

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 18, 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 Response to Respondents' Exceptions 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 Response to Respondents' Exceptions to the Administrative Law Judge's Proposed Order (the "Response").

The original of the Response 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 RESPONSE TO RESPONDENTS' EXCEPTIONS 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 his Response to Respondents' Exceptions to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257 and 1 TEX. ADMIN. CODE § 155.507.

In support thereof, the Executive Director would show that Respondents have not provided any legal or factual justification for any changes to the Proposed Order nor do Respondents provide any arguments to refute evidence presented at the evidentiary hearing. The Executive Director respectfully disagrees with the Respondents' Exceptions to the Administrative Law Judge's ("ALJ's") Proposed Order as set forth below and requests that the ALJ's Proposed Order be adopted as written with the incorporation of the Executive Director's Exceptions.

**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. 1<sup>st</sup> 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 the corrective action of permanently removing the UST system from service.

The ALJ concluded that the Executive Director established that Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2) and recommended the corrective action

of permanently removing the UST system from service.

## II. PROCEDURAL BACKGROUND

The evidentiary hearing for this case was held on January 20, 2011. The ALJ filed his PFD on March 17, 2011. In his letter conveying the PFD, the ALJ notes that the deadline for filing exceptions to the PFD is April 6, 2011 and the deadline to reply to exceptions is April 18, 2011. Respondents filed their Exceptions on April 8, 2011, two days after the deadline to reply. Pursuant to 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 Chief Clerk, the date the filing for Respondents' Exceptions was on April 8, 2011. 30 TEX. ADMIN. CODE § 1.10(g) states, "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 Respondents' Exceptions as untimely and respectfully recommends that the document not be considered by either the Commission or the ALJ.

## III. DISCUSSION OF RESPONDENTS' EXCEPTIONS

### 1. Respondents' Exception Regarding the "Fund"

In their Exceptions, Respondents argue that the TCEQ should pay for the permanent removal of the UST system from service because the TCEQ informed Respondents regarding a "fund" for this purpose at the time of Respondents' purchase of the Facility. The Executive Director presumes that the reference to "fund" in Respondents' Exceptions is the Petroleum Storage Tank Remediation Account ("Account"). TCEQ Investigator, Patty Gough testified at the evidentiary hearing that this Account is eligible for owners with a TCEQ confirmed release at the Facility before December 22, 1998. Respondents are not eligible owners for this Account because there is no confirmed release at the Facility and thus Respondents are responsible for permanently removing the UST system from service.

### 2. Respondents' Exception Regarding "Temporarily Out of Service" Status

Respondents also argue that they have placed the UST system indefinitely into the temporarily out of service status by removing the petroleum product and locking the UST system. Exhibit ED-6, the March 28, 2001 Notice of Violation for an Investigation at the Facility, states that "USTs may remain temporarily out-of-service indefinitely if the provisions of Title 30, Tex. Admin. Code 334.55(c) relating to protected and monitored systems are met." Ms. Gough testified that a UST system needs to be adequately protected from corrosion in order to meet the requirements of temporarily out of service. Ms. Gough also testified that the Facility

does not maintain any corrosion protection. Consequently, Respondents are not eligible to leave the UST system indefinitely in the temporarily out of service status because the Facility lacks corrosion protection. The removal of petroleum product and locking the UST system does not address the violation for failing to permanently remove the UST system from service.

3. *Respondents' Exception Regarding Current Tank Condition*

Respondents also argue that "the tanks are even under about 6 inches of concrete and are locked up and been empty for lots of years and there are no sumps at the property." Respondents did not introduce any evidence regarding the quantity of concrete above the UST system. Further, this argument also does not address the failure to permanently remove the UST system from service. Respondents are responsible for following the laws of the State of Texas, including the Commission's rules.

4. *Respondents' Exception Regarding TCEQ Records*

Respondents argue that TCEQ changed their story regarding enforcement at the Facility. Exhibit ED-6, the March 28, 2001 Notice of Violation for an Investigation conducted on February 14, 2001 at the Facility states,

Although violations have been documented at your facility, the TNRCC has determined that formal enforcement action against Fourfold Gulf is not warranted at this time. . . . *Please be aware that should similar violations be noted in future investigations, the TNRCC may take formal enforcement action.* (emphasis added)

Fourfold Gulf is a former name for the Facility. During the evidentiary hearing, Ms. Gough testified that enforcement policies may change and that the March 28, 2001 Notice of Violation does not preclude the TCEQ from pursuing enforcement in the future. Finally, this argument does not address the failure to permanently remove the UST system from service.

#### IV. PRAYER

ACCORDINGLY, the Executive Director submits his Response to the Respondents' Exceptions to the Administrative Law Judge's Proposed Order and respectfully requests that the Respondent's Exceptions be denied. The Executive Director respectfully requests that the order amended by the Executive Director's Exceptions be adopted.

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](mailto:Peipey.Tang@tceq.texas.gov)

### CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of April, 2011, an original and seven (7) copies of the foregoing "Executive Director's Response to Respondents' Exceptions to the Administrative Law Judge's Proposed Order" ("Response") 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 Response was mailed via Certified Mail, Return Receipt Requested, Article No. 7002 0860 0004 6476 6758, 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 Response was sent via Facsimile Transmission (512) 322-2061, to:

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

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

  
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Peipey Tang  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality