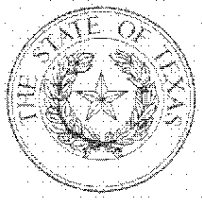
State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 3, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-10-5555; TCEQ Docket No. 2009-1991-PST-E; In Re: Executive Director of the Texas Commission on Environmental, Petitioner, v. Old Tymer Enterprises, Inc., Respondent**

Dear Mr. Trobman:

Please note that there was a typographical error on the cover letter for the Proposal for Decision that was issued on August 2, 2011. There was an incorrect date for the exceptions deadline. The correct exceptions deadline is **August 22, 2011** not August 2, 2011 as previously noted on the cover letter. The replies deadline remains the same (September 1, 2011). I apologize for any confusion it may have caused.

This matter has been designated **TCEQ Docket No. 2009-1991-PST-E; SOAH Docket No. 582-10-5555**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Catherine C. Egan

Catherine C. Egan
Administrative Law Judge

CCE:nl
cc: Mailing List

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SERVICE LIST

AGENCY: **Environmental Quality, Texas Commission on (TCEQ)**

STYLE/CASE: **OLD TYMER ENTERPRISES INC**

SOAH DOCKET NUMBER: **582-10-5555**

REFERRING AGENCY CASE: **2009-1991-PST-E**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ CATHY C. EGAN

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OLD TYMER ENTERPRISES, INC.

State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

August 2, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-5555; TCEQ Docket No. 2009-1991-PST-E; In Re: Executive Director of the Texas Commission on Environmental, Petitioner, v. Old Tymer Enterprises, Inc., Respondent

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than August 2, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than September 1, 2011.

This matter has been designated **TCEQ Docket No. 2009-1991-PST-E; SOAH Docket No. 582-10-5555**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Catherine C. Egan

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Administrative Law Judge

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Enclosures
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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: OLD TYMER ENTERPRISES INC

SOAH DOCKET NUMBER: 582-10-5555

REFERRING AGENCY CASE: 2009-1991-PST-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS	ADMINISTRATIVE LAW JUDGE ALJ CATHY C. EGAN
REPRESENTATIVE / ADDRESS	**PARTIES**
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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**

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission of Environmental Quality (Commission or TCEQ) brought this enforcement action against Old Tymer Enterprises, Inc. d/b/a The Olde Tymer (Respondent) for alleged violations of the Texas Water Code and TCEQ rules regarding underground storage tanks (USTs). The ED requests the imposition of an administrative penalty of $48,453.00, which includes an 84 percent enhancement penalty, and the implementation of corrective action. Respondent asked that the amount of the administrative penalty be reduced, and that no enhancement penalty be imposed because it did not own the USTs until three months before the inspection. The ED argues the enhancement penalty was properly calculated because the site, not the owner, has a history of violations.

The Administrative Law Judge (ALJ) finds that Respondent committed the violations cited by Staff, and recommends that the Commission assess a penalty of $48,453.00. The ALJ also recommends that the Commission order Respondent to perform the corrective action recommended by the ED within a reasonable period of time.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not contested in this case. Therefore, those matters are address in the Findings of Fact and Conclusions of Law without further discussion here.

The preliminary hearing was set for September 2, 2010. On August 31, 2010, the ED and Respondent filed a joint motion to waive appearance at the preliminary hearing and to admit without objection documents to establish jurisdiction and notice. The joint motion was granted and Exhibits ED-A, ED-B, ED-C, and ED-D were admitted without objection.[1] Jurisdiction was established and the parties' proposed procedural schedule adopted.

The hearing convened on March 30, 2011, before ALJ Catherine Egan at the State Office of Administrative Hearings (SOAH) in Austin Texas. Staff Attorneys Gary Shiu and Tracy Chandler represented the ED. Attorneys Arturo Rodriguez and Bradford Bullock represented Respondent. After the submission of closing arguments and briefs, the record closed on June 3, 2011.

III. DISCOVERY MATTER

The ED's Requests for Admissions were deemed admitted by Order No. 5. The deemed admission are discussed in more detail below.

IV. LEGAL AUTHORITY

The Commission is authorized under TEX. WATER CODE (Water Code) § 7.051 to assess administrative penalties against a person for violations of the Water Code, a Commission rule, or a permit. Water Code § 7.053 lists factors that the Commission should consider in calculating an administrative penalty. The factors include consideration of the nature, circumstances, extent, duration, and gravity of the prohibited act, or the hazard, or potential hazard, created to the health or safety of the public.

[1] Order No. 1 (Sept.1, 2010). Exhibit (Ex.) ED-A is a certified copy of the ED's Preliminary Report and Petition (EDPRP). Ex. ED-B is a certified copy of the Respondent's Answer to the EDPRP. Ex. ED-C is a certified copy of the request to refer the matter to SOAH. Ex. ED-D is a certified copy of the notice of the preliminary hearing. The ED also submitted these exhibits at the hearing as Ex. ED-17.

With regards to the alleged violator, the factors include the following:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.[2]

TCEQ also relies on the September 2002 Penalty Policy[3] in calculating administrative penalties under Water Code §7.053.

V. DISCUSSION

A. Background and Investigation

In June 2009, Respondent purchased from AMK Enterprise, Inc., the retail refueling station and convenience store known as The Olde Tymer located at 28295 Interstate 10 West, Boerne, Bexar County, Texas (the Facility). Amarjit Jolly is Respondent's Chief Executive Officer and manager. Mr. Jolly's daughter, Sahiba Jolly, is Respondent's Director. According to Mr. Jolly, he had no prior experience with operating a retail gasoline filling station or petroleum storage tanks (PSTs), and neither had Respondent. Mr. Jolly also confirmed that neither he nor Respondent had any relationship with AMK Enterprises, Inc., prior to purchasing the Facility. He insisted that he was unaware that the Facility's USTs were operating in violation

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[2] WATER CODE § 7.053. Similarly, the 2002 Penalty Policy allows adjustments for certain factors, including culpability, good-faith effort to comply, compliance history, economic benefits gained through noncompliance, and other factors as justice may require.

[3] Ex. ED-8; Tr. at 116.

of the Water Code and the Commission rules.[4]

According to De'Shaune Blake, a TCEQ Environmental Investigator for the San Antonio regional office, PST facilities are required to provide TCEQ certain information about the UST system. This information is then entered into TCEQ's Petroleum Storage Tank Registration database and relied upon by TCEQ investigators in conducting compliance inspections. She explained that this information must be accurate to ensure that the TCEQ investigator knows the testing and corrosion protection required for the UST system at the facility.

To prepare for the inspection of the Facility, Ms. Blake generated Respondent's PST database printout on July 27, 2009, several weeks before the inspection.[5] On September 3, 2009, Ms. Blake called Respondent, and spoke with Mr. Jolly, Respondent's manager. She told Mr. Jolly that she was scheduling a compliance evaluation and inspection of the Facility and that she would need to review Respondent's records about the UST system as part of this inspection.

On September 21, 2009, Ms. Blake and James Bard, a senior TCEQ Environmental Investigator for the San Antonio regional office, went to the Facility to inspect the UST system and were met by Mr. Jolly. Ms. Blake said that she asked Mr. Jolly for Respondent's UST system's records, but Mr. Jolly was only able to provide Respondent's financial assurance and delivery certificates. After reviewing these records, Ms. Blake inspected the automatic tank gauge monitor and the USTs as requested. Mr. Jolly opened the UST manways and sumps for her inspection. She also inspected the dispensers and vent lines. As she conducted her inspection of the USTs, she documented each noncompliance on the Exit Interview Form.[6] At the end of the inspection, Ms. Blake testified that she reviewed with Mr. Jolly the eight violations she had documented on the Exit Interview Form, and advised him that Respondent had 14 days to submit additional documentation to show that the USTs were brought into compliance with TCEQ rules or Respondent would be sent a Notice of Enforcement (NOE) letter. Mr. Jolly

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[4] Tr. at 288; Ex. ED-2 at 27.

[5] Tr. at 32-33; ED Ex. 2, Attachment 3.

[6] Ex. ED-2 at 27.

signed the Exit Interview Form as Respondent's manager.[7]

Subsequently, Ms. Blake referred the matter to TCEQ's Enforcement Division because some of the violations were Category A violations that prompt automatic enforcement because of their serious nature. The Category A violations included Respondent's failure to perform the corrosion protection test and the pipe tightness and line detection tests.[8]

The ED issued the NOE in a letter to Respondent dated November 6, 2009, at which point the matter was assigned to an Enforcement Coordinator. On June 8, 2010, the ED filed the ED's Preliminary Report and Petition (the EDPRP). The ED filed an amended EDPRP on February 2, 1011.

B. Admissions and Violations

The ED cited Respondent for several violations, some of which were combined by the Enforcement Division in calculating the administrative penalty. Based on the deemed admissions and evidence submitted at the hearing, the violations were established. The main issues focused on whether Respondent caused these violations, the severity of the enhancement penalty, and the base administrative penalty proposed by the ED. The issues surrounding administrative penalties are discussed in the next section.

On the day of the inspection, Respondent was the owner of the Facility and responsible for the day-to-day operations. It was uncontested that Respondent failed to:

- submit a complete and accurate UST registration by failing to provide the operator's complete name and title and by providing inconsistent information about the USTs—that they were made out of fiberglass reinforced plastics (FRP) and steel, when they cannot be both. (Violation 1)

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[7] Ex. ED-2 at 27.

[8] Tr. at 38, Ex. ED-2 at 10.

- perform the required triennial test for the USTs, the corrosion protection wiring for UST No. 1 was disconnected, and the corrosion protection wiring for UST No. 4 was missing. (Violation No. 2)
- properly reconcile the inventory control records at least once a month to detect a release that equaled or exceed the sum of 1% of the total substance flow-through for the month plus 130 gallons, and to record the inventory volume measurement for the regulated substance inputs, withdrawal, and remaining amounts in the tanks each operating day. Additionally, Respondent failed to show that the Facility USTs were monitored for releases once every month (not to exceed 35 day between the monitoring); that Respondent provided proper release detection for the associated piping; and that Respondent tested the line leak detectors at least once each year for performance and operational reliability. (Violation 3)
- conduct effective manual or automatic inventory control procedures.
- permanently attached to the top of the fill tube or to a nonremovable point in the fill tube area, a legible tab, label, or marking identifying the USTs as listed on the Facility's UST registration and self-certification form. (Violation 5)
- conduct the inspections on all sumps, manways, overspill container, or catchment basins at least once every 60 days to ensure that any penetration points are liquid tight as evident from the liquid found in the sump for UST No. 3, and the spill buckets for UST Nos. 3 and 4. (Violation 6)
- to maintain the installation records that included the as-built drawings (or plans) that were drawn to scale and provide enough detail to accurately describe the sizes, dimensions, and locations of the UST components. (Violation 7)
- provide notice to TCEQ that it was replacing the UST system's shear valves and piping, a major UST construction activity. (Violation 8)

Respondent received the NOE on November 11, 2009, the EDPRP on June 20, 2010, and the First Amended EDPRP on February 4, 2011. Additionally, Respondent agreed with the ED's recommended corrective action and acknowledged having the financial ability to perform the recommended corrective action.[9]

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[9] Ex. ED-19A (the Requests for Admissions).

C. Administrative Penalty

Mr. Jolly testified that he was new to this industry; had just purchased the Facility a couple of months before the inspection; and was unaware of the prior owner's history of violations. He further argued that he did not intentionally violate any Commission rules and wanted to correct any deficiency, but he claimed that his poor health and family misfortunes interfered with his ability to devote the time and resources necessary to correct all the violations. According to Mr. Jolly, it is unjust and unwarranted to impose such a harsh penalty for violations Respondent had no part in creating and had no opportunity to correct.

The evidence supports Respondent's claim that it had no relationship with AMK Enterprises, Inc., other than the purchase of the Facility. Additionally, Respondent had no involvement in, or responsibility for, the 17 prior violations and the two Enforcement Orders that occurred while AMK Enterprises, Inc., owned the Facility. Citing a basic tenet of law, that the punishment should fit the crime, Respondent urged the Commission to consider the purpose of administrative penalties—to encourage petroleum storage compliance. Because almost half of the requested penalty is due to violations committed by the prior owner, AMK Enterprises, Inc., Respondent requested that the enhanced administrative penalty not be imposed and that the administrative penalty be reduced.

Thomas C. Greimel, TCEQ's Enforcement Coordinator, explained the penalty calculation done in accordance with the Commission's September 2002 Penalty Policy and Revision No. 12 of the Enforcement Initiation Criteria that became effective on July 1, 2008.[10]

In this matter, Mr. Greimel screened the enforcement referral for enforcement action. He confirmed Ms. Blake's testimony, that if a Category A violation is cited in an investigation the matter must be referred for formal enforcement action. In this case, Respondent was cited with four Category A violations. Thus, Mr. Greimel concluded that this matter warranted formal

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[10] Ex. ED-20. The Enforcement Initiation Criteria states that the procedures are intended only for staff guidance.

enforcement action and proceeded to prepare the enforcement document, the penalty calculation worksheet, the proposed order, and documentation of the compliance history for both Respondent and the Facility.

According to Mr. Greimel, the penalty calculation worksheet has two matrixes that distinguish between violations that affect the environment, property, or human health and those that relate to documentation errors, referred to as programmatic matrix. The economic benefit portion of the worksheet calculates the economic benefit that Respondent may have gotten by delaying action or by avoiding costs through noncompliance. The following is a list of the violations, the applicable matrix, the calculated base penalty, and the economic benefit.

Violation No.	Matrix	Description & Citation	Base Penalty	Eco. Benefit
1.	Prog.	Failure to update registration. 30 TAC § 334.7(d)(2)	$ 100.00	$ 5.00
2.	Env.	Failing to operate and maintain corrosion protection system and cathodic protection system. The Water Code § 26.3475 30 TAC § 334.49(a) and (c)(4)	$5,000.00	$1,078.00
3.	Env.	Failure to monitor USTs for release, to provide release detection for piping, to test line leak detectors, conduct reconciliation of inventory control records, and failure to record volume measurements.[11] 30 TAC §§ 334.50(b)(1)(A), (b)(2), (b)(2)(A)(i)(ii), (d)(1)(B)(ii) and (d)(1)(B)(iii)	$ 5,000.00	$1,121.00
4.	Env.	Failure to conduct effective manual or automatic inventory control. 30 TAC §334.48(c)	$ 5,000.00	$ 21.00
5.	Prog.	Failure to have legible label on tanks.	$ 2,500.00	$ 4.00

[11] According to Mr. Greimel, these violations were combined because of the similarity of the violations. Tr. at 137.

		30 TAC § 334.8(c)(5)(C)		
6.	Env.	Failure to inspect sumps, manway, overspill container at least every 60 days. 30 TAC § 334.42(i)	$ 2,500.00	$ 105.00
7.	Prog.	Failure to maintain installation records *i.e.* as-built drawings, and plans. 30 TAC § 334.46(i)(2)(B)	$ 2,500.00	$ 2.00
8.	Prog.	Failure to provide notification of major UST construction. 30 TAC § 334.6(a)(2).	$ 2,500.00	$ 50.00
			$25,100.00	$2,386.00 adjusted to $2,269.00[12]

Mr. Greimel testified that violations related to release detection, spill and overfill, and corrosion protection are extremely serious violations due to the potential environment damage associated with them. Violations 2, 3, and 4 were identified as a potential major under the environmental, property, and human health matrix because a failure to comply with these requirements creates a risk that a significant amount of pollutants may be released into the water and soil exceeding safe levels for the environment and human health.[13] Mr. Greimel assigned only one violation event to Violation 2 because he used one calendar quarter, but he could have calculated the penalty based on months that would have doubled the penalty amount.[14]

Mr. Greimel explained that had Respondent submitted documentation showing a good faith effort to correct the violations, the administrative penalty would have been reduced. But Respondent failed to submit any documentation demonstrating compliance.[15] Additionally, the base penalty was enhanced 84 percent due to the Facility's 5-year compliance history. Prior to Respondent's ownership, the Facility received 17 notices of violations (NOVs) and two Enforcement Orders. Each NOV is assigned a two percent enhancement value and each

[12] Ex. ED-18.

[13] Tr. at 133.

[14] Tr. at 133-134.

[15] Tr. at 130.

Enforcement Order is assigned a 25 percent enhancement value. The Enforcement Orders were based on violations occurring between 2005 and 2008.[16]

Mr. Greimel recognized that Respondent only owned the Facility for three months and has no history of any prior violations. However, because the site has a history of violations, Mr. Greimel included an 84 percent enhancement penalty of $21,084.00 in the proposed administrative penalty. By combining the base penalty, the enhanced penalty and the economic benefit Respondent realized by its noncompliance, Mr. Greimel arrived at the proposed administrative penalty of $48,453.00 (25,100 + 21,084 + 2,269).[17] Mr. Greimel stated that as of the date of the hearing, he had not received any information or documentation showing that Respondent had done anything to correct these violations.[18]

D. Necessity for Corrective Action

Based on the admissions and evidence, the ED established the need for the corrective action requested. Respondent presented no evidence showing that it had corrected any of the violations. Therefore, the Commission is warranted in ordering Respondent to perform the corrective action set out in the First Amended EDPRP.

E. ALJ's Analysis

The evidence established the validity of the eight violations the ED cited against Respondent. The ALJ agrees that some of Respondent's violations concern records and testing that the prior owner, AMK Enterprise Properties, Inc., should have turned over to Respondent when it sold the Facility. Many of the tests required to be performed annually or biannually might have been performed by AMK Enterprise, Inc., but Respondent was unable to produce any records to show that these tests were performed.

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[16] Ex. ED-9.

[17] Ex. ED-18; Tr. at 156-157.

[18] Tr. at 124.

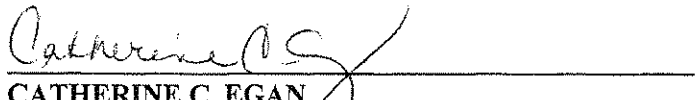
Respondent was responsible as the new owner to either secure the Facility's records from the prior owner to show that these tests were performed, and if no records were provided by the prior owner, Respondent was obligated to do the tests and maintain documentation of having done so. As for the enhanced penalty, the ED noted that the Commission rules make clear that compliance history stays with the site, irrespective of ownership. The Facility had a history of violations, a history Respondent should have been aware of because it is a matter of public record.

The ALJ finds that the ED correctly applied the Commission rules; the September 2002 Penalty Policy; Revision 12 of the Enforcement Initiation Criteria; and recommends that the Commission assess a total penalty of $48,453.00, as requested by the ED.

VI. RECOMMENDATION

In conclusion, the ALJ finds that the Respondent violated state laws and regulations regarding management of USTs, as alleged by the ED, and recommends the adoption of the attached Proposed Order, which assesses Respondent the administrative penalty of $48,453.00 and requires Respondent to undertake corrective action to bring the Facility into compliance.

SIGNED on August 2, 2011.



CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against and Requiring Corrective Action by Old Tymer Enterprises, Inc.
TCEQ DOCKET NO. 2009-1991-PST-E
SOAH DOCKET NO. 582-10-5555

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Preliminary Report and Petition recommending that the Commission enter an enforcement order assessing administrative penalties against and seeking corrective action from Old Tymer Enterprises, Inc. (Respondent). Catherine Egan, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 30 and 31, 2011, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent 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. Old Tymer Enterprises, Inc. (Respondent) currently owns and operates the retail refueling station and convenience store known as The Olde Tymer located at 28295 Interstate 10 West, Boerne, Bexar County, Texas (the Facility).

2. Respondent purchased the Facility from AMK Enterprises, Inc., in June or July 2009, and was the owner and operator of the Facility on September 21, 2009.

3. Amarjit Jolly is Respondent's Chief Executive Officer and manager, and his daughter, Sahiba Jolly, is Respondent's Director.

4. The Facility has four underground storage tanks (USTs) that contain gasoline, a regulated petroleum substance, for retail refueling.

5. Prior to purchasing the Facility, Respondent had never operated a service station and never used any USTs.

6. Respondent's USTs are not exempt or excluded from regulation under the Texas Water Code or the Commission Rules.

7. On September 21, 2009, Investigators De'Shaune Blake and James Bard conducted an investigation at the Facility for the Texas Commission on Environmental Quality (the Commission/TCEQ) to determine whether the USTs complied with the applicable petroleum storage tank (PST) requirements and found eight violations.

8. Ms. Blake recorded the eight violations on an Exit Interview Form and reviewed each violation with Mr. Jolly as Respondent's manager.

9. Respondent was given 14 days to submit additional document to the Commission to show that the USTs were in compliance with the Commission rules.

10. On September 21, 2009, Respondent failed to do the following at the Facility:

    a. submit to the Commission a complete and accurate UST registration by omitting the operator's first name when more that one person listed had the same last names and by providing inconsistent information about the USTs—that they were made out of fiberglass reinforced plastics (FRP) and steel, when they cannot be both. (Violation 1)

b. operate and maintain the corrosion protection system in a manner that will ensure the corrosion protection will be provided to all underground metal components of the UST system or to perform the required triennial test for the USTs. Notably, the corrosion protection wiring for UST No. 1 was disconnected and the corrosion protection wiring for UST No. 4 was missing. (Violation 2)

c. properly reconcile the inventory control records for the USTs at least once a month to detect a release that equaled or exceed the sum of 1% of the total substance flowing through for the month plus 130 gallons and recorded the inventory volume measurement for the regulated substance inputs, withdrawal, and remaining amounts in the tanks each operating day. (Violation 3)

d. properly monitor the Facility USTs for release every month (not to exceed 35 days between the monitoring), provide proper release detections for the associated piping, and test the line leak detectors at least once per year for performance and operational reliability. (Violation 3)

e. conduct effective manual or automatic inventory control procedures for the UST system. (Violation 4)

f. ensure that all USTs had a permanently applied legible tag, label, or mark indicating the tank number either at the top of the fill line or at a nonremovable point in the area. (Violation 5)

g. inspect all sumps, manways, overspill container, or catchment basins associated with the UST system every 60 days to assure that the side, bottom and any penetration point are liquid tight and free from liquid and debris. Notably, the UST No. 3 sump and the spill buckets for UST No. 3 and 4 were filled with liquid. (Violation 6)

h. maintain all installation record of the UST system, specially the as-built drawings or plans to accurately depict and describe the sizes, dimensions, and locations of the UST system components. (Violation 7)

i. give the Commission notification that a major UST system construction activity, the replacement of the shear valves and piping, was done. (Violation 8)

11. On November 6, 2009, the Commission sent Respondent a Notice of Enforcement (NOE) citing the above described eight violations and recommending the corrective action needed to correct the deficiency. Respondent received the NOE on November 11, 2009.

12. On February 2, 2011, the ED issued the Executive Director's First Amended Report and Petition to Respondent in accordance with the Water Code § 7.054, alleging that Respondents violated Sections 26.3475(a), (c)(1), and (d) of the Texas Water Code (Water Code) and 30 TAC §§334.6(a)(2); 334.7(d)(2); 334.8(c)(5)(C); 334.42(i); 334.46(i)(2)(B); 334.48(c); 334.49(a), (c)(4); and 334.50(b)(1)(A), (b)(2), (b)(2)(A)(i)(III); (d)(1)(B)(ii) and (iii)(I).

13. The ED recommended the imposition of an administrative penalty against Respondent in the total amount of $48,453.00, which included an 84 percent enhancement, and corrective action to bring the Facility into compliance.

14. Respondent timely requested a contested case hearing.

15. On July 26, 2010, the case was referred to the State Office of Administrative Hearings for a contested case hearing.

16. On August 5, 2010, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondent, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

17. By joint motion to waive appearance at the preliminary hearing and submission of an agreed hearing, the preliminary hearing was waived and the exhibits admitted establishing jurisdiction to proceed.

18. The hearing on the merits was conducted on March 30 and 31, 2011, in Austin, Texas, by Administrative Law Judge Catherine Egan. The ED was represented by Attorneys Gary Shiu and Tracy Chandler from the Commission's Litigation Division. Respondent was represented by Attorneys Arturo Rodriguez and Bradford Bullock of Russell and Rodriguez, L.L.P.

19. Respondent's failure to operate and maintain the corrosion protection system to ensure that corrosion protection would be continuously provided to all underground mental components

of the UST system, created a major potential for leakage of gasoline that could harm the environment and human health.

20. Respondent's failure to monitor the USTs for release every month, the failure to provide proper release detection for the USTs' associated piping; and the failure to test the line leak detectors at least once per year for performance and operational reliability, created a major potential for harm to the environment and to health human.

21. Respondent's failure to conduct effective manual or automatic inventory control procedures for the USTs at the Facility, created a major potential for harm to the environment and to health human.

22. The Facility's compliance history for the preceding five years included 17 notices of violations and two Enforcement Orders.

23. Respondent was not the owner at the time the Facility received the 17 notices of violations and the two Enforcement Orders.

24. The ED properly considered the compliance history of the Facility in assessing an 84 percent enhancement penalty.

25. Based upon the evidence presented at the hearing on the merits, an appropriate administrative penalty would be $48,453.00 taking into account the Facility's compliance history, culpability, economic benefit, good faith efforts to comply, release potential and other factors set forth in Water Code § 7.053 and in the Commission's 2002 Penalty Policy.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE (Water Code) §§ 7.051 and 7.073, 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, and may order the violator to take corrective action.

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. As required by Water Code § 7.055 and 30 TEX ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the Executive Director's First Amended Report and Petition and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.

4. Respondent timely requested a contested case hearing, pursuant to 30 TAC § 70.105.

5. As required by TEX. GOV'T CODE ANN. §§ 2001. 051(1) and 2001.052; Water Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was 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. Respondent is subject to the Commission's jurisdiction in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to Water Code § 5.013

8. Respondent was responsible for compliance with the Commission rules pursuant to 30 TAC §§334.1(b)(3) and 334.2(73).

9. Based on the above Findings of Fact, Respondent violated Water Code § 26.3475(a), (c)(1), and (d), and 30 TAC §§ 334.6(a)(2); 334.7(d)(2); 334.8(c)(5)(C); 334.42(i); 334.46(i)(2)(B); 334.48(c); 334.49(a) and (c)(4); and 334.50(b)(1)(A), (b)(2), (b)(2)(A)(i)(III), (d)(1)(B)(ii) and (d)(1)(B)(iii); in regard to the operation of the Facility's USTs.

10. The ED's recommended administrative penalty properly 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.

11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

12. Based on consideration of the above Findings of Fact, the factors set out in Water Code § 7.053, the Commission's Penalty Policy, and Revision No. 12 of the Enforcement Initiation Criteria, the ED correctly calculated the penalties for each of the eight violations, resulting in a total administrative penalty of $48,453.00.

13. 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. Old Tymer Enterprises, Inc. d/b/a the Olde Tymer is assessed an administrative penalty in the amount of $48,453.00 for violations of the Texas Water Code and the Commission rules. The payment of this administrative penalty and the compliance of Old Tymer Enterprises, Inc. d/b/a The Old 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 Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

2. Respondent is ordered to implement the following corrective measures immediately:

   a. Begin conducting effective manual or automatic inventory control procedures for all USTs, as required by 30 TAC § 334.48;

   b. Begin inspecting all sumps, manways, overspill containers, and catchment basins at the Facility every 60 days, as required by 30 TAC § 334.42; and

   c. Begin providing notification of all major UST construction activities, as required by 30 TAC § 334.6.

3. Respondent is ordered to implement the following corrective measure within 30 day after the effective date of the Commission Order:

   a. Submit an amended registration to reflect the complete name of the Facility operator contact and a consistent and accurate description of the composition of the USTs at the Facility, as required by 30 TAC § 334.7 to:

      Registration and Reporting Section
      Permitting & Remediation Support Division, MC 138
      Texas Commission on Environmental Quality
      P.O. Box 13087
      Austin, Texas 78711-3087

   b. Begin conducting bimonthly inspections of the cathodic protection system, ensure that the wiring for the UST Nos. 1 and 4 is present and connected and that other system components are functioning as designed, and conduct the required triennial testing of the cathodic protections system, as required by 30 TAC § 334.49.

c. Install and implement a release detection method for the USTs and the piping associated with the USTs and test the line leak detector for performance and operational reliability, as required by 30 TAC § 334.50.

d. Permanently apply or affix tags, labels, or marking to the UST fill tubes with an identification number that matches the number list on the UST registration and self-certification for, as required by 30 TAC § 334.8.

e. Begin maintaining all records pertaining to the UST system components required by 30 TAC § 334.10.

4. Within 45 days after the effective date of the Commission 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 Paragraphs Nos. 3 and 4. 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 summiting false information, including the possibility of fines and imprisonment of knowing violations.

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MD 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

With a copy to:

Joel Anderson, Waste Section Manager
San Antonio Regional Office
Texas Commission on Environmental Quality
14250 Judson Road
San Antonio, Texas 78233-4480

5. 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 Respondent has not complied with one or more of the terms or conditions in this Commission Order.

6. 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.

7. 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.

8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent's attorney and to Respondent.

9. 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

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Bryan W. Shaw, PhD, Chairman
For the Commission