

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 5, 2011

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

Re: SOAH Docket No. 582-11-0470; TCEQ Docket No. 2010-0597-PST-E;
Executive Director of the Texas Commission on Environmental Quality v.
Waylon Collins

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 April 25, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than May 5, 2011.

This matter has been designated **TCEQ Docket No. 2010-0597-PST-E; SOAH Docket No. 582-11-0470**. 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,

A handwritten signature in cursive script that reads "Roy G. Scudday".

Roy G. Scudday
Administrative Law Judge

RGS/ap
Enclosures
cc: Mailing List

**SOAH DOCKET NO. 582-11-0470
TCEQ DOCKET NO. 2010-0597-PST-E**

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§ § § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V.		
WAYLON COLLINS, Respondent		

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$2,625 in administrative penalties against and obtain corrective action from Waylon Collins (Respondent) for violations of 30 TEX. ADMIN. CODE (TAC) §§ 334.47(a)(2), 334.54(b)(2), and 334.22(a). Simply stated, the ED alleges that Respondent failed to permanently remove from service underground storage tank (UST) systems and failed to timely pay administrative fees.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. The Commission should find that the violations occurred, assess Respondent an administrative penalty of \$2,625, and order that Respondent take corrective action.

II. PROCEDURAL HISTORY AND JURISDICTION

The hearing convened on March 30, 2010, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Stephanie J. Frazee, Attorney, Litigation Division. The Office of Public Interest Counsel was represented by attorney Amy Swanholm. Respondent appeared on his own behalf. The record closed on the date of the hearing.

Jurisdiction was proved as found in the order dated December 3, 2010. Undisputed procedural facts are set out in findings in the Proposed Order.

III. DISCUSSION

A. Violations

Waylon Collins is the registered owner of a closed gasoline station located at 301 S.H. 70N, Roby, Fisher County, Texas (Facility). On October 1, 2009, TCEQ Investigator Patty Gough, conducted a petroleum storage tank (PST) out of service inspection of the Facility. As a result of her inspection, Investigator Gough determined that Respondent had violated rules within the Commission's jurisdiction as follows:

Respondent failed to update TCEQ UST Registration Form;

Respondent failed to perform the permanent removal of a UST that has not met upgrade requirements;

Respondent failed to properly secure UST's against tampering and vandalism; and

Respondent failed to have records available for inspection.

On March 30, 2010, Investigator Gough conducted a follow-up inspection after the issuance of a Notice of Violation on November 30, 2009, which Notice had given Respondent until February 26, 2010, to bring the Facility into compliance. As a result of her inspection, Investigator Gough determined that the Facility had the same violations as on the previous inspection.

As part of her investigations, Investigator Gough found the UST Registration for the Facility dated January 9, 2003, signed by Respondent as Owner. In addition, she found that the records of the Fisher County Appraisal District showed Respondent as the owner of the Facility.

Respondent testified that he did not purchase the property, only the equipment on it, including the storage tanks.

Under TEX. WATER CODE (Code) § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Code.¹ Additionally, the Commission may order the violator to take corrective action.²

In this case, Respondent is alleged to have violated 30 TAC §§ 334.47(a)(2), 334.54(b)(2), and 334.22(a), which are rules within the Commission's authority. Specifically, the ED alleges that Respondent violated 30 TAC §§ 334.47(a)(2) and 334.54(b)(2) by failing to permanently 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 is not brought into timely compliance with the upgrade requirements, and by failing to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access tampering or vandalism by unauthorized persons. In addition, Respondent is alleged to have violated 30 TAC § 334.22(a) and TEX. WATER CODE § 5.702 by failing to pay the outstanding UST fees and associated late fees for the Facility for fiscal years 2005 through 2007.

The rule at 30 TAC § 334.1(b)(3) provides that the requirements and provisions of the rules regarding USTs apply equally to all owners of UST systems. "Owner" is defined in the rule at 30 TAC § 334.2(73) as follows:

Any person who holds legal possession or ownership of an interest in an underground storage tank (UST) system or an aboveground storage tank (AST). For the purposes of this chapter, if the actual ownership of a UST system or an AST is uncertain,

¹ Code § 7.052(c).

² Code § 7.073.

unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a UST system or AST with the commission under § 334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration.

Based on the evidence in the record, Respondent is the owner of the Facility, and, as a result, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Order.

Respondent does not dispute that the UST system has not been permanently removed or that he has not paid the outstanding UST fees and associated late fees for the Facility.

B. Penalties

The total administrative penalty sought for the two violations is \$2,625. The penalty amount for the first violation, failure to permanently remove a UST, comprises a penalty of \$2,500 for one monthly violation event. Because Respondent had one previous Notice of Violation for the same or similar violations, the penalty was enhanced by 5% or \$125, for a total of \$2,625. No penalty was assessed for the second violation as the fees would be billed as part of the routine fee billing process.

The proposed penalty for the Facility of \$2,625 was assessed under the terms of the Commission's 2002 Penalty Policy.³ Respondent did not dispute the overall accuracy of the ED's calculation of the penalty.

³ ED Ex.13, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

Based on the above analysis, the ALJ concludes that a penalty of \$2,625 is consistent with the factors in Code § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.⁴ The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

In addition, based on the evidence, the ALJ recommends that Respondent be ordered to permanently remove the UST system from service, in accordance with 30 TAC § 334.55.

SIGNED April 5, 2011.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁴ Under Code § 7.053, the ED must consider the following factors:

- 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.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Requiring Corrective Action by
Waylon Collins
TCEQ DOCKET NO. 2010-0597-PST-E
SOAH DOCKET NO. 582-11-0470**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Second Amended Report and Petition (EDSARP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action from Waylon Collins (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on March 30, 2011, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel.

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. Waylon Collins. (Respondent) is the record owner of a closed gasoline station located at 301 S.H. 70N, Roby, Fisher County, Texas (Facility).

2. On October 1, 2009, TCEQ Investigator Patty Gough, conducted a petroleum storage tank (PST) out of service inspection of the Facility. As a result of her inspection, Investigator Gough determined that Respondent had committed four violations of the TCEQ rules regarding underground storage tanks (UST).
3. On March 30, 2010, Investigator Gough conducted a follow-up inspection after the issuance of a Notice of Violation on November 30, 2009, which set forth four violations: failure to update TCEQ UST Registration Form; failure to perform the permanent removal of a UST that has not met upgrade requirements; failure to properly secure UST's against tampering and vandalism; and failure to have records available for inspection. As a result of her inspection, Investigator Gough determined that the Facility had the same violations as on the October 1, 2009 inspection.
4. The UST Registration for the Facility dated January 9, 2003, was signed by Respondent as Owner.
5. The records of the Fisher County Appraisal District show Respondent as the owner of the Facility.
6. Respondent is the owner of the Facility and responsible for its compliance with the rules of TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) §§ 334.1(b)(3) and 334.2(73).
7. On April 9, 2010, the ED issued a Notice of Enforcement for the Facility to Respondent regarding the violations found in the inspection on March 30, 2010.
8. On March 24, 2011, the ED issued the EDSARP in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated 30 TAC §§ 334.47(a)(2), 334.54(b)(2), and 334.22(a), and Code § 5.702, specifically for failing to permanently remove UST systems from service and failing to timely pay annual fees.

9. The ED recommended the imposition of an administrative penalty in the total amount of \$2,625, and corrective action to bring the site into compliance.
10. Respondent violated 30 TAC §§ 334.47(a)(2), 334.54(b)(2), and 334.22(a), and Code § 5.702, specifically for failing to permanently remove UST systems from service and failing to timely pay annual fees.
11. The penalty amount for the Facility for the first violation, failing to permanently remove a UST system from service, comprises a penalty of \$2,500 for one monthly violation event, for a total of \$2,500. Because Respondent had one previous Notice of Violation for the same or similar violations, the penalty was enhanced by 5% or \$125, for a total of \$2,625.
11. No penalty was requested for the second violation as the fees would be billed as part of the routine fee billing process.
13. An administrative penalty of \$2,625 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
14. On August 9, 2010, Respondent requested a contested case hearing on the allegations in the Executive Director's Preliminary Report and Petition (EDPRP) issued on August 3, 2010.
14. On September 20, 2010, the case was referred to SOAH for a hearing.
15. On November 1, 2010, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
16. The preliminary hearing was waived by the parties, and the ED established jurisdiction to proceed.

17. The hearing on the merits was conducted on March 30, 2011, in Austin, Texas, by ALJ Roy G. Scudday.
18. Respondent represented himself at the hearing, appearing by telephone. The ED was represented by Stephanie J. Frazee, attorney in TCEQ's Litigation Division. The Office of Public Interest Counsel was represented by attorney Amy Swanholm.

II. CONCLUSIONS OF LAW

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002. Additionally, the Commission may order the violator to take corrective action, pursuant to Code § 7.073.
4. As required by Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, or the penalties and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.27, 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. Based on the above Findings of Fact, Respondent violated 30 TAC §§ 334.47(a)(2), 334.54(b)(2), and 334.22(a), and Code § 5.702.
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors 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.
9. The Commission has adopted a Penalty Policy setting forth 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 Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violations and a total administrative penalty of \$2,625 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures 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. Waylon Collins is assessed an administrative penalty in the amount of \$2,625 for violation of 30 TAC §§ 334.47(a)(2) and 334.7(d)(3). The payment of this administrative penalty and Waylon Collin's compliance 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: Waylon Collins; Docket No. 2010-0597-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 from the effective date of the Commission Order, Respondent shall:
 - a. Permanently remove the UST system from service, in accordance with 30 TAC § 334.55; and
 - b. Submit payment for all outstanding fees, including any associated interest and penalties with the notation, "Waylon Collins, TCEQ Financial Administration Account No. 0033911U 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

3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision 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 and 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
Texas Commission on Environmental Quality
Abilene Regional Office
1977 Industrial Boulevard
Abilene, Texas 79602-7833

5. 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 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. As required by Code. § 7.059, 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**