SOAH DOCKET NO. 582-11-1709
TCEQ DOCKET NO. 2010-0503-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
VS.	§	**OF**
Mohamed Basheer DBA EXXON 45, Respondent	§	**ADMINISTRATIVE HEARINGS**

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct a minor typographical error in Finding of Fact No. 10. Specifically, the word "a" should be removed.

2. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct a minor typographical error in Finding of Fact No. 25. Specifically, the date "March 10, 2010 should be replaced with "March 25, 2010."[1]

[1] ED-9.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

Respectfully submitted,
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by _____

Tammy L. Mitchell
State Bar of Texas No. 24058003
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2012, the original of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Exceptions") were 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 Exceptions were sent to the following persons by the method of service indicated:

Jennifer Fleck Ted A. Cox, P.C. 4010 Dacoma, Suite 100 Houston, Texas 77092	Via facsimile to (713) 956-8485 and Via First Class Mail and Certified Mail, Article No. 7004 2510 0003 9118 0207
The Honorable Kerrie Jo Qualtrough State Office of Administrative Hearings William P. Clements Building 300 West 15th Street, Suite 502 P.O. Box 13025 Austin, Texas 78711-3025	Via Interagency Mail and via facsimile to (512) 322-2061

I further certify that on this day a true and correct copy of the foregoing Exceptions were electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.

Tammy L. Mitchell
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against
Mohamed Basheer d/b/a Exxon 45
TCEQ Docket No. 2010-0503-PST-E
SOAH Docket No. 582-11-1709

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED's) Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against Mohamed Basheer d/b/a Exxon 45 (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. On August 12, 2010, the ED filed his "Executive Director's Preliminary Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing an Administrative Penalty Against and Requiring Certain Actions of Mohamed Basheer d/b/a Exxon 45" (EDPRP) with the Office of the Chief Clerk.

2. On August 12, 2010, the Executive Director mailed the EDPRP to Respondent at 6101 Broadway Street, Galveston, Texas 77551.

3. On November 1, 2010, Respondent filed an answer to the EDPRP and requested a hearing.

4. On December 2, 2010, the Executive Director referred this matter to SOAH for an evidentiary hearing on the merits.

5. On December 16, 2010, the TCEQ's Chief Clerk mailed notice of the preliminary hearing scheduled for January 20, 2011, to Respondent at 6101 Broadway Street, Galveston, Texas 77551.

6. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice, and attached EDPRP, being deemed as true, and the relief sought in the notice possibly being granted by default.

7. On January 18, 2011, the ED and Respondent filed a "Joint Motion to Waive Appearance at the Preliminary Hearing and Submission of Agreed Hearing Schedule," containing a proposed hearing schedule, that the ALJ adopted.

8. On September 8, 2011, the ALJ convened the hearing on the merits in Houston, Texas. Both parties participated in the hearing.

9. Respondent owns and operates an underground storage tank (UST) system and a convenience store with retail sales of gasoline located at 6101 Broadway Street, Galveston, Galveston County, Texas. The business is called the Exxon 45.

10. The Exxon 45 has ~~a~~ TCEQ petroleum storage tanks facility identification number 26658.

11. The USTs at the Exxon 45 are not exempt or excluded from regulation and contain a regulated petroleum substance.

12. The Exxon 45 consists of one or more sources as defined in TEX. HEALTH & SAFETY CODE § 382.003(12).

13. During an investigation conducted on February 11, 2010, a Galveston County Air Pollution Control investigator documented multiple UST violations at the Exxon 45.

14. At the time of the February 11, 2010 investigation, Respondent was the owner of the Exxon 45.

15. At the time of the February 11, 2010 investigation, Respondent was the operator of the Exxon 45.

16. Respondent failed to conduct daily inspections of the Exxon 45's Stage II vapor recovery system.

17. Respondent failed to have at least one Exxon 45 representative receive training in the operation and maintenance of the Stage II vapor recovery system, and failed to have each current employee receive in-house Stage II vapor recovery training regarding the purpose and correct operating procedure of the vapor recovery system.

18. Respondent failed to verify proper operation of the Stage II equipment at least once every 12 months or upon major system replacement or modification, whichever occurred first.

19. Respondent failed to maintain Stage II records at the Exxon 45.

20. Respondent failed to provide notification of a scheduled test cancellation within 24 hours of cancellation.

21. Respondent failed to upgrade the Exxon 45's Stage II equipment to onboard refueling vapor recovery (ORVR) compatible systems. At the time of the Investigation, the Exxon 45 had not installed an ORVR system.

22. Respondent entered into a TCEQ Agreed Order for enforcement matter 2007-1087-PST-E (Agreed Order), dated March 10, 2008.

23. Ordering Provision 2.a.ii. of the Agreed Order required Respondent to monitor the USTs at the Exxon 45 for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring).

24. Ordering Provision 2.a.ii. of the Agreed Order required Respondent to conduct proper inventory control procedures for all of the USTs at the Exxon 45.

25. Respondent owned and operated the Exxon 45 when the violations of the Agreed Order were documented on March ~~10~~25, 2010.

26. Respondent failed to monitor USTs at the Exxon 45 for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring).

27. Respondent failed to conduct proper inventory control procedures for all USTs at the Exxon 45.

28. Respondent submitted financial records to the ED for an analysis of his inability to pay the recommended administrative penalty.

29. Respondent did not provide financial information regarding two bank accounts that he owns.

30. The Executive Director and Respondent stipulated at the evidentiary hearing that the administrative penalty of $39,964 specified in the Penalty Calculation Worksheet was correctly calculated in accordance with the TCEQ Penalty Policy, effective September, 2002, and taking into account the factors set forth in TEXAS WATER CODE § 7.053.

31. Ordering Provisions Nos. 19.a. through 19.c. of the EDPRP are the appropriate corrective actions for the alleged violations in this enforcement matter.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE §§ 7.051 and 7.073, 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 who violates a Commission administrative rule, order, or permit, and also may order the violator to take corrective action.

2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with proposed Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.

3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to TEX. WATER CODE § 5.013.

4. Respondent timely requested a contested case hearing, pursuant to 30 TEX. ADMIN. CODE § 70.105.

5. Respondent received sufficient notice of the hearing on the alleged violations and the recommended penalties and corrective actions, pursuant to TEX. GOV'T

CODE §§ 2001.051(1) and 2001.052; TEX. WATER CODE § 7.058; and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, 70.104, and 80.6(b)(3).

6. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. WATER CODE § 26.3475(c)(1); 30 TEX. ADMIN CODE §§ 115.242(1)(C), 115.244(1), 115.245(2), 115.245(3), 115.246(5), 115.248(1), 334.50(b)(1)(A) and 334.50(d)(1)(B); and TCEQ Agreed Order Docket No. 2007-1087-PST-E, Ordering Provision 2.a.ii.

7. Based on consideration of the above Findings of Fact, the elements set forth in TEX. WATER CODE §§ 7.052 and 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for the alleged violations, resulting in a total administrative penalty of $39,964.

8. The Executive Director met his burden of proof to show an administrative penalty of $39,964 is warranted for the violations found and should be assessed against Respondent.

9. Pursuant to 30 TEX. ADMIN. CODE § 70.8, Respondent waived his inability to pay claim because he did not provide records for two bank accounts, which are potentially relevant financial information.

10. Respondent is responsible for paying the administrative penalty.

11. Although Respondent has waived his inability to pay claim, it would be more just, in accordance with TEX. WATER CODE § 7.053(4), for the Respondent to be allowed to pay the penalty over 36 months.

12. To bring the Exxon 45 into compliance, Respondent should take the corrective actions proposed by the ED and set out below in the Order.

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. Respondent is assessed an administrative penalty in the amount of $39,964 for violations of the following statutes, rules, and order: TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. WATER CODE § 26.3475(c)(1); 30 TEX. ADMIN CODE §§ 115.242(1)(C), 115.244(1), 115.245(2), 115.245(3), 115.246(5), 115.248(1), 334.50(b)(1)(A) and 334.50(d)(1)(B); and TCEQ Agreed Order Docket No. 2007-1087-PST-E, Ordering Provision 2.a.ii.

2. Within 30 days after the effective date of this Order, Respondent shall pay $1,114 of the administrative penalty. The remaining amount of $38,850 of the administrative penalty shall be payable in 35 monthly payments of $1,110 each. The first monthly payment shall be paid within 30 days after the effective date of this Order. The subsequent payments shall be paid not later than 30 days following the due date of the previous payment. If Respondent fails to timely and satisfactorily comply with the payment requirements of this Order, including the payment schedule, the ED may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, Respondent's failure to meet the payment schedule of this Order constitutes the failure by Respondent to timely and satisfactorily comply with all of the terms of this Order.

3. The full payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.

4. 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: Mohamed Basheer d/b/a Exxon 45, Docket No. 2010-0503-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

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 ED 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 TEX. GOV'T CODE § 2001.144 and 30 TAC § 80.273.

8. The Commission's Chief Clerk shall forward a copy of this Order 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

_____

Bryan W. Shaw, Ph. D., Chairman
For the Commission

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Bryan W. Shaw, Ph. D., Chairman
For the Commission