with the applicable petroleum storage tank (PST) requirements.
7. On February 22, 2001, the Commission sent Respondents a Notice of Violation (NOV) citing seven deficiencies. Failure to have corrosion protection for the USTs was one of the deficiencies cited.
8. Under each deficiency, the NOV stated what information was needed to correct the deficiency.
9. Under each deficiency the NOV also stated in bold type that Respondents could "elect to have all of the product removed from the tanks and re-register the tanks as temporarily out of service" by the compliance due date of March 23, 2001.
10. On March 23, 2001, Respondents provided documentation to the Commission showing the tanks were empty, locked, and registered as temporarily out of service. Commission investigator Gary Burling reviewed the information. Via a March 26, 2001 memorandum reviewed by the Abilene Air/Waste Section Manager Mike Burch, Gary Burling determined the "facility appears to be in compliance and no further action will be required at this time."
11. At the same time, on March 28, 2001, the Commission issued a letter to Respondents noting the investigation and documentation showed the USTs were out of service. The letter also stated: "If your temporarily out-of-service UST system is not properly protected and monitored, options are limited to either: 1) permanent removal from service, or 2) request for variance in order to return the UST system to operation."
12. For over eight years, Respondents heard nothing further from the Commission and the Commission apparently took no further action with respect to the USTs.

Then, pursuant to a United States Environmental Protection Agency initiative requiring states to investigate out-of-service facilities that had not filed for several years, TCEQ Region 3 PST investigator Darla Ward conducted a PST Modified Compliance Evaluation Investigation on December 4, 2008. During the inspection, Ms. Ward determined the three single-wall steel USTs were still temporarily out-of-service. Because the USTs did not meet the upgrade requirements and had not been permanently removed, an NOV letter was sent on January 27, 2009.

13. Following receipt of the January 2009 NOV, Respondents contacted the TCEQ Abilene office and were referred to TCEQ investigator Patty Gough. Ms. Gough provided a list of local licensed contractors and other information to Respondents. Respondents reported financial hardship in permanently removing the USTs and were granted additional time to come into compliance.
14. On September 14, 2009, TCEQ investigator Patty Gough conducted a PST record review investigation and determined the three single-wall steel USTs were still temporarily out-of-service, did not meet the upgrade requirements, and had not been permanently removed. She also reported that Respondents had received no affordable bids for the corrective action.
15. On October 16, 2009, the ED mailed a Notice of Enforcement to Respondents.
16. Respondents are responsible for compliance with the rules of TCEQ pursuant to 30 TAC §§ 334.1(b)(3) and 334.2(73).
17. On May 13, 2010, the ED issued the EDPRP to Respondents in accordance with Tex. Water Code Ann. (Water Code) § 7.054, alleging that Respondents violated 30 TAC § 334.7(a)(2) by failing to permanently remove the USTs from service.
18. The ED recommended the imposition of an administrative penalty in the total amount of \$5,250, and corrective action to bring the Facility into compliance.
19. On May 24, 2010, Respondents requested a contested case hearing on the allegations in the EDPRP.
20. On June 30, 2010, the case was referred to SOAH for a contested case hearing.
21. On July 14, 2010, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondents, which included the date, time, and place of the hearing,

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

22. At the preliminary hearing that was held on August 19, 2010, the ED established jurisdiction to proceed.
23. The hearing on the merits was conducted on January 20, 2011, in Austin, Texas, by ALJ Howard S. Seitzman.
24. The ED was represented by Peipey Tang, Attorney, Litigation Division. Respondents appeared on their own behalf.
25. Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be \$5,250.

II. CONCLUSIONS OF LAW

1. Under Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondents are subject to the Commission's enforcement authority, pursuant to Water Code § 7.002. Additionally, the Commission may order Respondents to take corrective action, pursuant to Water Code § 7.073.
4. As required by Water Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
5. As required by Tex. Gov't Code Ann. §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondents were 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, Respondents violated 30 TAC

§ 334.47(a)(2).

8. In determining the amount of an administrative penalty, Water 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 Water Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of \$5,250 is justified and should be assessed against Respondents.
11. Based on the above Findings of Fact, Respondents should be required to take the corrective action measures that the ED 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. Gary Lee Corpian and Marilu Lee Corpian are assessed an administrative penalty in the amount of \$5,250 for violation of 30 TAC § 334.7(a)(2). The payment of this administrative penalty and Gary Lee Corpian's and Marilu Lee Corpian'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: Gary Lee Corpian and Marilu Lee Corpian; TCEQ Docket No. 2009-1720-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

2. Within 30 days from the effective date of the Commission Order, Respondents shall permanently remove the UST system from service, in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of the Commission Order, Respondents 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 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 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:

Mike Taylor, Waste Section Manager
Abilene Regional Office
Texas Commission on Environmental Quality
1977 Industrial Boulevard
Abilene, Texas 79602-7833

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 Executive Director determines that Respondents have 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 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondents.
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, PhD, Chairman
For the Commission**