

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 31, 2011

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

Re: SOAH Docket No. 582-11-1277; TCEQ Docket No. 2010-0834-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Dobani inc. d/b/a Gulf Freeway Shell,

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 **September 20, 2011**. Any replies to exceptions or briefs must be filed in the same manner no later than **September 30, 2011**.

This matter has been designated **TCEQ Docket No.2010-0834-PST-E; SOAH Docket No. 582-11-1277**. 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 black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/llg
Enclosures
cc: Mailing List

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STYLE/CASE: DOBANI, INC / GULF FREEWAY SHELL

SOAH DOCKET NUMBER: 582-11-1277

REFERRING AGENCY CASE: 2010-0834-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ KERRIE QUALTROUGH

REPRESENTATIVE / ADDRESS

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xc: Docket Clerk, State Office of Administrative Hearings

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**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Executive Director (ED) asks the Texas Commission on Environmental Quality (Commission or TCEQ) to assess an administrative penalty against the Respondent, Dobani Inc., d/b/a Gulf Freeway Shell, for violations of the rules regulating underground storage tanks (USTs). Respondent contested the alleged violations and the recommended administrative penalty. The Administrative Law Judge (ALJ) recommends that the Commission find that Respondent violated the UST requirements and assess an administrative penalty of \$9,303 with a three-year payout.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Jurisdiction and notice were not disputed. These issues are addressed in the findings of fact and conclusions of law in the proposed order without further discussion in this proposal for decision (PFD).

The evidentiary hearing convened on June 21, 2011, before ALJ Kerrie Jo Qualtrough in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Phillip M. Goodwin, P.G., Staff Attorney, Litigation Division. Nasrullah Dobani and Kevin Leasure represented Respondent.

At the conclusion of the evidentiary hearing, Mr. Dobani requested that he be allowed to submit additional evidence to show that Respondent was in compliance with the TCEQ's rules. The ALJ agreed with his request, but warned Respondent of the risk that the ED could change the recommended penalty amount in response to any new evidence. On June 24, Respondent submitted bills of lading for 22 fuel deliveries, and these documents were marked as Respondent Exhibit 6. Over the ED's objection, the ALJ admitted this exhibit.

In response, the ED revised his penalty calculation worksheet (PCW) to reflect an increased administrative penalty, and submitted the revised PCW to the ALJ on July 1.¹ On July 11, Respondent requested that Respondent Exhibit 6 be removed from the record because the documents were incomplete. On July 15, the ED agreed with Respondent regarding the withdrawal of Respondent Exhibit 6 from the evidentiary record. The ED argued that the PFD should be based on the evidentiary record as it existed at the end of the June 21 evidentiary hearing. The ALJ agreed with the parties and, on July 18, the ALJ removed Respondent Exhibit 6 and closed the evidentiary record.²

III. DISCUSSION

A. Violations

Respondent owns and operates four USTs at the Gulf Freeway Shell, 8115 Gulf Freeway, Houston, Texas. On April 21, 2010, Jocina Chase of the TCEQ's Houston Regional Office conducted an investigation at Respondent's facility to evaluate whether the USTs were in compliance with the TCEQ's UST rules. As a result of the inspection, the ED alleged that Respondent violated the following requirements: TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. WATER CODE §§ 26.3467(a), and 26.3475(c)(1) and (c)(2); 30 TEX. ADMIN. CODE

¹ ED Ex. 23.

² ED Exhibit 23 was not admitted into the evidentiary record.

(TAC) §§ 115.226(1); 334.8(c)(4)(A)(vii), (c)(5)(A)(i), (c)(5)(B)(ii) and (c)(5)(C); 334.42(i); 334.48(c); 334.50(b)(1)(A), (d)(1)(B)(ii), and (d)(1)(B)(iii)(I); and 334.51(b)(2)(C).³

1. Delivery Certificate

According to Ms. Chase, the facility's delivery certificate expired on August 31, 2008, yet Respondent was still accepting fuel deliveries at the time of the April 21, 2010 inspection. The ED alleged that Respondent violated 30 TAC § 334.8(c)(4)(A)(vii) and (c)(5)(B)(ii) because Respondent failed to timely renew its TCEQ delivery certificate. The ED also asserted that the Respondent should have submitted a properly completed UST registration and self-certification form at least 30 days before the expiration date. Since the delivery certificate had expired, the ED further alleged that Respondent violated TEX. WATER CODE § 26.3467(a) and 30 TAC § 334.8(c)(5)(A)(i) because he did not make available a current and valid delivery certificate to a common carrier before accepting a fuel delivery.⁴

Ms. Chase testified that a delivery certificate is valid for one year and must be renewed every 12 months. Respondent's delivery certificate expired in 2008, almost two years before the April 21, 2010 inspection. Prior to the inspection, Respondent's inventory control sheets indicate that he had been receiving regular deliveries of fuel.⁵

Ms. Chase also pointed out that the TCEQ received the necessary forms to renew Respondent's delivery certificates on April 22, 2011, and it now has a current certificate.⁶ Therefore, although the ED was no longer seeking corrective action, he is still requesting the assessment of an administrative penalty because Respondent was out of compliance at the time of inspection.

³ At the evidentiary hearing, the ED stated that since Respondent had submitted documentation showing compliance, the ED was no longer alleging that Respondent violated TEX. WATER CODE § 26.3475(c)(2) and 30 TAC §§ 334.42(i) & 334.51(b)(2)(C).

⁴ ED Ex. A, pg. 5.

⁵ ED Ex. 8, pgs. 4-9, "gallons delivered" column.

⁶ See, Resp. Ex. 1.

Mr. Dobani testified on behalf of Respondent. It is Respondent's position that it had a delivery certificate at the time of the inspection. Respondent Exhibit 1 is a copy of two delivery certificates for the facility. The first certificate states that it "[e]xpires [the] last day of August 2010."⁷ Therefore, it is Respondent's position that it had a current and valid delivery certificate at the time of inspection. However, Respondent did not know or could not recall when he submitted his renewal to the TCEQ.

The ALJ concludes that the ED has met his burden of proof that Respondent committed the alleged violations. Regarding the timely renewal of the delivery certificates, Respondent did not submit a properly completed UST registration and self-certification form at least 30 days before the annual renewal date for the UST delivery certificate, as required by 30 TAC § 334.8(c)(4)(A)(vii) and (c)(5)(B)(ii). Respondent's delivery certificate expired on August 31, 2008. Ms. Chase informed Mr. Dobani of the upcoming inspection on April 19, 2010, an assertion Mr. Dobani disputes. Nevertheless, the next day, on April 20, Mr. Dobani signed the TCEQ's "UST Registration & Self-Certification Form."⁸ This form was received by the agency on April 22,⁹ and the renewal was effective on May 5.¹⁰ Therefore, Respondent did not timely file the necessary documents to renew his delivery certificate before the August 31, 2008 expiration date.

Further, the ED has met his burden to prove that Respondent violated TEX. WATER CODE § 26.3467(a) and 30 TAC § 334.8(c)(5)(A)(i). Respondent did not make available to a common carrier a valid and current TCEQ delivery certificate before delivery of fuel into its USTs since its delivery certificates expired in 2008.¹¹ The evidence shows that Respondent accepted four deliveries of unleaded fuel during the month of April 2010, before the inspection.¹²

⁷ Resp. Ex. 1.

⁸ ED Ex. 6, pg. 4.

⁹ ED Ex. 6, pg. 2.

¹⁰ ED Ex. 1, pg. 2.

¹¹ ED Ex. 8, pgs. 7-9.

¹² ED Ex. 8, pg. 9.

In his defense, Respondent argued that his 2010 delivery certificate was valid at the time of inspection because the certificate indicates that it expires on the last day of August 2010. The annual expiration date for a delivery certificate is determined by the last digit of the official TCEQ owner identification number.¹³ Respondent's owner/operator number is 066938.¹⁴ Therefore, Respondent's delivery certificate will always expire on August 31, regardless of the date the certificate was renewed.¹⁵ Mr. Dobani renewed his delivery certificate effective May 5, 2010. Therefore, it was not in effect at the time of the April 21, 2010 inspection. As a result, the ALJ concludes that Respondent violated the following laws: TEX. WATER CODE § 26.3467(a) and 30 TAC § 334.8(c)(4)(A)(vii), (c)(5)(A)(i), and (c)(5)(B)(ii).

2. Monthly Inventory Control

The ED alleged that Respondent failed to conduct effective inventory control procedures for all of its USTs involved in the retail sale of petroleum substances used as motor fuel.¹⁶ According to the ED, this failure resulted in a violation of 30 TAC § 334.48(c), which requires owners of USTs to conduct effective manual or automatic inventory control procedures for all UST systems at retail service stations. The owner must also maintain complete and accurate inventory records.

Ms. Chase stated that proper inventory control procedures allow a facility to reconcile its fuel deliveries with the amount of fuel sold and the amount of fuel remaining in the USTs. A large difference in these amounts could indicate that a UST has a leak.

Ms. Chase testified that at her inspection, Respondent did not have the monthly inventory control sheets available for review. However, Ms. Chase allowed Respondent to fax the sheets to her after the April 21, 2010 inspection, which he did. Ms. Chase reviewed these sheets, found

¹³ 30 TAC § 338.8(c)(5)(B)(iii).

¹⁴ Resp. Ex. 1.

¹⁵ 30 TAC § 338.8(c)(5)(B)(iii)(VIII).

¹⁶ ED Ex. A, pg. 5.

in ED Exhibit 8, to determine if Respondent was properly tracking its inventory of fuel on a daily and a monthly basis. According to Ms. Chase, Respondent's monthly inventory control sheets are missing important information, including proper closing stick readings, and calculations for leak checks and water levels.¹⁷ Ms. Chase testified that these missing measurements and calculations are necessary for proper monthly inventory control.

Ms. Chase also stated that Respondent is now properly performing monthly inventory control. Therefore, the ED is no longer seeking corrective action regarding this alleged deficiency, but is still seeking administrative penalties because Respondent was out of compliance at the time of the inspection.

At the evidentiary hearing, Respondent offered, and the ALJ admitted, Respondent Exhibits 2, 3, and 4. These three exhibits are monthly inventory control sheets for March, April, and May 2010. However, the monthly inventory control forms in ED Exhibit 8 are different from the monthly inventory control forms in Respondent Exhibits 2, 3, and 4. Mr. Dobani testified that he did not keep two separate sets of books, and he was now using the proper forms for his inventory control records. He could not explain why he faxed the incorrect sheets found in ED Exhibit 8 to Ms. Chase soon after the investigation, but then produced the correct sheets at the evidentiary hearing as Respondent Exhibits 2, 3, and 4.

Further, Mr. Dobani testified that he completed a TCEQ-approved course on May 12, 2009.¹⁸ He was told at that course that he was using old forms for the monthly inventory control. He could not explain why he was still using the old forms at the time of the April 21, 2010 inspection and now found in ED Exhibit 8.

In the ALJ's opinion, the ED has shown that Respondent violated 30 TAC § 334.48(c). Respondent was not maintaining adequate monthly inventory control records at the time of the

¹⁷ ED Ex. 8, pg. 7-9.

¹⁸ See, ED Ex. 8, pg. 10.

April 21, 2010 inspection. Respondent failed to properly track his closing stick readings, failed to indicate his monthly water levels, and failed to calculate the leak check, all necessary components of proper monthly inventory control procedures.¹⁹

Regarding Respondent Exhibits 2, 3, and 4, the evidence does not reveal when Mr. Dobani prepared those monthly inventory control sheets. He testified that he did not keep two sets of inventory records, yet there are two different sets of records in evidence.²⁰

Although Mr. Dobani could not explain why there are two different monthly inventory control records for the same time period, Mr. Dobani did state that Ms. Chase had been very helpful to him in explaining what he needed to do to come into compliance. One possible explanation for the two sets of records is that Mr. Dobani attempted to correct his inaccurate monthly inventory control sheets after the April 21, 2010 inspection. However, subsequent attempts to come into compliance do not change the noncompliance at the time of the inspection. The ED has met his burden of proof that Respondent violated 30 TAC § 334.48(c), even though Respondent may have attempted to remedy its past noncompliance.

3. Release Detection

The ED alleged that Respondent failed to monitor the USTs for releases at a frequency of at least once per month. According to the ED, 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. The ED also asserted that Respondent did not record inventory volume measurements for the fuel inputs, withdrawals, and the amount still remaining in the tank each operating day. The ED maintains that this failure

¹⁹ ED Ex. 8, pgs. 7-9.

²⁰ Compare ED Ex. 8, pgs. 7-9, with Resp. Ex. 4.

to monitor for releases violates TEX. WATER CODE § 26.3475(c)(1) and 30 TAC § 334.50(b)(1)(A), (d)(1)(B)(ii), and (d)(1)(B)(iii)(I).²¹

Ms. Chase testified that Respondent used an automatic tank gauge as its method of release detection.²² She stated that the TCEQ requires a UST system to perform a check for a release at least once within every 35 days. However, at the time of inspection, the automatic tank gauge system was not functioning. Further, according to Ms. Chase, accurate monthly inventory control records are necessary if an owner chooses to utilize an automatic tank gauge as its method of release detection. Since Respondent had not maintained adequate monthly inventory control records and its automatic tank gauge was not working, it is Ms. Chase's opinion that Respondent failed to have an adequate method of release detection.

Ms. Chase stated that at the inspection, Respondent indicated that he was using the statistical inventory reconciliation (SIR) method to meet the release detection requirements. However, Respondent did not produce his SIR records at the time of inspection, nor did he provide those records to Ms. Chase at a later date.

Ms. Chase testified that Respondent came into compliance with this requirement after the inspection. His automatic tank gauge is now working and he produced the necessary documentation. Therefore, the ED is no longer seeking corrective action, but is recommending an administrative penalty for the violation.

Respondent did not present an argument or evidence regarding this violation.

After reviewing the evidence, the ALJ concludes that Respondent violated section 26.3745(c)(1) of the Texas Water Code, which mandates that underground storage tank systems must comply with the TCEQ's requirements for tank release detection equipment.

²¹ ED Ex. A, pg. 5.

²² See, ED Ex. 6, pg. 6.

Respondent did not monitor its USTs in a way that would detect a release at a frequency of at least once every month (not to exceed 35 days between each monitoring) by using one or more of the allowable release detection methods, as required by 30 TAC § 334.50(b)(1)(A). Respondent selected the combination of an automatic tank gauge and inventory control as its method of release detection. However, at the time of inspection, the automatic tank gauge was not functioning. Further, when Ms. Chase asked Respondent to produce the required monitoring records, it could not do so, presumably because the automatic tank gauge did not work. Also, as previously discussed, Respondent's monthly inventory control procedures were inadequate, and these procedures are a component of a release detection system using an automatic tank gauge.²³ As alleged by the ED, the ALJ concludes that Respondent violated TEX. WATER CODE § 26.3745(c)(1) and 30 TAC § 334.50(b)(1)(A) because its automatic tank gauge was not working and its monthly inventory reports were incomplete.

However, the ALJ disagrees with the ED that Respondent violated 30 TAC § 334.50(d)(1)(B)(ii) and (d)(1)(B)(iii)(I). These two subsections set out the requirements if a UST system uses a tank tightness test as the method of release detection. The evidence shows that Respondent used an automatic tank gauge to detect releases, not a tank tightness test. Therefore, the ED did not meet its burden of proof that Respondent violated these two TCEQ subsections.

5. Fill Tube Markings

As a result of his investigation, the ED alleged that 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. It is the ED's position that this violated 30 TAC § 334.8(c)(5)(C).²⁴

²³ 30 TAC § 334.50(d)(4).

²⁴ ED Ex. A, pg. 6.

Ms. Chase testified that when she investigated the facility on April 21, 2010, the fill ports²⁵ on the USTs were not marked. Later, Respondent submitted photographs of the fill ports with what appear to be paper labels showing DIS for diesel, SUP for super, and UNL for unleaded.²⁶ When Ms. Chase returned to the facility, the paper labels were gone. Ms. Chase informed Respondent that the fill ports must be permanently marked. Ms. Chase testified that Respondent has now properly marked the fill ports and the ED is no longer seeking corrective action for this violation.

At the evidentiary hearing, Respondent provided photographs showing that the fill ports are now permanently marked with DIS, SUP, and UNL.²⁷ In addition, the fill ports are color-coded with the markings. However, at hearing, Mr. Dobani conceded that the fill ports were not marked at the time of the inspection.

After reviewing the evidence, the ALJ finds that Respondent violated 30 TAC § 334.8(c)(5)(C). The fill ports were not properly marked at the time of the April 21, 2010 inspection, as conceded by Respondent.

6. Availability of Delivery Records

According to the ED, Respondent did not have its fuel delivery records available for review at the time of inspection. Ms. Chase stated that she notified Respondent on April 19, 2010 that she would be conducting an inspection, and it should have had the bills of lading or delivery receipts onsite when she conducted the April 21 inspection. Thus, it is the ED's position that Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TAC § 115.226(1), by failing to have the records available.²⁸ However, the ED is no longer

²⁵ Ms. Chase did not differentiate between the terms "fill tubes" and "fill ports." The ALJ assumes that the two terms are synonymous for purposes of this discussion.

²⁶ ED Ex. 10, pgs. 30-32.

²⁷ Resp. Ex. 5.

²⁸ ED Ex. A, pg. 6.

seeking corrective action for this alleged violation because Respondent has subsequently produced documentation indicating current compliance with this requirement.

Mr. Dobani disputed that he received advanced notice of the April 21 inspection. He testified that he was very busy in the store on that day when Ms. Chase arrived to inspect the facility. He later faxed the requested documents to Ms. Chase. However, Ms. Chase testified that she did not receive the bills of lading from Respondent.

The owner of USTs in the Houston/Galveston area must maintain a record at the facility of the dates on which gasoline was delivered and must keep these records for a period of two years.²⁹ Further, a person may not cause, suffer, allow, or permit the performance of any activity in violation of any commission rule.³⁰ The ALJ concludes that Respondent did not comply with these provisions because the records were not available at the time of the inspection. Further, Ms. Chase gave Respondent an opportunity to fax the bills of lading and the delivery receipts after the inspection. However, the record does not indicate that Respondent provided Ms. Chase with the necessary documentation, either during or after the inspection.³¹

Also, the evidence supports Ms. Chase's testimony that she informed Mr. Dobani about the upcoming inspection on April 19, 2011. As previously stated, Mr. Dobani signed the delivery certificate renewal forms on April 20, one day after Ms. Chase's notice. This corroborates Ms. Chase's testimony that on April 19, she informed Respondent of the upcoming April 21 inspection. Therefore, even though TCEQ rules require an owner to always have the bills of lading at the facility, Mr. Dobani knew that an inspection was imminent and should have had the bills of lading available at the April 21 inspection. By failing to make these documents available, Respondent violated TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TAC § 115.226(1).

²⁹ 30 TAC § 115.226(1).

³⁰ TEX. HEALTH & SAFETY CODE § 382.085(b).

³¹ Resp. Ex. 6 contained some bills of lading for the relevant time period. However, Respondent withdrew Resp. Ex. 6 from the evidentiary record.

B. Administrative Penalty

The ED's Enforcement Coordinator, Keith Frank, testified regarding his calculations of the recommended administrative penalty, and the ALJ admitted into evidence his PCW.³² Mr. Frank calculated the penalty based on six violations and recommended that Respondent be assessed an administrative penalty of \$9,303. According to Mr. Frank, he followed the TCEQ's Penalty Policy³³ when he enhanced the total base penalty by two percent because Respondent had a previous notice of violation³⁴ and reduced the penalty by \$500 because of Respondent's good faith efforts in bringing the facility into compliance.³⁵

At the hearing, Respondent argued for the first time that it could not pay the recommended administrative penalty. Mr. Dobani stated that he did not follow the process set out in the TCEQ's rules to request an inability to pay review³⁶ because he could not read or write English very well. Therefore, when he received the ED's discovery requests, including a question about Respondent's ability to pay the penalty, Mr. Dobani could not understand what the ED was asking him and could not adequately respond to the ED's inquiry.

The ALJ finds that the ED properly calculated the administrative penalty. The ED's recommended penalty, as calculated in the PCW, considered the factors required by TEX. WATER CODE § 7.053, including its 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.

³² ED Ex. 9.

³³ ED Ex. 4.

³⁴ ED Ex. 5.

³⁵ ED Ex. 9, pgs. 1 & 2.

³⁶ *See*, 30 TAC § 70.8.

As explained above, the ALJ does not recommend a finding that Respondent violated 30 TAC § 334.50(d)(1)(B)(ii) and (d)(1)(B)(iii)(I), regarding the use of a tank tightness test as the method for release detection. When Mr. Frank calculated the penalty amount for the release detection violation, he grouped together three sections of the TAC and one section of the Texas Water Code to calculate one violation subtotal.³⁷ The removal of the two sections regarding the tank tightness test does not affect the recommended penalty amount for this violation because Respondent still violated two other laws regarding release detection. Specifically, removal of 30 TAC § 334.50(d)(1)(B)(ii) and (d)(1)(B)(iii)(I) from the penalty calculation does not affect the violation subtotal of \$2,500 because Respondent still violated TEX. WATER CODE § 26.3745(c)(1) and 30 TAC § 334.50(b)(1)(A).

Regarding Respondent's inability to pay the recommended penalty, the TCEQ's rules require a respondent who makes such a claim to submit the relevant financial records to the ED no later than 30 days before the evidentiary hearing.³⁸ A respondent waives the inability to pay claim if he fails to provide the necessary financial records within that timeframe.³⁹

Respondent claimed an inability to pay the penalty for the first time at the evidentiary hearing. Therefore, according to TCEQ's rules, Respondent has waived this claim. Although the ALJ is sympathetic to Mr. Dobani's position since he apparently had difficulty understanding what was required to assert this claim, the TCEQ's rules dictate that Respondent has nevertheless waived the claim that it cannot pay the recommended administrative penalty.

The ALJ recommends that the Commission assess an administrative penalty of \$9,303 for the violations discussed in this PFD. The ALJ also recommends that the Commission allow Respondent to pay out the administrative penalty over a three year period due to its efforts in bringing the facility into compliance with the TCEQ's rules.

³⁷ ED Ex. 9, pg. 9.

³⁸ *Id.* § 70.8(b).

³⁹ *Id.*

IV. SUMMARY

The ALJ has considered the evidence presented at the June 21, 2011 evidentiary hearing and concludes that Respondent violated the following UST requirements:

TEX. WATER CODE §§ 26.3467(a) and 30 TAC § 334.8(c)(4)(A)(vii), (c)(5)(A)(i), (c)(5)(B)(ii) for the failure to timely renew its delivery certificate and to make available a valid certificate to a common carrier before accepting a fuel delivery;

30 TAC § 334.48(c) for the failure to conduct effective monthly inventory procedures;

TEX. WATER CODE § 26.3475(c)(1) and 30 TAC § 334.50(b)(1)(A) for the failure to monitor for UST releases;

30 TAC § 334.8(c)(5)(C) for the failure to properly mark the fill tubes; and

TEX. HEALTH & SAFETY CODE § 382.085(b) and 30 TAC § 115.226(1) for the failure to make its fuel delivery records available.

As a result, the ALJ recommends that the Commission assess a \$9,303 administrative penalty against Respondent, payable over a three year period.

SIGNED August 31, 2011.


**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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 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.
14. On November 4, 2010, the ED referred this matter to SOAH for a contested case hearing.
15. On December 9, 2010, the Commission's Chief Clerk mailed to Respondent a notice of the January 13, 2011 preliminary hearing.
16. 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. 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. 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. 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. Respondent exhibited good faith in bringing the facility into compliance with the TCEQ's rules.

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 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