

**SOAH DOCKET NO. 582-11-2028
TCEQ DOCKET NO. 2010-1087-PST-E**

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

V.

**EDWARD RATLIFF,
Respondent**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S REPLY TO RESPONDENT EDWARD
RATLIFF'S EXCEPTIONS TO PROPOSAL FOR DECISION
("ED'S REPLY")**

COMES NOW the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Respondent's Exceptions to Proposal for Decision, and files the following response.

I. BACKGROUND

The Executive Director filed the Executive Director's Preliminary Report and Petition ("EDPRP") in this matter on October 25, 2010; Respondent filed his Answer on November 18, 2010; the matter was referred to the State Office of Administrative Hearings ("SOAH") on December 22, 2011; and a Notice of Hearing was mailed to Respondent by the TCEQ's Office of the Chief Clerk, on January 24, 2011. The evidentiary hearing in this matter took place on November 18, 2011, and Respondent appeared via telephone. The Administrative Law Judge ("ALJ") issued a Proposal for Decision on January 17, 2012. Respondent filed his Exceptions to Proposal for Decision on February 6, 2012.

There are three major sections within Respondent's Exceptions: In Section I, Respondent discusses Jurisdiction, Notice, and Procedural History. In Section II, he discusses what he understands may be the applicable law with three sub-topics: Waiver, Texas Water Code Section 26.344, and Equal Application of the Law. Finally, in Section III, Respondent communicates his intent to "appeal" the Proposed Order.

II. REPLY TO ASSERTIONS REGARDING JURISDICTION AND NOTICE

Respondent asserts that the State Office of Administrative Hearings (“SOAH”) failed to establish the necessary jurisdiction required to hear this enforcement action involving his six underground storage tanks (“USTs”) and that he was not put on notice of the facts asserted by the EDPRP because the EDPRP contained “false statements of fact” and did not “provide fair and truthful notice of the facts asserted.”

There is nothing particularly new about Respondent’s continued assertions in regard to whether SOAH and/or TCEQ have jurisdiction in this matter. He has repeatedly stated that TCEQ has waived its enforcement authority in this matter or that there is no jurisdiction because his USTs are exempt from regulation under Tex. Water Code § 36.344, and/or he was not put on notice of the claims asserted because the EDPRP was either insufficiently specific or contained “false statements of fact.” However, here follow, in chronological order, Respondent’s various motions relating to the issues of jurisdiction and the disposition made by the ALJ.

- Motion to Dismiss and Plea to the Jurisdiction—Denied by ALJ’s Order No. 3, the ALJ confirmed that jurisdiction had been established.
- Motion for Frivolous Claim by State Agency—Denied by Order No. 4.
- Motion as to the Propriety of Taking Judicial Notice—Denied by Order No. 5.
- Respondent Edward Ratliff’s Special Exceptions—Denied by Order No. 8.

This record clearly shows Respondent has availed himself of a number of opportunities to argue that there is no TCEQ or SOAH jurisdiction in this matter, but he has not prevailed a single time. That is because there seems to be a fundamental confusion reflected in his motions as to how jurisdiction is obtained in an administrative proceeding such as this enforcement action. The ALJ’s Proposal for Decision (“PFD”) succinctly states how jurisdiction to hear this matter was obtained. On page 2, the ALJ said, “The Commission has jurisdiction over this matter pursuant to Water Code § 5.013 and Chs. 7 and 26. The State Office of Administrative hearings (SOAH) has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Water Code § 26.021 and Tex. Gov’t Code Ch 2003.” But Respondent has persisted with attempting

to raise a jurisdiction issue despite having been informed by the ALJ, in Order No. 3, “[t]he ALJ finds that these contentions [“contentions” referring to waiver and exemption to regulation] raised by Respondent are in the nature of affirmative defenses to the merits of the enforcement action brought by the ED, but they do not concern the jurisdiction of either TCEQ or the State Office of Administrative Hearings.”

Finally, Respondent participated in an evidentiary hearing at which he was provided another yet opportunity to provide facts and substantive evidence as to why waiver and his purported exemption from regulation worked to prevent TCEQ and SOAH from taking jurisdiction in this matter. And, again, he failed to be persuasive, as evidenced by the ALJ’s findings in the PFD.

Respondent’s Section I also contains a number of assertions regarding the EDPRP filed in this matter. Respondent alleges that TCEQ did not follow Texas’ fair notice standard of pleading. However, in response, the Executive Director would point out that the fair notice standard in drafting a pleading is relatively liberal and there is no requirement that the Executive Director plead evidentiary matters in his petition with the meticulous particularity Respondent seems to be reaching for. State Fid. Mortg. Co. v. Varner, 740 S. W.2d 477, 480 (Tex. App.—Houston [1st Dist.] 1987, writ denied); Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007). There is legal authority available that holds a petition is sufficient if it alleges facts generally. Willock v. Bui, 734 S.W.2d 390, 392 (Tex. App.—Houston [1st Dist.] 1987, no writ) and additional authority that states that as a general rule a suit cannot be dismissed, “if the pleadings state a valid cause of action.” Gallien v. Washington Mut. Home Loans, Inc., 209 S.W.3d 856, 862-63 (Tex. App.—Texarkana 2006, no. pet.).

More specifically, Respondent alleges that, “[t]he false statements of facts made by the TCEQ are indisputable; the Court had notice that TCEQ has made multiple proven false statements of fact previously in this case.” Respondent makes these allegations against TCEQ and seems to impugn “the Court” at the same time he points to the tenets of Texas Rules of Civil Procedure (“TRCP”) 13. But counsel for the Executive Director can state, unequivocally, that the EDPRP for this matter was signed after reading the pleading and that to the best of his knowledge, information, and belief

formed after reasonable inquiry the instrument was not groundless and brought in bad faith or groundless and brought for purpose of harassment. TRCP 13 defines “groundless” as having “no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.” Respondent’s allegations of false statements by TCEQ staff, which have been repeated a number of times, but which are not, and have never been, supported by a scintilla of evidence or applicable law, are, therefore, groundless.

For these reasons, Respondent’s arguments regarding jurisdiction and notice should be accorded the same disposition made by the ALJ in this matter: They should be firmly denied.

III. REPLY TO RESPONDENT’S SECTION II, APPLICABLE LAW

A. Waiver

As regards Respondent’s argument that TCEQ has waived its enforcement authority, waiver is an affirmative defense which must be pled and proved; it is not jurisdictional. Further, “[w]aiver is an affirmative defense and is proven by showing a party’s ‘intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.’ It is the movant’s burden to show waiver. In determining if a waiver has in fact occurred, a court must examine the acts, words, or conduct of the parties, and it must be ‘unequivocally manifested’ that it is the intent of the party to no longer assert its right.” Buffington v. DeLeon, 177 S.W.3d 205, 212 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (internal citations omitted); *accord* Rodriguez v. Villarreal, 314 S.W.3d 636, 645 (Tex. App.—Houston [14th Dist.] 2010, no pet.). In addition, “Intent is the key element in establishing waiver. The law on waiver distinguishes between a showing of intent by actual renunciation and a showing of intent based on inference. In the latter situation, it is the burden of the party who is to benefit by a showing of waiver to produce conclusive evidence that the opposite party ‘unequivocally [sic] manifested’ its intent to no longer assert its claim. This is a particularly onerous burden.” G. H. Bass & Co. v. Dalsan Properties-Abilene, 885 S.W.2d 572, 577 (Tex. App.—Dallas 1994, no pet.); *accord* Rodriguez v. Villareal, 314 S.W.3d 636, 645 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The Respondent makes a number of claims

and includes a number of factual matters that may be disputed, but there is no evidence provided in support of the Respondent's claim. Respondent provides no evidence that the TCEQ actually renounced its authority to enforce the rule at issue (and the TCEQ did not) nor do Respondent's Exceptions to the PFD cite to any conclusive evidence that the TCEQ unequivocally manifested its intent to no longer assert its claim. Respondent has, again, failed to meet his burden. There is no waiver and Respondent's allegation of waiver should be rejected.

Respondent argues that the passage of time and the lack of enforcement against prior owners can be construed as waiver. However, there is no statute of limitations on enforcement in these types of cases as in shown in *Waller v. Sanchez*, a case in which there was a 13 year delay in enforcing city and county ordinances and laws. According to *Waller v. Sanchez*, "Although an exception has been engrafted where the state engages in proprietary functions, the uniform rule is that the state and its essential instrumentalities are immune from the defenses of limitations, laches, and estoppel, unless limitation is permitted to run by statute." *Waller v. Sanchez*, 618 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1981, no pet.). Since there is no applicable statute of limitations on this enforcement action, the TCEQ is completely within its rights to assert its claim regardless of the passage of time.

Contrary to Respondent's arguments, there is also no waiver because of lack of enforcement against prior owners. According to TEX. WATER CODE § 7.002, "The commission may initiate an action under this chapter to enforce provisions of this code...." The use of the word "may" indicates that it is at the discretion of the ED that enforcement actions are initiated. Therefore, it was within the ED's discretion to pursue any prior owners of the USTs at issue in this case just as it is within TCEQ's discretion to bring an action against the current owner. TCEQ requires all current UST owners to comply with UST rules, whether there are prior owners or not (*See* 30 TEX. ADMIN. CODE § 334.1(b)(3), which states the requirements in the UST rules apply to "owners" of UST systems). Thus, TCEQ did not and has not waived its enforcement responsibilities. Regardless of what may have happened in regard to enforcement against a prior owner, as the Executive Director showed, Respondent is the current owner and is, therefore, the

individual responsible for the UST system.

For these reasons, the Executive Director respectfully recommends that these arguments raised by Respondent in his Exceptions to the PFD should also be summarily denied.

B. Tex. Water Code § 26.344

Respondent contends that his USTs are exempt from TCEQ regulation because of the exemption found at TEX. WATER CODE § 26.344(a)(5) and 30 TEX. ADMIN. CODE § 334.3(a)5). He claims the exemption because of his use of the tanks to capture and store storm water and grey water, following the conversion from petroleum storage to water storage. As authority, he points to the Code Construction Act (TEX. GOV'T CODE ch. 311) and a number of Texas cases that state that the Commission may exercise only those powers expressly and clearly conferred on the agency by the Legislature. In the process, he ignores or glosses over other sources of authority that are equally, if not more, compelling. For example, Section 26.345 of the Texas Water Code empowers the Commission to develop a regulatory program regarding underground and aboveground storage tanks. The Commission responded to that legislative mandate by developing a comprehensive regulatory scheme that includes the rule at 30 TEX. ADMIN. CODE § 334.1(b), which states, in part, “[a]n UST system is subject to all or part of the applicable regulations in this chapter only when such system: (A) meets the definition of UST system under §334.2 of this title (relating to Definitions); (B) contains, has contained, or will contain a regulated substance as defined under §334.2 of this title, and C) is not completely exempted from regulation under § 334.3(a) of this title.” However, even if on the face of it this language may appear to support Respondent’s contention in regard to an exemption, in fact it does not. That is because the TCEQ rule at 30 TEX. ADMIN. CODE § 334.2(50) makes it clear that a UST that has had a regulated substance such as petroleum placed in it, it is “in service” from the date of that first placement or containment of petroleum through the time it is permanently removed from the ground, is abandoned in place, or has completed the process for a change-in-service. Respondent was informed of all TCEQ requirements for a change-in-service, but he has never completed the requirement that he undertake a site assessment to

determine whether his USTs may have leaked a petroleum substance, although the USTs were in the ground on Respondent's property for approximately 30 years. After this enforcement action was initiated, Respondent admits removing the tanks himself, with the assistance of some men he hired (ref. page 12 ALJ's PFD), but, again, he did not have a qualified person conduct a site assessment to determine whether the tanks have ever leaked petroleum substances, as required by 30 TEX. ADMIN. CODE § 334.55(e).

Thus, application of the Code Construction Act to Section 26.344 of the Water Code would be misleading and erroneous. The plain language of the statute exempts tanks that were placed in the ground for the original purpose of storing storm water, but was never intended to exempt tanks that at any time contained petroleum without the safeguard of a site assessment to check for a leak. As the ALJ pointed out in his PFD (ref. page 10, ALJ's PFD), this distinction was clearly established through expert testimony, at the evidentiary hearing, about a comment made during the rulemaking process for 30 TEX. ADMIN. CODE ch. 334. According to the Texas Register publication in 1989, the comment stated:

One commenter addressed the need for clarification of the applicability of the rules to tanks that had contained regulated substances, but were subsequently cleaned and refilled with unregulated substances. TWC states that if the tanks contained a regulated substance subsequent to January 1, 1974, then the tank is subject to UST regulation and should comply with the change in service requirements of §334.55(d).
14 Tex. Reg. 4714 (Sep. 15, 1989).

This comment, dating back to 1989, clearly shows how the Texas Water Commission understood and intended to deal with the issue of tanks that contained a petroleum substance subsequent to 1974. The registration forms submitted by the prior owners of the USTs, which were introduced into evidence at the hearing on the merits, show that the USTs did contain petroleum after 1974. Therefore, these USTs do fall within TCEQ's regulatory authority, they did not qualify for an exemption. TCEQ staff also determined that Respondent did not qualify for a variance to application of TCEQ rules (ref. pages 10-11, ALJ's PFD) and Respondent did not complete the requirements necessary for a change-in service.

For these reasons and despite the tortured construction placed on it by

Respondent, TEX. WATER CODE § 26.344 is not a bar to TCEQ jurisdiction. This part of Respondent's argument also fails and should be denied.

C. Equal Application of the Law

In this section of his Exceptions, Respondent attempts to demonstrate that he has in some way been singled out for arbitrary and discriminatory treatment by having been selected for enforcement when, he claims, earlier owners had no enforcement actions taken against them. Respondent continues to allege this despite evidence having been presented at hearing that there was an enforcement action against the previous owner. But the earlier enforcement action was temporarily resolved after the owner took the tanks out of service and TCEQ staff wrote a memo to the previous owner in 2001 informing them that no further enforcement action would be taken "at this time." Respondent attempts to construe the memo as evidence that TCEQ intended to waive its right to enforce permanently, but that is an incorrect construction of the intent of the memo. State administrative agency policies, strategies, and priorities change over time and there is nothing in the language of the memo to indicate that there would be or could be a permanent no enforcement policy. Instead, the intent of the memo was to express just what it clearly states, that there would be no further enforcement at that time. However, that policy could have changed a week from the date of the memo and the policy had changed by the time Respondent became the owner in April 2009.

Regardless of the history of enforcement against this property and its previous owners, in order to prove that one is being actively discriminated against or singled out for unequal treatment, it is not sufficient to show only that a law is enforced against some, but not others. State v. Malone Service Co., 829 S.W.2d 763, 766-67 (Tex. 1992). "To establish a claim of discriminatory enforcement, a defendant must show: 1) that he has been singled out for prosecution while others similarly situated and committing the same acts have not, and 2) that the governmental entity has purposefully discriminated on the basis of such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. *Id.* at 766... A discriminatory purpose is never presumed. *Id.* at 767... The complexity of regulatory enforcement requires that a state agency retain broad discretion in carrying out its statutory functions. Thus, a

discriminatory purpose is never presumed; rather, the party asserting the defense of discriminatory enforcement must show a clear intentional discrimination in enforcement of the statute.” *Id.*; City of San Antonio v. Texas Waste Systems, Inc., No. 04-06-00481-CV, 2007 WL 2042768 (Tex. App.—San Antonio, Jul. 18, 2007, pet. denied) (memo op.); Combs v. STP Nuclear Operating Co., 239 S.W.3d 264, 275-76 (Tex. App.—Austin, 2007, pet. denied).

A warranty deed showing Respondent’s ownership of the property was introduced into evidence at the hearing. Respondent was not arbitrarily singled out for some sort of invidious or discriminatory treatment. He was selected for enforcement because he is the owner of record at the time of the TCEQ investigations; it is that straightforward. Thus, this argument also fails and should be denied any further credence.

IV. REPLY TO RESPONDENT’S SECTION III, NOTICE OF APPEAL

In this section of his Exceptions, it appears Respondent may be attempting to put either the Commission, the ALJ, or both on notice either that he is appealing or intends to appeal the proposed order. Respondent contributes to confusion by alleging that the TCEQ denied some of his earlier motions when in actuality only the ALJ had the jurisdiction and authority to take those actions. Such an appeal is untimely and administratively inappropriate at this juncture because the Commission has not even heard this matter, therefore Respondent has not yet exhausted his administrative remedies. According to Subaru of Am., Inc. v. David McDavid Nissan, Inc., “under the exclusive jurisdiction doctrine, the Legislature grants an administrative agency the sole authority to make an initial determination in a dispute...Typically, if an agency has exclusive jurisdiction, a party must exhaust all administrative remedies before seeking judicial review of the agency’s action. Until then, the trial court lacks subject matter jurisdiction and must dismiss the claims within the agency’s jurisdiction.” Subaru of Am. Inc. v. David McDavid Nissan, Inc., 84 S.W.3d 212, 221 (Tex. 2002); Texas Educ. Agency v. Cypress-Fairbanks I.S.D., 830 S.W.2d 88, 90 (Tex. 1992). As regards exclusive jurisdiction, according to a decision in Vickery v. Stanley, the TCEQ has exclusive jurisdiction over compliance with Chapter 26 of the Texas Water Code.

Vickery v. Stanley, No. 12-09-00408-CV, 2010 WL 4638714, at *4 (Tex. App.—Tyler, Nov. 17, 2010, no pet.) (memo op.). Again, because Respondent has not exhausted his administrative remedies this appeal is untimely and inappropriate and should be denied.

V. PRAYER

WHEREFORE PREMISES CONSIDERED the ED respectfully recommends that Respondent's Exceptions to Proposal for Decision be denied.

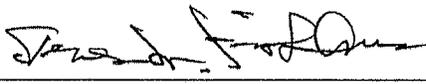
Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I certify that on the 15th day of February, 2012, the original of the foregoing ED's Reply to Respondent's Exceptions to Proposal for Decision ("ED's Reply") was 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 ED's Response was served as indicated, to:

Mr. Edward M. Ratliff, Owner
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Via Certified Mail, Article
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Filed original and seven copies

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



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