

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

September 1, 2011

Via E-Filing

The Honorable Catherine C. Egan
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: Executive Director's Reply to Old Tymer Enterprises, Inc. d/b/a The Olde Tymer's Suggested Modifications to Proposal for Decision, Findings of Fact, Conclusion of Law, and Ordering Paragraphs
SOAH Docket No. 582-10-5555
TCEQ Docket No. 2009-1991-PST-E

Dear Judge Egan:

Enclosed please find a copy of the "Executive Director's Reply to Old Tymer Enterprises, Inc. d/b/a The Olde Tymer's Suggested Modifications to Proposal for Decision, Findings of Fact, Conclusion of Law, and Ordering Paragraphs" filed today in the above-referenced matter.

The original 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 "Gary K. Shiu".

Gary K. Shiu
Attorney
Litigation Division

Enclosure

cc: TCEQ Chief Clerk, MC 105
Blas Coy, Public Interest Counsel, TCEQ, MC 103
Thomas Greimel, Enforcement Division, TCEQ, MC 128
Arturo D. Rodriguez, Jr., Russell & Rodriguez, L.L.P., 1633 Williams Drive, Building 2,

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • www.tceq.state.tx.us

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

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

OLD TYMER ENTERPRISES, INC.
D/B/A THE OLDE TYMER,
RESPONDENT

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO OLD TYMER ENTERPRISES, INC. D/B/A THE
OLDE TYMER'S SUGGESTED MODIFICATIONS TO PROPOSAL FOR DECISION,
FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDERING PARAGRAPHS**

TO THE HONORABLE CATHERINE C. EGAN:

COMES NOW, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and files his "Executive Director's Reply to Old Tymer Enterprises, Inc. d/b/a The Olde Tymer's Suggested Modifications to Proposal for Decision, Findings of Fact, Conclusion of Law, and Ordering Paragraphs."

I. INTRODUCTION

The Honorable Administrative Law Judge ("ALJ") correctly noted that based on the Findings of Fact in the Proposal for Decision ("PFD"), the factors set out in TEX. WATER CODE § 7.053, the 2002 TCEQ Penalty Policy ("Penalty Policy"), and Revision No. 12 of the TCEQ Enforcement Initiation Criteria ("EIC"), the ED properly calculated the administrative penalty by appropriately taking into account the eight documented violations, compliance history of the site at issue, and the economic benefit the respondent received by delaying action or avoiding costs through non-compliance. Old Tymer Enterprises, Inc. d/b/a The Olde Tymer's ("Respondent") argument that the ALJ's determination on the assessed administrative penalty is unjust and unconstitutional does not rest on relevant legal precedent or notable authority. In contrast, the ED properly calculated the administrative penalty by following the statutory requirements enumerated in the Texas Water Code and by consistently following the applicable TCEQ rules and its Penalty Policy.

II. EXECUTIVE DIRECTOR'S REPLY TO RESPONDENT'S EXCEPTIONS

A. Findings of Fact Nos. 24 and 25.

Respondent's constitutional challenge to the assessed penalty is unsupported by relevant legal precedence. Respondent relies on a case concerning "unconstitutionally excessive" fines in the context of *treble* damages under the Texas Deceptive Trade Practices Act ("DTPA")¹ and makes a leap of legal applicability, without comparing any factual or legal similarities in Pennington to the present TCEQ matter, to form a vague connection between the constitutionality of the DTPA penalties in Pennington and the administrative penalty in this TCEQ action. Indeed, other than Respondent's subjective perception in the matter, Respondent provided no applicable legal precedence showing that the Commission's compliance history penalty enhancements calculations are potentially unconstitutionally excessive. Neither did Respondent provide any relevant authoritative example that deviation from this penalty calculation policy is warranted in this case. In other words, Respondent provided no legal or historic basis to sufficiently challenge the constitutionality of compliance history enhancement calculations of TCEQ administrative penalties.

The ALJ correctly noted that the ED appropriately applied the Commission rules, the Penalty Policy, the EIC, and requirements under the Texas Water Code in calculating the total administrative penalty in this case. It has been the consistent practice of the TCEQ to adjust any assessed penalty enhancement based on the compliance history of the *site*, as well as the history of the owner/operator associated with the site. The compliance history penalty enhancement is formulaic and appropriately implements 30 TEX. ADMIN. CODE ch. 60, TEX. WATER CODE chs. 5 and 7, and the Penalty Policy.

Respondent contends that the compliance history of the previous owner and operator of the site, AMK Enterprises, Inc., and the previously unadjudicated Notices of Violations ("NOVs") attached to The Olde Tymer facility (the "Site") should not carry over as a compliance history penalty enhancement against Respondent. Respondent is not the first to make this argument. During the adoption of 30 TEX. ADMIN. CODE § 60.1, public commentators opined that the use of NOV as a component of compliance history is unfair because NOVs are allegations without recipient response. The Commission disagreed with this argument and emphasized that 30 TEX. ADMIN. CODE § 60.1 implements the Texas Water

¹ Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980).

Code and the Water Code requires the inclusion of NOVs as a component of compliance histories.²

Certain commentators also voiced their disagreement with the portions of the compliance history relating to a prior owner should be included in the new owner's compliance history, which, in their view, calls for an involuntary transfer of liability.³ The commentators then suggested: "[§ 60.1(d)] should be reworded to provide that the compliance history of all parties who previously owned or operated a site during the applicable five-year compliance period will *not* be considered in compiling the current owner's or operator's history."⁴ [Emphasis added]

The Commission disagreed with those comments: "The commission believes that five years is an appropriate amount of time to obtain an accurate picture of compliance for a site. By looking at the entire five-year period for a *site, even when a sale of a facility has occurred*, an accurate compliance history picture will emerge. However, the Commission believes it is necessary to allow some degree of flexibility for companies that purchase facilities, which is why the rule allows that for any part of the compliance period that involves a different owner, the compliance history will be assessed for only the *site* under review."⁵ [Emphasis added] Subsequent to the adaptation of 30 TEX. ADMIN. CODE § 60.1 and the Penalty Policy, the Commission has consistently followed compliance history enhancement calculations related to the site under review in an enforcement action.

Similarly, Respondent was the owner and operator of the Site at the time of the TCEQ investigation. A change of ownership of the Site occurred within the five-year compliance period relating to this enforcement matter. Consequently, the compliance history of the *site* is properly used to determine penalty enhancements based on the history of the Site. Respondent's exceptions to the PFD are no different than the arguments raised by public commentators during the promulgation of 30 TEX. ADMIN. CODE § 60.1. As the Commission rejected those commentators' comments, the ALJ should reject Respondent's arguments raised here.

² 30 TEX. ADMIN. CODE § 60.1(c)(7).

³ ED Ex. 21; 27 Tex. Reg. 257-258.

⁴ ED Ex. 21; 27 Tex. Reg. 258.

⁵ ED Ex. 21; 27 Tex. Reg. 257-261.

B. Conclusion of Law No. 10.

The assessed administrative penalty appropriately considered the history and extent of previous violations by the Respondent, in accordance with TEX. WATER CODE § 7.053. As noted in the ED's closing remarks, a violator's compliance history classification (i.e., whether the person has a history of committing violations) is separately assessed from the compliance history of the site under enforcement. This separate but distinct assessment categorizes a person's compliance history as "poor performer," "average performer," and "high performer" based on the person's history for all the regulated sites which are owned or operated by the same person.⁶ These performance classifications are reflected in the Compliance History Report for this case.⁷ Since Respondent's personal compliance history classification is "average," Respondent's personal compliance history rating did not result in any additional enhancements to the administrative penalty.⁸

With respect to Respondent's unsubstantiated insinuation that it walked into a bad business deal, which allegedly contributed to the compliance history enhancement penalty assessed against Respondent, the ALJ appropriately noted that "as for the enhanced penalty [based on the Site's compliance history], the ED noted that the Commission rules make clear that compliance history stays with the site, irrespective of ownership. The [Site] had a history of violations, a history Respondent should have been aware of because it is a matter of public record." In any event, the focus should not be on the circumstances surrounding the private propriety transaction between Respondent and AMK Enterprises, Inc. ("AMK"), but rather on existing Commission practice and policies on reviewing compliance history enhancements as they apply in this enforcement matter. When looking at the entire five-year compliance period of the Site, the compliance history must be assessed for the Site under review; and since previous Commission Enforcement Orders and NOVs are attached to the Site's compliance history, it is consistent with TCEQ policy to apply a penalty enhancement based on the compliance history of The Olde Tymer facility.

⁶ ED Ex. 8 at Bates page 19: "Compliance history classification of the respondent will be determined according to 30 TEX. ADMIN. CODE § 60.2(f)."

⁷ ED Ex. 9. According to the Compliance History Report for OTE, Respondent has a performance classification of "Average" by default.

⁸ Thomas Greimel's testimony, Hearing Transcript, Volume 2, from page 245, lines 7 through page 247, line 3; page 261, line 19 through page 262, line 14.

C. Conclusion of Law No. 12.

The ED disagrees with Respondent's suggested modification to the total assessed penalty. As previously stated, the ED's recommended administrative penalty properly considered the factors required by TEX. WATER CODE § 7.053 and the 2002 TCEQ Penalty Policy, resulting in a total administrative penalty of \$48,453.00.⁹

D. Ordering Paragraph No. 1.

For the above stated reasons, the ED opposes to Respondent's proposed modification to Ordering Paragraph No. 1 to state that Respondent is only assessed an administrative penalty in the amount of \$25,100.00. The ED does *not* oppose to Respondent's suggestion to allow Respondent pay the assessed administrative penalty six (6) months after the Commission Order becomes final.

III. CONCLUSION

The ED correctly calculated the penalties for each of the eight violations and applied the appropriate compliance history and economic benefit enhancements to the base penalty, resulting in a total administrative penalty of \$48,453.00. As a result, the ED respectfully request that the ALJ deny Respondent's recommended modifications to the Findings of Fact, Conclusions of Law, and Ordering Paragraphs in her Proposal for Decision.

⁹ The assessed penalty of \$48,453.00 correctly combines the base penalty of \$25,100 and penalty enhancements based on the Site's compliance history (\$21,084.00) and the economic benefits Respondent obtained by delaying action or by avoiding costs through compliance associated with Violation Nos. 2, 3, 6, and 8 (\$2,269.00). Respondent's argument against the compliance history enhancement notwithstanding, Respondent provided no factual or legal basis as to why the economic benefits enhancement should also be removed from the total assessed penalty.

Respectfully submitted,

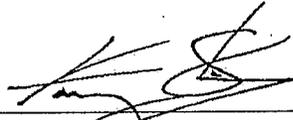
Texas Commission on Environmental Quality

Mark R. Vickery

Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
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by 

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of September, 2011, the original of the foregoing "Executive Director's Reply to Old Tymer Enterprises, Inc. d/b/a The Olde Tymer's Suggested Modifications to Proposal for Decision, Findings of Fact, Conclusion of Law, and Ordering Paragraphs ("ED's Reply to Suggested Modifications") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, true and correct copies of the foregoing ED's Reply to Suggested Modifications was mailed to the following persons by the method of service indicated:

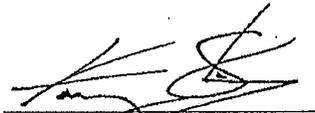
Via E-Filing

The Honorable Catherine C. Egan
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**Via Certified Mail, Return Receipt Requested
Article Number 7002 2410 0001 7629 5402**

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I further certify that on this day a true and correct copy of the foregoing ED's Reply to Suggested Modifications was submitted electronically to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Gary K. Shiu
Attorney
Litigation Division
Texas Commission on Environmental Quality

