

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

September 20, 2011

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

Re: Executive Director's Exceptions to the Administrative Law Judge's Proposed Order;
TCEQ Docket No. 2010-0834-PST-E; SOAH Docket No. 582-11-1277

Dear Judge Qualtrough:

Enclosed is a true and correct copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip M. Goodwin".

Phillip M. Goodwin, P.G.
Attorney
Litigation Division

Enclosure

cc: Nasrullah Dobani, Director, DOBANI, INC. d/b/a Gulf Freeway Shell, 8115 Gulf Freeway,
Houston, Texas 77017-3622
Blas Coy, Public Interest Counsel, TCEQ

SERVICE LIST

**DOBANI INC. d/b/a Gulf Freeway Shell
SOAH Docket No. 582-11-1277
TCEQ Docket No. 2010-0834-PST-E**

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
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Attorney for the Executive Director

Nasrullah Dobani, Director
DOBANI INC. d/b/a Gulf Freeway Shell
8115 Gulf Freeway
Houston, TX 77017-3622
Fax: (713) 641-6132
Respondent

Blas J. Coy, Jr.
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-6363
Fax: (512) 239-6377

**SOAH DOCKET NO. 582-11-1277
TCEQ DOCKET NO. 2010-0834-PST-E**

**EXECUTIVE DIRECTOR OF THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY, Petitioner**

v.

**DOBANI INC. D/B/A GULF
FREEWAY SHELL, Respondent;
RN1022775955**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

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

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Executive Director" or "ED") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's ("ALJ's") Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

DOBANI INC. d/b/a Gulf Freeway Shell ("Respondent") owns and operates an underground storage tank ("UST") system and a convenience store with retail sales of gasoline located at 8115 Gulf Freeway, Houston, Harris County, Texas (the "Station"). At the time of the investigation performed on April 21, 2010, several violations of state statutes and Commission Rules were noted. All of the violations noted were subsequently corrected prior to the evidentiary hearing held on June 21, 2011. Accordingly, the Executive Director is seeking administrative penalties against the Respondent.

II. Exceptions

The Executive Director agrees with and supports the adoption of the Administrative Law Judge's proposed Order, with suggested Modifications as outlined below.

1. The Executive Director recommends that Conclusion of Law No. 7 of the proposed Order be modified to read "Based on the above Findings of Fact, Respondent violated TEX. WATER CODE § 26.3475(c)(1) and 30 TEX. ADMIN. CODE § 334.50(b)(1)(A), **(d)(1)(B)(ii) and (d)(1)(B)(iii)(I).**" (emphasis added) In the final paragraph of Section III.A.4. of the Proposal for Decision, the ALJ notes that the alleged violations of 30 TEX. ADMIN. CODE § 334.50(d)(1)(B)(ii) and (d)(1)(B)(iii)(I) refer to a method of release detection not employed by Respondent (tank tightness testing with inventory control), thus the ED did not meet his burden of proof regarding these alleged violations. The ED respectfully disagrees, with explanation as follows.

TCEQ rules identify ten methods of release detection, the requirements for which are located in 30 TEX. ADMIN. CODE § 334.50(d)(1) through (d)(10). 30 TEX. ADMIN. CODE § 334.50(d)(1) specifically addresses tank tightness testing and inventory control as a method of release detection, which could only be used as an allowable method of release detection until December 22, 1998. However, 30 TEX. ADMIN. CODE § 334.50(d)(1)(B) also establishes the protocol for performing inventory control to be used for any method of release detection that involves inventory control. In the instant case, Respondent's selected method of release detection was automatic tank

gauging ("ATG") used in conjunction with inventory control, the requirements of which are found in 30 TEX. ADMIN. CODE § 334.50(d)(4). 30 TEX. ADMIN. CODE § 334.50(d)(4)(A)(i) states "Inventory control procedures shall be in compliance with paragraph (1)(B) of this subsection." This subsection incorporates by reference the inventory control protocol detailed in 30 TEX. ADMIN. CODE § 334.50(d)(1)(B) for sites using ATG with inventory control as a primary method of release detection. Based on Findings of Fact Nos. 5 and 6 of the proposed Order, the ALJ found that Respondent was not properly performing inventory control procedures. Due to this incorporation by reference, it is appropriate and necessary to cite violations for not following the prescribed inventory control protocol as a violation of 30 TEX. ADMIN. CODE § 334.50(d)(1)(B).

Another method of release detection that requires release detection is statistical inventory reconciliation ("SIR"), addressed in 30 TEX. ADMIN. CODE § 334.50(d)(1)(B)(9). As with the requirements for release detection using ATG with inventory control, this section also incorporates by reference 30 TEX. ADMIN. CODE § 334.50(d)(1)(B), stating "Inventory control procedures must be in compliance with paragraph (1)(B) of this subsection." Neither 30 TEX. ADMIN. CODE § 334.50(d)(4) [ATG with inventory control] nor 30 TEX. ADMIN. CODE § 334.50(d)(9) [SIR with inventory control] provide specific inventory control requirements, other than to incorporate by reference the inventory control requirements located in 30 TEX. ADMIN. CODE § 334.50(d)(1)(B). It is therefore necessary and appropriate to cite to 30 TEX. ADMIN. CODE § 334.50(d)(1)(B) for any method of release detection that requires the use of inventory control procedures.

2. The Executive Director recommends that the second sentence of Finding of Fact No. 3 of the proposed Order be modified from "Respondent failed to timely renew his TCEQ delivery certificate." to "Respondent failed to timely renew **its** TCEQ delivery certificate." (emphasis added)
3. The Executive Director recommends a new Finding of Fact be inserted between existing Findings of Fact Nos. 13. and 14 in the proposed Order to read "On October 4, 2010, Respondent filed its Answer to the EDPRP." and that the remaining Findings of Fact be renumbered accordingly.
4. The Executive Director recommends that Finding of Fact No. 20 of the proposed Order be modified from "Respondent exhibited good faith in bringing the facility into compliance with the TCEQ's rules." to "Respondent exhibited good faith in bringing the facility into compliance with the TCEQ's rules for the violation of 30 TEX. ADMIN. CODE § 334.8(c)(4)(A)(vii) and (c)(5)(B)(ii)."
5. The Executive Director recommends that Conclusion of Law No. 13 be modified from "Based on the above Findings of Fact, Respondent waived his claim that it has an inability to pay the recommended administrative penalty, pursuant to 30 TEX. ADMIN. CODE § 70.8." to "Based on the above Findings of Fact, Respondent waived **its** claim that it has an inability to pay the recommended administrative penalty, pursuant to 30 TEX. ADMIN. CODE § 70.8." (emphasis added)

III. Prayer

WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposal for Decision and proposed Order before their consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision and proposed Order are inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision and proposed Order. A copy of the Proposal for Decision and proposed Order with the recommended modifications is included as Attachment "A".

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, Division Director
Litigation Division

By Phillip M. Goodwin
Phillip M. Goodwin, P.G.
State Bar of Texas No. 24065309
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0675
(512) 239-3434 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2011, an original and seven (7) copies of the foregoing "Exceptions to Administrative Judge's Proposal for Decision" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.

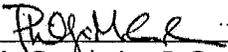
I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, Return Receipt Requested and Via Facsimile (713) 641-6132 to:

Nasrullah Dobani, Director
DOBANI, INC. d/b/a Gulf Freeway Shell
8115 Gulf Freeway
Houston, Texas 77017-3622

CM/RRR No. 7002 2410 0001 7629 6638

I further certify that on this day a true and correct copy of the foregoing Exceptions was electronically filed with the State Office of Administrative Hearings to:

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701



Phillip M. Goddwin, P.G.
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT "A"

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
DOBANI, INC. d/b/a Gulf Freeway Shell
TCEQ Docket No. 2010-0834-PST-E
SOAH Docket No. 582-11-1277**

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 Dobani, Inc. d/b/a Gulf Freeway Shell (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. Dobani, Inc. d/b/a Gulf Freeway Shell (Respondent) owns and operates four underground storage tanks (USTs) and a convenience store with retail sales of gasoline located at 8115 Gulf Freeway, Houston, Texas.
2. On April 19, 2010, Jocina Chase in the TCEQ's Houston Regional Office contacted Respondent to notify him that she would be conducting an inspection of the USTs. Ms. Chase conducted an inspection on April 21, 2010 and documented several violations of the TCEQ's UST rules.

3. The delivery certificate for Respondent's facility expired on August 31, 2008, and it was not in effect at the time of the April 21, 2010 inspection. Respondent failed to timely renew ~~his~~its TCEQ delivery certificate. Respondent failed to submit a properly completed UST registration and self-certification form at least 30 days before the expiration date.
4. On or about April 21, 2010, Respondent did not have a valid and current delivery certificate and had been accepting fuel deliveries without a valid and current delivery certificate prior to that date. Because the delivery certificate was expired, Respondent did not make available a current and valid delivery certificate to a common carrier before Respondent accepted a fuel delivery.
5. On or about April 21, 2010, Respondent did not conduct effective inventory control procedures for all of its USTs involved in the retail sale of petroleum substances used as motor fuel. Respondent did not maintain complete and accurate inventory records. Respondent's monthly inventory control sheets were missing proper closing stick readings and calculations for leak checks and water levels.
6. On or about April 21, 2010, Respondent's automatic tank gauge was not functioning. Respondent failed to monitor the USTs for releases at a frequency of at least once per month. Respondent did not utilize a method of release detection and also failed to reconcile its detailed inventory control records at least once each month, in a manner sufficiently accurate to detect a release that equals or exceeds the sum of 1.0 percent of the total substance flow-through for the month plus 130 gallons.
7. On or about April 21, 2010, Respondent failed to ensure that a legible tag, label, or marking with the tank number was permanently affixed to either the top of the fill tube or to a non-removable point in the immediate area of the fill tube.
8. On or about April 21, 2010, Respondent did not have its fuel delivery records available for review at the time of inspection.
9. Respondent received notice of the violations on or about May 24, 2010.

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

11. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$9,303 against Respondent.

12. The \$9,303 recommended administrative penalty is the accumulation of the penalties assessed for each violation, calculated in the manner provided by the Penalty Policy.

13. On September 2, 2010, the ED mailed the EDPRP to Respondent at 8115 Gulf Freeway, Houston, Texas 77017-3622.

~~13-14.~~ On October 14, 2010, Respondent filed its Answer to the EDPRP.

~~14-15.~~ On November 4, 2010, the ED referred this matter to SOAH for a contested case hearing.

~~15-16.~~ On December 9, 2010, the Commission's Chief Clerk mailed to Respondent a notice of the January 13, 2011 preliminary hearing.

~~16-17.~~ 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.

~~17-18.~~ On January 12, 2011, the ED and Respondent filed a "Joint Motion to Waive Appearance at the Preliminary Hearing and Submission of Agreed Hearing Schedule."

~~18-19.~~ The hearing on the merits was held on June 21, 2011 in Austin, Texas. Both parties participated in the hearing. The ED was represented by Phillip M. Goodwin, P.G., Staff Attorney, Litigation Division. Nasrullah Dobani and Kevin Leasure represented Respondent.

~~19.20.~~ Respondent claimed for the first time at the evidentiary hearing that it was unable to pay the recommended administrative penalty. Respondent did not submit the relevant financial records to the ED at least 30 days before the evidentiary hearing.

~~20.21.~~ Respondent exhibited good faith in bringing the facility into compliance with the TCEQ's rules for the violation of 30 Tex. Admin. Code § 334.8(c)(4)(A)(vii) and (c)(5)(B)(ii).

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 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 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 TAC §§ 1.12, 39.25, 70.104, and 80.6(c).
5. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE § 26.3467(a) and 30 TAC § 334.8(c)(4)(A)(vii), (c)(5)(A)(i), and (c)(5)(B)(ii).
6. Based on the above Findings of Fact, Respondent violated 30 TAC § 334.48(c).

7. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE § 26.3475(c)(1) and 30 TAC § 334.50(b)(1)(A).
8. Based on the above Findings of Fact, Respondent violated 30 TAC § 334.8(c)(5)(C).
9. Based on the above Findings of Fact, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TAC § 115.226(1).
10. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE § 7.053, 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, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.
11. Based on 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 each of the alleged violations, resulting in a total administrative penalty of \$9,303.
12. The ED met his burden of proof to show an administrative penalty of \$9,303 is warranted for the violations found and should be assessed against Respondent.
13. Based on the above Findings of Fact, Respondent waived ~~his~~its claim that it has an inability to pay the recommended administrative penalty, pursuant to 30 TAC § 70.8.

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 \$9,303 for violations of the following statutes and rules: TEX. WATER CODE §§ 26.3467(a) and 26.3475(c)(1);

TEX. HEALTH & SAFETY CODE § 382.085(b); 30 TAC §§ 115.226(1); 334.8(c)(4)(A)(vii), (c)(5)(A)(i), (c)(5)(B)(ii), and (c)(5)(C); 334.48(c); and 334.50(b)(1)(A).

2. Within 30 days after the effective date of this Order, Respondent shall pay \$258.41 of the administrative penalty. The remaining amount of \$9,044.59 of the administrative penalty shall be payable in 35 monthly payments of \$258.41 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.

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: Dobani Inc., d/b/a Gulf Freeway Shell, Docket No. 2010-0834-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

4. 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.
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 TEX. GOV'T CODE § 2001.144 and 30 TAC § 80.273.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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