State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

May 18, 2011

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

Re: SOAH Docket No. 582-11-0541; TCEQ Docket No. 2010-0157-PST-E; In Re: Executive Director Of The Texas Commission On Environmental Quality v. David Higginbotham and Katha Higginbotham

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 June 7, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than June 17, 2011.

This matter has been designated **TCEQ Docket No. 2010-0157-PST-E; SOAH Docket No. 582-11-0541**. 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,

Rebecca S. Smith

Rebecca S. Smith
Administrative Law Judge

RSS/Ls
Enclosures
cc: Mailing List

300 West 15th Street Suite 502 Austin, Texas 78701 / P.O. Box 13025 Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.475.4994 (Fax)
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SOAH DOCKET NO. 582-11-0541
TCEQ DOCKET NO. 2010-0157-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
	§	
	§	
	§	**OF**
V.	§	
	§	
DAVID HIGGINBOTHAM AND KATHA HIGGINBOTHAM,	§	
Respondents	§	
	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) brings this enforcement action against David and Katha Higginbotham (Respondents). The ED alleges that Respondents violated the Commission's rules relating to petroleum underground storage tanks (USTs). The Administrative Law Judge (ALJ) finds that the ED proved the violation and recommends that the Commission approve the requested administrative penalty and corrective action.

I. JURISDICTION AND NOTICE

Respondent does not dispute the Commission's jurisdiction or notice, so no further discussion regarding notice or jurisdiction is included here. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law concerning jurisdiction and notice.

II. PROCEDURAL HISTORY

Respondents own property they inherited that is located at 11231 Rose Road, in Conroe, Montgomery County, Texas. This property has four unused USTs on it. The USTs date from the time when the property was owned by Mr. Higginbotham's father.

On January 13, 2010, the ED issued a notice of enforcement (NOE) to Respondents, alleging that Respondents did not timely conduct a tank integrity assessment and equip the UST with cathodic protection.[1] On July 16, 2010, the ED issued a preliminary report and petition (Petition) alleging one violation for failure to remove a

[1] ED. Ex. 3.

UST system that has not been timely brought into compliance with upgrade requirements and mailed a copy of it to Respondents.[2] On August 6, 2010, Respondents filed a request for a contested case hearing.[3]

On September 24, 2010, the ED requested the Commission's Chief Clerk to refer this dispute to the State Office of Administrative Hearings (SOAH) for hearing,[4] which the Chief Clerk did on October 1, 2010. On October 15, 2010, the Chief Clerk mailed notice of a November 18, 2010 preliminary hearing to Respondents, the ED, and the Public Interest Counsel (PIC).[5] The preliminary hearing was held on that date.

The hearing on the merits convened on March 21, 2010, before ALJ Rebecca S. Smith. The ED was represented by Tammy Mitchell. The Higginbothams represented themselves.

III. ALLEGED VIOLATION

The ED alleges that Respondents violated one rule relating to USTs. Specifically, the ED alleges that Respondents failed to 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 was not brought into timely compliance with the upgrade requirements, in violation of 30 TEX. ADMIN. CODE § 334.47(a)(2).

Respondents contend that there was no reason to remove the USTs, which are out of service and inaccessible. Respondents also argue that, according to earlier Texas Natural Resource Conservation Commission (TNRCC) documents, the USTs were exempt from regulation. Finally, Respondents argue that they lack the money to comply and that it should be the State of Texas's responsibility to remove the USTs or to pay for their removal.

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[2] ED Ex. A.

[3] ED Ex. B.

[4] ED Ex. C.

[5] ED Ex. D.

A. The Rule

As discussed, the TCEQ rules relating to USTs require that any UST system with components that were not timely upgraded must be removed from service within 60 days of the upgrade implementation date.[6] Among the items to be upgraded is the cathodic protection system. According to the rules, USTs installed before December 22, 1988, which contain or have contained any regulated substances must have upgraded their cathodic protection by December 22, 1998.[7]

The USTs in question were installed around 1972.

B. The Evidence

1. The ED

The ED introduced evidence concerning three investigations relating to the Higginbothams' USTs. The first investigation was conducted by a former TCEQ employee, Janie Munoz. Ms. Munoz drafted a report in which she noted the existence of USTs on the property. Neither she nor anyone else knew what material the USTs were made of. She noted a violation of failing to conduct a tank integrity assessment and install UST cathodic protection under 30 TEX. ADMIN. CODE § 334.47(b)(1)(A). Based on these findings, on August 27, 2007, a Notice of Violation for this alleged violation was sent to Mr. Higginbotham. The Notice of Violation indicated that the options were either permanent removal from service or retrofitting the USTs with corrosion protection that meets the upgrade requirements.

TCEQ environmental investigator Jocina Chase conducted the second investigation. This was a record review to see if the Higginbothams had come into compliance. Ms. Chase concluded that they had not complied. The Higginbothams received a Notice of Violation, dated November 5, 2009, as a result of this investigation.

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[6] 30 TEX. ADMIN. CODE § 334.47(a)(2).

[7] 30 TEX. ADMIN. CODE § 334.44(b)(1)(A).

Ms. Chase conducted a final investigation in December 2009. This investigation was a follow-up record review, and as in the previous record review, Ms. Chase determined that the Higginbothams remained out of compliance. On January 13, 2010, a Notice of Enforcement was sent to the Higginbothams.[8]

Ms. Chase testified that when she examined the USTs, she looked inside them and saw some liquid. She could not identify the liquid, although she said that she could smell gasoline.

Ms. Chase testified that the USTs were not exempt from regulation. She also explained the reason behind the rule requiring upgrade or permanent removal from service: the rule protects soil and water from possibly leaking tanks. She also testified that someone could place liquid in the tanks. She finally testified that the USTs did not meet the requirements for being temporarily out of service, because the rules for temporary removal from service require that the UST be adequately protected from corrosion.[9]

The ED also introduced evidence that the Higginbothams owned the USTs. The facility is currently out of service, and there are no dispensers there. Therefore, the monthly throughput is zero.

2. The Higginbothams

Both Mr. and Mrs. Higginbotham testified. Mrs. Higginbotham testified that they have attempted in good faith to comply with the rules, and that they paid all the fees and back fees for the USTs. She also testified that they inherited the property in 1993 and that they never used the USTs. She testified that they live in the building that used to be the shop and that they lack the money to remove the tanks. She believes that the removal law was written to hold people who install USTs responsible, but that since they did not install the USTs, the State of Texas should be responsible for removing them.

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[8] ED Ex. 3.

[9] The Higginbothams cross-examined Ms. Chase about a 1986 form in which Mr. Higginbotham's father had indicated that the USTs had painted protection on their exterior. (ED Ex. 1 at 40) Ms. Chase testified that painting was not part of cathodic protection and noted that Mr. Higginbotham's father did not check the box indicating that the USTs had cathodic protection.

Mr. Higginbotham testified that he was surprised to see moisture in the tanks when Ms. Chase opened them on her visit. He thinks that water might have leaked into them through planter boxes that the Higginbothams placed over the area where the pumps used to be.

The Higginbothams introduced a document from the TNRCC that indicates the tanks are out of service and exempts them from financial responsibility requirements. This document states that the USTs are conditionally exempt from the financial responsibility (that is, insurance) requirements. Nevertheless, this document also states, in bold, "exemption from UST financial responsibility does not necessarily exempt this facility from other technical and/or administrative requirements of the TNRCC and/or other federal, state, and local jurisdictions, when applicable."[10]

C. Analysis

The TCEQ rules cover the Higginbothams' USTs, which do not meet the requirements for exemption or exclusion under 30 TEX. ADMIN. CODE §§ 334.3 or 334.4. As mentioned above, the rules require USTs that contain or *have contained* any regulated substances to have upgraded their cathodic protection. Although it is undisputed that the Higginbothams themselves have not used the USTs to store gasoline, the USTs have contained gasoline in the past. They are covered by the rules, and the rules require removal.

Additionally, although the Higginbothams essentially argue that the USTs cannot cause any harm because they are empty, the fact remains that there was some amount of liquid in them and that Ms. Chase smelled gasoline. This liquid could leak from tanks that remain in place. The ALJ certainly agrees that the Higginbothams do not intend to cause any harm and appear to have complied with the registration rules for USTs. The ALJ also believes that the Higginbothams in good faith read the exemption from the

[10] Respondents' Ex. 4.

financial responsibility requirements to be a broader exemption than it is.[11] Nevertheless, the TCEQ's UST rules are clear, and they indicate that there has been a violation.

IV. ADMINISTRATIVE PENALTY

Texas Water Code § 7.053 requires the Commission to consider the following factors when determining the amount of an administrative penalty:

- 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.

Additionally, the Commission has adopted a penalty policy to guide the computation and assessment of administrative penalties.

The ED supported its requested penalty by presenting the testimony of Roshondra Lowe, an enforcement coordinator with the Commission. Ms. Lowe described how she used the penalty policy to perform calculations shown in the penalty calculation worksheet and reach the penalty amount. Ms. Lowe testified that the base penalty amount was $10,000, which was taken from the penalty policy. Using the Environmental, Property, and Human Health Matrix, she classified any release as potential, not actual, because she was not sure if there was an actual release. She classified any potential release as major harm because it had the potential of releasing pollutants that would exceed levels that are protective of human health or environmental receptors. Based on this classification, she used an amount that was 25% of the $10,000 base penalty, or $2,500. She calculated using one quarterly event, with no benefit for good faith efforts to comply since the USTs are still out of compliance. The economic benefits did not affect

[11] The Higginbothams wrote a letter in response to the first inspection indicating that the tanks were exempt from the "UST financial responsibility requirements." (ED Ex. 1 at 46) Although the ALJ believes the Higginbothams acted in good faith, they were aware of that language, which specifically limits the exemption to the financial responsibility requirements. The ALJ finds credible that they believed despite this limiting language, that they were entirely exempt. That belief, however, does not trump the actual language of the exemption, which provides that the tanks remain subject to other regulations.

the penalty because the delayed costs were less than $15,000. There was a 10% adjustment for two previous NOVs (5% per NOV.) This results in a final penalty of $2,750.

The Higginbothams raised the issue of their ability to pay the penalty. In response, the ED presented the testimony of Senior Financial Analyst Rob Norris. Mr. Norris determined that the Higginbothams were not eligible for financial review because the penalty was less than the $3,600 minimum for eligibility. Mr. Norris also testified about the Higginbotham's assets, which the ALJ will disregard as irrelevant to the proceeding. The Higginbothams moved to reopen the record to introduce additional evidence about their ability to pay and the cost of removal. The ALJ denied this motion.

In fact, the Higginbotham's primary concern appears to be the cost of removal of the USTs. Mr. Norris testified that there is no program to help offset those costs, unless there is a need for remediation because of a release. Although the ALJ certainly understands that the cost could be high, under the law, leaving the tanks in place as they are is not an option. And although the Higginbothams argue that it should be the State's responsibility to pay for removal, there is no evidence that a program is in place to do that, and the ALJ cannot order such action.

Ms. Lowe's calculation appears accurate and the requested penalty appropriate. The ALJ recommends that the Commission assess Respondents a $2,750 penalty.

SIGNED May 18, 2011.

Rebecca S. Smith

REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against and Requiring Corrective Action by David Higginbotham and Katha Higginbotham

TCEQ DOCKET NO. 2010-0157-PST-E
SOAH DOCKET NO. 582-11-0541

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 requiring corrective action from David Higginbotham and Katha Higginbotham (Respondents). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 21, 2011, in Austin, Texas, and presented the Proposal for Decision.

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. David and Katha Higginbotham (Respondents) own a former gasoline station located at 11231 Rose Road, Conroe, Montgomery County, Texas (Facility).
2. Respondents own four underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
3. On July 19, 2007, TCEQ Investigator Janie Munoz conducted an inspection of the Facility and determined that Respondents had committed one violation of the TCEQ rules regarding USTs.

4. On August 27, 2007, the TCEQ issued a Notice of Violation to Respondents.

5. On October 30, 2009, TCEQ Investigator Jocina Chase conducted a follow-up inspection and determined that Respondents remained in violation of the TCEQ rules.

6. On November 5, 2009, the TCEQ issued a second Notice of Violation to Respondents.

7. On December 22, 2009, Ms. Chase conducted a second follow-up record review and determined that Respondents had not corrected their alleged violation.

8. On January 13, 2010, the TCEQ issued a Notice of Enforcement to Respondents.

9. On July 16, 2010, the ED filed a Preliminary Report and Petition (EDPRP) with the Commission's Chief Clerk and mailed a copy of it by U.S. first class mail and certified mail, return receipt requested, to Respondents at 11231 Rose Road, Conroe, Texas 77303. The Preliminary Report and Petition alleged that Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2).

10. On August 6, 2010, Respondents requested a contested case hearing on the allegations in the EDPRP, and on October 1, 2010, the Chief Clerk referred this dispute to SOAH for hearing.

11. A Notice of Preliminary Hearing was issued on October 15, 2010.

12. A preliminary hearing was held on November 18, 2010, before ALJ Rebecca S. Smith at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.

13. The evidentiary hearing convened on March 21, 2011, before ALJ Rebecca S. Smith also at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th

Street, Austin, Texas. The ED was represented by Staff Attorney Tammy Mitchell. Respondents represented themselves. The record closed that day.

14. Respondents failed to 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 was not brought into timely compliance with the upgrade requirements.

15. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of $2,750.

16. An administrative penalty of $2,750 takes into account the factors contained in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed $10,000 per violation, per day for the violations alleged in this proceeding.

3. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.

4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the proposed penalties and corrective actions.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondents were notified of the hearing on the alleged violation and the proposed penalties and corrective actions.

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 and Conclusions of Law, Respondents violated 30 TEX. ADMIN. CODE § 334.47(a)(2) by failing to 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 was not brought into timely compliance with the upgrade requirements.

8. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:

- Its 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;
- The 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 out 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 TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of $2,750 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 that the Executive Director 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. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall pay an administrative penalty in the amount of $2,750 for the violation of 30 TEX. ADMIN. CODE § 334.47(a)(2). The payment of this administrative penalty and compliance with all the terms and conditions set forth in this Order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: David and Katha Higginbotham, TCEQ DOCKET NO. 2010-0157-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. Within 30 days after the effective date of this Order, David and Katha Higginbotham shall permanently remove the UST system from service, in accordance with 30 TEX. ADMIN. CODE § 334.55.

3. Within 45 days after the effective date of this Order, David and Katha Higginbotham 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 paragraph 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 or 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:

Waste Section Manager
Houston Regional Office
Texas Commission on Environmental Quality
5425 Polk Avenue, Suite H
Houston, Texas 77023-1486

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice

to David and Katha Higginbotham if the Executive Director determines that Mr. and Mrs. Higginbotham have not complied with one or more of the terms or conditions in this 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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to David and Katha Higginbotham.

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, Ph.D., Chairman
For the Commission