

**SOAH DOCKET NO. 582-10-5555
TCEQ DOCKET NO. 2009-1991-PST-E**

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § § §	BEFORE THE STATE OFFICE
v.		OF
OLD TYMER ENTERPRISES, INC., Respondent		ADMINISTRATIVE HEARINGS

**OLD TYMER ENTERPRISES, INC.’S SUGGESTED MODIFICATIONS TO
PROPOSAL FOR DECISION,
FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDERING PARAGRAPHS**

TO THE HONORABLE COMMISSIONERS:

COMES NOW APPLICANT, OLD TYMER ENTERPRISES, INC. (“Old Tymer”), and presents to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) this its Suggested Modifications to the Proposal for Decision, Findings of Fact, Conclusions of Law, and Ordering Paragraphs issued on August 2, 2011, in the above-captioned proceeding.

Although the Administrative Law Judge correctly found that Old Tymer was not the owner of the facility at the time that the site received 17 notices of violation and two Enforcement Orders, and that Old Tymer acquired the facility by lease in an arm’s length transaction, Old Tymer respectfully disagrees with the Administrative Law Judge’s recommendation to enhance its base penalty by 84% based on the site’s compliance history. Old Tymer appreciates the opportunity to suggest these modifications.

I. OLD TYMER'S RECOMMENDED MODIFICATION TO FINDINGS OF FACT

Based on the arguments and evidence produced at the Hearing on the Merits, Old Tymer suggests the following revisions to the Administrative Law Judge's Findings of Fact as provided below:

1. *Old Tymer suggests the following change to Finding of Fact No. 24 to read as follows: "The ED improperly considered the compliance history of the Facility in assessing an 84 percent enhancement penalty."*

In her PFD, the ALJ correctly notes that it is a basic tenet of law that the punishment should fit the crime – indeed, this basic tenet is so important that it is enshrined in the Texas Constitution at Article I, section 13 where it states that “excessive fines shall not be imposed.” Generally, prescribing fines is left to the discretion of the legislature and a court will not hold a fine unconstitutionally excessive except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to “shock the senses.” *Pennington v. Singleton*, 606 S.W.2d 682, 690 (Tex. 1980) (internal citation omitted).

A primary consideration in determining whether a fine is excessive is whether it is fixed with reference to the object it is to accomplish. See *id.* The ED points to Texas Water Code § 5.117 as its authority to levy fines against petroleum storage tank permittees for violations of the applicable rules. And it points to the TCEQ's 2002 Penalty Policy, which is based on 30 Texas Administrative Code § 60.1 as the basis of its authority to “enhance” penalties based on compliance history.

Old Tymer is not arguing that compliance history should play no role in penalty enhancement or that it cannot be constitutionally applied in any circumstance. Rather, Old Tymer argues that enhancing a penalty against it by 84% (34% of which is based on unadjudicated notices of violations) when the evidence shows, as the ALJ correctly noted, that it

had no relationship with the entity that actually incurred the compliance history violations amounts to levying an unconstitutional fine. It is a combination of the size of the penalty enhancement and the fact that Old Tymer was in no way related to the previous violations and allegations that makes the imposition of such a large penalty enhancement unconstitutional.

It certainly **should** shock the conscience to think that a business can be fined as much or potentially more (e.g. if AMK had had a slightly longer compliance history) for “enhancements” than for the underlying fine. Yet, that is precisely what is happening here – Old Tymer is being fined an additional 84% for violations that it did not have the opportunity to dispute or cure. Such a large enhancement not only shocks the conscience, but it also violates Article I, section 13 of the Texas Constitution and is not even impliedly authorized by Sec. 5.117 of the Texas Water Code.

Old Tymer objects to the imposition of the suggested enhancement on the grounds that it violates the Texas Constitution, and asks the Commission to strike that portion of the fine recommended by the ALJ.

2. *Old Tymer suggests the following change to Finding of Fact No. 25 to read as follows: “Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be \$25,100.00 taking into account the Facility’s compliance history, culpability, economic benefit, good faith efforts to comply, release potential, the interests of justice, and other factors set forth in Water Code § 7.053 and in the Commission’s 2002 Penalty Policy.”*

The penalty suggested by Old Tymer represents the base fine calculated for the violations observed when Old Tymer operated (but did not own) the Facility. Penalizing Old Tymer for violations for which the previous operator/owner was also penalized (and presumably penalizing

the next operator after Old Tymer, and so on) allows the Commission to collect an unending stream of penalties not only for adjudicated violations, but also unadjudicated ones as well.

Although the purpose of the 2002 Penalty Policy is to keep operators from playing a shell game at the public's expense by incorporating new entities so as to avoid compliance, the enhancement policy should not be universally applicable in all situations. It should only be applied when there is evidence that the entity being charged with current violations was in some way related to previous violations. Since that is not the case here, an enhancement that nearly doubles Old Tymer's penalty is unconscionable.

II. OLD TYMER'S RECOMMENDED MODIFICATION TO CONCLUSIONS OF LAW

Based on the arguments and evidence produced at the Hearing on the Merits, Old Tymer suggests the following revisions to the Conclusions of Law as provided below:

1. *Old Tymer suggests the following change to Conclusion of Law No. 10 to read as follows: "The ED's recommended administrative penalty improperly considered the factors required by Water Code § 7.053, 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.*

The Commission should make especial note of two provisions that are especially apt in this situation – the provision that takes into account the **violator's** history of compliance, and that any penalty be **just**. As the ALJ correctly noted, Old Tymer has no violation history. The

operator, Amarjit Jolly, was new to the gas station business and was assured by the previous operator that the station was in compliance. Then, three months after he had taken control of the Facility, he is cited for the violations in question.

While it seems patently clear based on the photographs that were introduced by the ED at the Hearing on the Merits that the conditions that incurred the violations must have predated Old Tymer's assumption of operations, Old Tymer does not dispute that it was the Facility operator when the violations in question were observed. What Old Tymer disputes is that it should be punished again for unrelated violations and allegations of violations that occurred when it was **not** the Facility operator and had **no** relationship whatsoever to the Facility. The Commission should remember that neither Old Tymer, nor its president Amarjit Jolly, have any compliance history (positive or negative) with the TCEQ. It is one thing to hang another entity's compliance history on an experienced operator who has compliance experience. It is another to punish an investor and practically double his fine because he stepped into a bad situation.

2. *Old Tymer suggests the following change to Conclusion of Law No. 12 to read as follows: "Based on consideration of the above Findings of Fact, the factors set out in the Water Code § 7.053, the Commission's Penalty Policy, and Revision No. 12 of the Enforcement Initiation Criteria, the ED incorrectly calculated the penalties for each of the eight violations, resulting in a total administrative penalty of \$25,100.00."*

As previously stated, the recommended change represents the underlying base penalty.

III. OLD TYMER'S RECOMMENDED MODIFICATION TO ORDERING PARAGRAPHS

Old Tymer suggests the following revisions to the Commission's Ordering Paragraphs as provided below:

1. *Old Tymer Enterprises, Inc. d/b/a the Olde Tymer is assessed an administrative penalty in the amount of \$25,100.00 for violations of the Texas Water Code and the Commission rules, to be paid within 180 days of the date that this Order becomes final. The payment of this administrative penalty and the compliance of Old Tymer Enterprises, Inc. d/b/a the Olde Tymer 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: Old Tymer Enterprises, Inc. d/b/a the Olde Tymer; TCEQ Docket No. 2009-1991-PST-E" to:*

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

IV. CONCLUSION

Old Tymer respectfully requests that the Commission enter an Order consistent with the changes suggested above.

Respectfully submitted,

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**ATTORNEYS FOR OLD TYMER
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2011, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel of record:

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