

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 15, 2011

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

Re: **SOAH Docket No. 582-11-3204; TCEQ Docket No. 2010-1326-PST-E; Ali Zulfiqar d/b/a Mini Mart 102 and ZQS Corporation, Inc.**

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 **December 5, 2011**. Any replies to exceptions or briefs must be filed in the same manner no later than **December 15, 2011**.

This matter has been designated **TCEQ Docket No. 2010-1326-PST-E; SOAH Docket No. 582-11-3204**. 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 "Lilo D. Pomerleau".

Lilo D. Pomerleau  
Administrative Law Judge

LDP:nl  
Enclosures  
cc: Mailing List

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**STYLE/CASE:** ALI ZULFIQAR / MINI MART 102 AND ZQS CORP

**SOAH DOCKET NUMBER:** 582-11-3204

**REFERRING AGENCY CASE:** 2010-1326-PST-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ LILO D. POMERLEAU**

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ALI ZULFIQAR4 D/B/A MINI MART 102 AND ZQS CORP.  
INC. D/B/A MINI MART 102

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**SOAH DOCKET NO. 582-11-3204  
TCEQ DOCKET NO. 2010-1326-PST-E**

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

**V.**

**ALI ZULFIQAR D/B/A MINI MART 102  
AND ZQS CORPORATION, INC.  
D/B/A/ MINI MART 102,  
Respondents**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) brings this enforcement action against Ali Zulfiqar d/b/a Mini Mart 102 (Respondent) and the ZQS Corporation, Inc. d/b/a Mini Mart 102 (ZQS Corporation). The ED alleges that Respondent and the ZQS Corporation violated the Commission's rules relating to petroleum underground storage tanks (USTs). The Administrative Law Judge (ALJ) finds that the ED proved the violations against Respondent and recommends that the Commission approve the requested administrative penalty, with a payout over a three-year period. The ALJ also recommends that the Commission require Respondent to take corrective action.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

The preliminary hearing convened on March 10, 2011, and documents establishing jurisdiction and proper notice were admitted. As those matters are not contested, they are addressed in the findings of fact and conclusions of law without further discussion.

The hearing on the merits convened on September 1, 2011, before ALJ Lilo D. Pomerleau at the State Office of Administrative Hearings (SOAH) in Austin Texas. The ED was represented by Staff attorney Stephanie Frazee. Respondent was represented by attorney Mark W. Stevens.

## II. DISCUSSION

### A. Background and Investigation

Mr. Zulfiqar formed the ZQS Corporation in 2008. On February 12, 2008, Respondent purchased a convenience store, including the fixtures, merchandise, gasoline pumps, and tanks, and signed a lease for the property owned by Binh Tran at 2311 25<sup>th</sup> Avenue, Texas City, Galveston County, Texas. Under the terms of the lease, Respondent is responsible for maintaining the gasoline pumps and equipment, including all storage tanks.<sup>1</sup>

On January 12, 2010, Lisa E. Merritt, a TCEQ Houston Regional Office investigator, responded to a complaint and investigated Respondent's Mini Mart convenience store (the Facility) to evaluate its compliance with applicable laws and regulations. The Facility includes three 6,000 gallon, steel USTs. At the time, all three USTs were out-of-service, and she was unable to determine whether there were fuel remains in the tanks. Specifically, Ms. Merritt found four violations:

1. Failure to provide an amended registration for any change in the USTs (to indicate that the system was out of service). 30 TEX. ADMIN. CODE § 334.7(d)(3).
2. Failure to assure that all piping, pumps, manways, and ancillary equipment has been capped, plugged, locked, and/or otherwise secured to prevent access, tampering, or vandalism. 30 TEX. ADMIN. CODE § 334.54(b)(2).
3. Failure to develop and maintain all UST records pertaining to corrosion protection testing. 30 TEX. ADMIN. CODE § 334.10(b)(1)(A).
4. Failure to ensure or provide documentation that no more than 2.5 centimeters of fuel and/or residue remain in each tank. 30 TEX. ADMIN. CODE § 334.54(d)(2).

On February 18, 2010, the TCEQ sent a letter to both Binh Tran and Respondent giving notice of the outstanding violations that Ms. Merritt identified on January 12, 2010. The TCEQ

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<sup>1</sup> ED Ex. 7. Mr. Zulfiqar is listed as the buyer of the business, merchandise, and PST equipment, and he is listed as the lessee of the property, with the ZQS Corporation listed as the tenant's trade name. ED Ex. 7 at 124. Mr. Zulfiqar listed himself as the tank owner on the TCEQ Underground Storage Tank Registration & Self-Certification Form. ED Ex. 5.

requested documentation and corrective action within 60 days.<sup>2</sup> There was no response.

On June 16, 2010, Ms. Merritt revisited the Facility. At that time, Respondent was dispensing fuel from two tanks, and Respondent did not have a current, valid delivery certificate. The super unleaded tank was still not operational. Ms. Merritt cited Respondent for 13 violations. She spoke with Mr. Zulfiqar and went over the violations, leaving him an exit interview form that requested certain records.<sup>3</sup>

Subsequently, Ms. Merritt referred the matter to TCEQ's Enforcement Division because four of the violations were Category A violations that prompt automatic enforcement because of their serious nature. Because the PST registration showed that Mr. Tran was the owner/operator, on July 26, 2010, the TCEQ sent a Notice of Enforcement letter to Mr. Tran with a copy to Mr. Zulfiqar.<sup>4</sup> This letter detailed the 13 violations. On December 14, 2010, the ED filed the ED's Preliminary Report and Petition (the EDPRP). The TCEQ mailed the EDPRP to Respondent and the ZQS Corporation by certified mail.<sup>5</sup> After the referral to the Enforcement Division, Respondent came into compliance on four violations; therefore, the ED is not pursuing action on them in this matter.

#### **B. Responsibilities of Respondent as Facility Operator**

Respondent contends that Mr. Tran is the owner of the property. This is correct; Mr. Zulfiqar (Respondent) leases the property. Yet, as stated above, effective February 12, 2008, Mr. Zulfiqar purchased the business, which included the fixtures, merchandise, gasoline pumps, and gasoline tanks. The PST Registration Database Query Results listed Ali Zulfiqar as the owner of the Facility known as Mini Mart 102 at 2311 25<sup>th</sup> Avenue, Texas City, Texas, effective March 1, 2008. The listed operator is the ZQS Corporation, Inc.<sup>6</sup>

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<sup>2</sup> ED Ex. 10 at 167.

<sup>3</sup> ED Ex. 11 at 213-226; Respondent Ex. 18.

<sup>4</sup> ED Ex. 11 at 229-231.

<sup>5</sup> ED Ex. 1.

<sup>6</sup> ED Ex. 6.

In her Investigation Reports for both the January 12, 2010 investigation and the June 16, 2010 investigation, TCEQ investigator Ms. Merritt listed Binh Tran as the owner of the Facility and Mr. Zulfiqar as a “contact.” However, the TCEQ sent a Notice of Violation (NOV) letter to both Messrs. Tran and Zulfiqar.

The Commission is authorized under TEX. WATER CODE ANN. § 7.051 to assess administrative penalties against a person for violations of the Water Code, a Commission rule, or a permit. Mr. Zulfiqar (Respondent) is the owner of USTs under the Commission’s rule, which defines an “owner” as “[a]ny person who holds legal possession or ownership of an interest in an underground storage tank.”<sup>7</sup> As the Facility owner, Respondent is responsible for paying any assessed penalty.<sup>8</sup> The ED has not demonstrated that the ZQS Corporation has legal possession or ownership in the Facility.

### **C. Alleged Violations**

At the hearing, Ms. Merritt set out the alleged violations, detailing the applicable TCEQ rule and/or code violation and how such a violation has the potential to affect the environment. Mr. Zulfiqar explained what he knew about the alleged violations. These positions are set out more fully below.<sup>9</sup>

#### **1. Documentation for Out-of-Service USTs**

For out-of-service UST systems, TCEQ rules require that all piping, pumps, manways, and ancillary equipment be capped, plugged, locked, or secured to prevent access, tampering, and vandalism.<sup>10</sup> When Ms. Merritt conducted her second inspection of the property, the super

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<sup>7</sup> 30 TEX. ADMIN. CODE § 334.2(73).

<sup>8</sup> 30 TEX. ADMIN. CODE § 334.1(b)(3).

<sup>9</sup> This discussion tracks alleged violations set out in the Penalty Calculation Worksheet found at ED Ex. 17. The penalty calculation worksheet combines some violations—instead of nine separate violations, it references seven. The worksheet is discussed in more detail below in Section II.C. Administrative Penalty.

<sup>10</sup> 30 TEX. ADMIN. CODE § 334.54(b)(2).

unleaded tank was out of service, and there were no locks on the tank to prevent access by any person. Ms. Merritt admitted that she could not determine if there was any gasoline in the unleaded UST, and there was no evidence of contamination. However, if a tank is not secured, other chemicals may be inserted into the tank, there could be a vapor build up, and a release is possible

Mr. Zulfiqar testified that he was new to the business of selling gasoline and owning a convenience store. According to Mr. Zulfiqar, the owner of the Facility, Mr. Tran, had a previous relationship with Chris Miller, who is affiliated with UST Service, a company that offers services to comply with TCEQ rules and regulations. Mr. Zulfiqar paid Mr. Miller approximately \$2,000 to \$3,000 to fix the gasoline pumps, and it was his understanding that Mr. Miller would take care of TCEQ compliance.

The evidence establishes that Respondent failed to secure the super unleaded tank that was out of service on June 16, 2010, when Ms. Merritt inspected the facilities. The ALJ understands that Respondent is new to the business of selling gasoline and may have been unaware of environmental regulations. However, lack of knowledge is not excused under the TCEQ's rules and practices.

## **2. Overfill Prevention**

The TCEQ requires UST owner/operators to develop and maintain corrosion protection records; specifically, an owner/operator is required to document the type of overfill prevention installed on the UST system. 30 TEX. ADMIN. CODE § 334.10(b)(1)(A). Ms. Merritt explained that various types of overfill prevention equipment exist that are designed to prevent problems when a gasoline delivery is made. It is necessary for an operator to maintain records showing that this equipment is working because an investigator cannot be present to observe the equipment when a delivery is made. She testified that the equipment is designed to prevent leakage, vapor loss, and possible explosion. According to Ms. Merritt, Respondent failed to maintain these records and provide them to her when she inspected the property again in June.

The ED has proved this allegation. Ms. Merritt's testimony that Respondent did not have these records when she inspected the Facility is unrefuted. After Ms. Merritt's inspection, in 2010, Respondent hired UST Services, Inc. Hopefully, he will be able to meet these requirements in the future.

### 3. Registration and Delivery Certificate

When Ms. Merritt conducted her investigation on June 16, 2010, Respondent had failed to amend the registration to reflect the current operator and the out-of-service status of the super unleaded storage tank, in violation of 30 TEX. ADMIN. CODE § 334.7(d)(3). The TCEQ also requires timely renewal of a previously issued UST delivery certificate. Specifically, a delivery certificate is valid for one year, and an owner/operator is required to submit a renewal 30 days before the annual renewal date.<sup>11</sup> As of the June 16, 2010 investigation, the delivery certificate had expired on January 2009 and had not been renewed. Ms. Merritt testified that Respondent needed to complete the registration self-certification form; then, the TCEQ will issue a certificate. The evidence indicates that the certificate was not renewed at the time of Ms. Merritt's June 16, 2010 investigation.

Mr. Zulfiqar testified that he speaks English as a second language. Moreover, he leased the facilities from Mr. Tran, who also speaks English as a second language. Mr. Zulfiqar believed that he had a certificate for all gas deliveries, but he did not furnish one at the hearing.<sup>12</sup> Respondent obtained storage tank registrations, effective August 17, 2010 and September 21, 2010.<sup>13</sup>

The ALJ concludes that the ED has met his burden of proving that Respondent committed the alleged violations. Regarding the timely renewal of the delivery certificates,

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<sup>11</sup> 30 TEX. ADMIN. CODE § 334.8(c)(5)(B)(ii).

<sup>12</sup> Respondent did provide a delivery certificate effective the last day of June 2011. ED Ex. 26.

<sup>13</sup> Respondent Ex. 5.

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 rule.

#### **4. Certificate Availability**

The required delivery certificate referenced in the above alleged violation must be available to a common carrier pursuant to 30 TEX. ADMIN. CODE § 334.8(c)(5)(A)(i). Ms. Merritt noted that the three USTs were not operational and did not have gasoline when she initially inspected Respondent's business on January 12, 2010. Then, in June, Respondent was operating two tanks. She deduced that he must have had a fuel delivery between inspections, in violation of the TCEQ rule that a valid certificate be available at the time of delivery.

Mr. Zulfiqar testified that he did not know about the TCEQ requirements when he leased the facilities. He stated that Mr. Tran had told him to get insurance but did not tell him about TCEQ rules and regulations (nor about previous violations associated with the Facility).

The ED proffered sufficient and uncontroverted evidence that Respondent received a fuel delivery without possessing a valid certificate. The ALJ finds that Respondent violated TEX. WATER CODE ANN. § 26.3467(a) and 30 TEX. ADMIN. CODE § 334.8(c)(5)(A)(i).

#### **5. Insurance**

An owner/operator must have documentation of financial assurance for the UST system. 30 TEX. ADMIN. CODE ch. 37.815. At the time of the June investigation, Respondent did not provide such documentation. Ms. Merritt testified that Respondent secured insurance after the investigation.<sup>14</sup> Thus, for a period of time, Respondent did not have required coverage to compensate any third party for bodily injury and/or property damage caused by accidental releases arising from the operation of petroleum USTs.

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<sup>14</sup> The period of insurance coverage runs from August 16, 2010, to August 15, 2011. ED Ex. 26.

Mr. Zulfiqar testified that he always had insurance from Rick Morgan Insurance, beginning with his lease of the facilities. However, the only evidence proving that insurance was obtained for the facilities indicated coverage from August 16, 2010 to August 16, 2011.<sup>15</sup> The ALJ agrees with the ED that Respondent did not have the required insurance.

## **6. Proper Pressurized Release Detection and Line Leak Detection**

At least once a month, an owner/operator is required to have each pressurized line tested or monitored for releases. 30 TEX. ADMIN. CODE § 334.50(b). Ms. Merritt testified that there was no record or documentation that these tests had been performed. An owner/operator is also required to test the line leak detector at least once per year for performance and operational reliability and provide documentation of such. 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(III). Ms. Merritt testified that the detectors must be tested to ensure that the mechanism to prevent fuel leakage is working. Respondent did not provide documentation that this test was timely completed. Ms. Merritt admitted that there was no evidence of leakage.

On or about August 1, 2011, UST Services, Inc. performed a precision test of the product lines and/or the leak detectors. The testing was performed according to the manufacturer's requirements and, according to UST Services, Inc.<sup>16</sup> Subsequent to Ms. Merritt's investigation, Respondent hired UST Services to conduct various tests.<sup>17</sup> Mr. Zulfiqar also testified that he has taken a Stage 2 class, although he did not indicate when.

The evidence indicates that Respondent either did not perform these required tests or did not have documentation to demonstrate that he did so when Ms. Merritt conducted her investigation on June 16, 2010. The ALJ notes that, after the inspection, Ms. Merritt gave Respondent an opportunity to provide documents to her but he did not do so. The ALJ further

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<sup>15</sup> ED Ex. 26.

<sup>16</sup> Respondent Ex. 8.

<sup>17</sup> See Respondent Ex. 10.

notes that the ED does not have to show that leakage occurred. The purpose of the rule is to prevent leakage and possible damage. Respondent did not comply with the Commission's rule.

## **7. Sumps Inspection**

During her June inspection, Ms. Merritt observed water in the fuel spill bucket. Water added to fuel will damage vehicles. An owner/operator must ensure that any sumps or manways used as part of a UST release detection system and any overspill containers are inspected at least once every 60 days to assure that their sides, bottoms and any penetration points are tight. Any liquids or debris must be removed and properly disposed of within 72 hours of discovery. Respondent failed to provide any documentation that the overspill containers or catchment basins were being inspected every 60 days. This is a requirement pursuant to 30 TEX. ADMIN. CODE § 334.42(i).

Mr. Zulfiqar did not believe there was any water around the tanks. Again, he indicated that he was not aware of the testing responsibilities associated with operation of USTs. The evidence supports a finding that Respondent was not inspecting the overspill containers or basins as required by the Commission's rules.

## **C. Administrative Penalty**

Danielle Porras, TCEQ's Enforcement Coordinator, testified regarding her calculations of the recommended administrative penalty. She explained that she performed the penalty calculations in accordance with the Commission's September 2002 Penalty Policy and the TCEQ Enforcement Initiation Criteria, Revision No. 12, which became effective July 1, 2008.<sup>18</sup>

Ms. Porras testified that she receives investigation reports and screens enforcement referrals to ensure that they meet the TCEQ criteria. She concluded that this matter warranted formal enforcement action and prepared a penalty calculation worksheet and the proposed order.

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<sup>18</sup> ED Ex. 17 and 18. The Enforcement Initiation Criteria is used by the TCEQ investigator.

Ms. Porras created the Penalty Calculation Worksheet (PCW) in this matter, which underwent peer review plus four management-level reviews. Under the TCEQ’s penalty policy: (1) Respondent’s facilities are a minor source of possible containments because the facility has a monthly throughput of less than 50,000 gallons; and (2) all seven violations carry the maximum base penalty of \$10,000 per day per violation. Moreover, the penalty calculation policy and worksheet references two matrices: one concerns violations that affect the environment, property, or human health; the other relates to documentation errors, and is referred to as programmatic matrix.<sup>19</sup>

The following is a list and description of the violations, the applicable matrix, and the calculated violation penalty subtotal, as set out in the PCW:

<b>Violation No</b>	<b>Description and Citation</b>	<b>Matrix</b>	<b>Adjusted Violation Base Penalty (includes number of events)</b>
1	Failed to maintain all piping, pump, manways, tank access points, and ancillary equipment in a capped or otherwise secured manner to prevent access, tampering, or vandalism	Environmental	\$2,500
2	Failed to maintain all UST records and make them immediately available for inspection	Programmatic	\$1,000
3	Failed to notify TCEQ of any change or additional information concerning USTs (registration did not reflect current operator and out-of-service status for super unleaded tank); also failed to timely renew a previously issues UST delivery certificate	Programmatic	\$2,000

<sup>19</sup> ED Ex. 18, Penalty Policy of the Texas Commission on Environmental Quality, Sept. 2002.

Violation No	Description and Citation	Matrix	Adjusted Violation Base Penalty (includes number of events)
4	Failed to make available to a common carrier a valid TCEQ delivery certificate before accepting delivery of a regulated substance	Environmental	\$500
5	Failed to demonstrate acceptable financial assurance	Programmatic	\$3,000
6	Failed to provide proper release detection for the pressurized piping (annual piping tightness test not conducted) and failed to test the line leak detectors at least once per year	Environmental	\$2,500
7	Failed to inspect all sumps, manways, overspill containers or basins at least once every 60 days	Environmental	\$1,000

Ms. Porras testified that violations related to release detection, spill and overflow, and corrosion protection are extremely serious violations due to the potential environment damage associated with them. She identified Violations 1, 2, 3, 5 and 6 as a potential major under the environmental, property, and human health matrix because a failure to comply with these requirements creates a risk that a significant amount of pollutants may be released into the water and soil exceeding safe levels for the environment and human health. Ms. Porras testified that she used the lowest number of violation events per violation. In fact, all but two of the violations were cited as a single event. Of those two, Violation No. 3 was actually a combination of two rule violations: (1) the failure to notify the agency of any change or additional information concerning the USTs and (2) the failure to renew a UST delivery certificate. Ms. Porras counted those as two events. The second multiple-event violation (Violation No. 5) concerned the failure to demonstrate acceptable financial assurance—Ms. Porras testified that this could have been counted as a daily event, but she counted it as a single event per tank (Respondent had three tanks).<sup>20</sup>

<sup>20</sup> See ED Ex. 17.

Ms. Porras explained that Respondent submitted documentation showing a good faith effort to correct some violations; accordingly, she reduced the administrative penalty by \$1,150. Additionally, the base penalty was enhanced 54 percent due to the facility's five-year compliance history. Before Respondent's lease and operation of the facilities, the facilities received three notices of violations (NOVs) for the same or similar violations, which is assigned a 15% upward adjustment, and two NOVs for dissimilar violations, which is assigned a 4% upward adjustment. The Facility is a repeat violator and is classified as a poor performer. Finally, Ms. Porras enhanced the penalty to capture the avoided costs of compliance associated with Violation Nos. 3, and 5-7. Ms. Porras recommended a final penalty amount of \$19,868.

Respondent takes issue with the base penalty amount of \$10,000 for each allegation and further argued that imposing the penalties, as calculated on the worksheet, is arbitrary and capricious. He also argues that a distinction should be made in this case because Respondent took over the Mini Mart business from Mr. Tran, and it is improper for the TCEQ to enhance the penalty for violations that occurred when Mr. Tran owned the Facility. Respondent argues this enhancement is improper, arbitrary and capricious. Respondent concedes that there have been some deficiencies in compliance with the TCEQ's rules, but argues these deficiencies had to do with documentation and were not environmental violations. In fact, no contamination or releases occurred. According to Respondent, the public is not safer merely because UST operators fill out certain forms or possess required certificates. Respondent did not cite to a statute, rule, TCEQ policy, or case to support his positions.

Mr. Zulfiqar clearly did not know of or understand the extensive requirements associated with the operation of USTs. He is from Pakistan and speaks English as a second language. He purchased the lease and UST properties from Mr. Tran, who was from Vietnam. However, the ALJ finds that the ED properly calculated the administrative penalty. The ED's recommended penalty appropriately considered the factors required by TEX. WATER CODE ANN. § 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.

The ALJ acknowledges that Respondent's penalty calculation was increased because of previous violations charged against the Facility when the Mini Mart was owned and operated by Mr. Tran. However, the Commission's rules and Penalty Policy require consideration of the site's compliance history (here, the Mini Mart Facility), for the previous five-years preceding the investigation, irrespective of a change of ownership.<sup>21</sup> The ALJ agrees with the ED that the penalty was calculated in accordance with the TCEQ's written policy, and it must be applied fairly and consistently to all PST owners and operators. As noted by the ED, after her June investigation, Ms. Merritt notified the TCEQ enforcement division because there were four Category A violations, which were not based on Mr. Tran's previous actions. Finally, petroleum storage tank violations are serious because of the potential threat to human health and safety and because the water supply may be contaminated.

#### **D. Respondent's Ability to Pay**

Mr. Zulfiqar argues that he cannot pay the proposed penalty. He testified that he has four children, one of whom is a newborn. He has put all the money that he has into the business. The convenience store was filthy when he leased it; he and his wife worked day and night to clean it up and establish a business. Mr. Zulfiqar testified that he works seven days a week; his wife worked five days a week, until her youngest was born. With the poor economy, the business has slowed significantly in the last six to seven months. He stated that he does not have an extra \$6,000—in fact, he currently owes \$15,000 to pay for supplies, such as gasoline. However, he did not provide documentation of this debt.

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<sup>21</sup> See 30 TEX. ADMIN. CODE 60.1(d)(b)(c) and (d). Subsection (d) is confusing. It attempts to distinguish the instance when a previous owner owns multiple sites—only the site under review is considered for the five-year compliance period (in this case, the five years proceeding June 16, 2010).

Respondent has the burden of showing that he is unable to pay the penalty.<sup>22</sup> TCEQ witness Paige Seidenberger testified that she reviewed the financial documentation Mr. Zulfiqar provided to the TCEQ: (1) the TCEQ financial data request form; (2) 2009 and 2010 tax returns; (3) bank statements; (4) disclosures; and (5) vehicle ownership. Ms. Seidenberger calculated that Respondent had approximately \$6,000 a year in discretionary income that would not be needed to pay for living expenses. She concluded that Respondent would not be able to pay the penalty in a lump sum but could make monthly payments. Based on the amount of the proposed penalty, she recommended that Respondent be required to pay installments of approximately \$552 per month for 36 months.<sup>23</sup>

According to Ms. Seidenberger, some of Respondent's documents were questionable. First, she noted that the inventory level of the convenience store stayed the exact same amount for every period in the 2009 statement. Second, the salary information Respondent reported in the 2009 tax returns varied from the salary amounts reported to the Texas Work Force Commission. In her opinion, financial statements need to be reliable and accurate, these documents were not. She found evidence that Mr. Zulfiqar's and the corporation's assets, such as a vehicle and personal expenses, were comingled.

Respondent took issue with Ms. Seidenberger's recommendation and her expertise. Ms. Seidenberger is not a certified public accountant (CPA). In response to her concerns, Respondent provided a letter from his CPA, Dewan A. Ahmed, who indicated that the inventory of any grocery store remains more or less the same at the end of the day. Mr. Ahmed indicated this is true for Respondent's business.<sup>24</sup> Indeed, Mr. Zulfiqar testified that he mainly sells cigarettes and beer, and he immediately replenishes this stock. Mostly, customers buy their food elsewhere.

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<sup>22</sup> 30 TEX. ADMIN. CODE 70.8.

<sup>23</sup> ED Ex. 23.

<sup>24</sup> Respondent Ex. 1.

The ALJ agrees with Respondent that Ms. Seidenberger does not have a working knowledge of operating a convenience store. However, the evidence indicates that she was working with both Respondent and Respondent's counsel to secure documentation for her review. The TCEQ's rules require a respondent who makes a claim that he or she is unable to pay to submit the relevant financial records to the ED no later than 30 days before the evidentiary hearing.<sup>25</sup> On August 11, 2011, before the September 1, 2011 hearing date, Ms. Seidenberger asked Respondent to complete missing pages or information in the TCEQ's Financial Data Request Form, to provide missing pages from the company's bank statements in April, May, and June of 2010, to explain why Respondent had the same inventory level for all the financial reporting periods, and to explain some salary discrepancies.<sup>26</sup> She then examined and evaluated the information that Respondent provided to her as late as August 19, even though that she did not receive all the requested items.<sup>27</sup> The ALJ believes that Ms. Seidenberger tried to conduct an informed review with the documents and information provided to her.

Additionally, the ALJ agrees with Ms. Seidenberger that some of the documentation is suspect. Respondent indicated in the TCEQ Financial Data Request Form that he was responsible for monthly living expenses (rent, fuel, utilities, and food) totaling \$36,000 per year—oddly, this matches the total amount, indicated in the same form, of yearly salaries paid to Mr. and Mrs. Zulfiqar. Respondent did not satisfactorily address the discrepancies noted by Ms. Seidenberger, such as the salary amount report to the Texas Workforce Commission. The ALJ believes that Mr. and Mrs. Zulfiqar have worked very hard at their business. But the burden of proof is on Respondent to show that they are unable to pay the penalty. There is no persuasive *documentary* evidence to buttress Mr. Zulfiqar's testimony that he cannot pay the penalty over a three-year period.

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<sup>25</sup> 30 TEX. ADMIN. CODE § 70.8. A respondent waives the inability to pay claim if he fails to provide the necessary financial records within that timeframe.

<sup>26</sup> See Respondent Ex. 14. Counsel for Respondent was still responding to Ms. Seidenberger's information requests as late as August 23, 2011. Respondent Ex. 2.

<sup>27</sup> See Respondent Ex. 14.

### III. SUMMARY

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

Violation No. 1: 30 TEX. ADMIN. CODE § 334.54(b)(2) for the failure to maintain all piping, pumps, manways, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured matter to prevent access, tampering, and vandalism by unauthorized persons;

Violation No. 2: 30 TEX. ADMIN. CODE § 334.10(b) for the failure to maintain all UST records and make them immediately available for inspection upon request by TCEQ personnel;

Violation No. 3: 30 TEX. ADMIN. CODE §§ 334.7(d)(3) and 334.8(c)(5)(B)(ii) for the failure to notify the TCEQ of the change in operator and the out-of-service status on the super unleaded tank; and the failure to timely renew a previously issued UST delivery certificate, which expired on January 31, 2009;

Violation No. 4: 30 TEX. ADMIN. CODE § 334.8(c)(5)(A)(i) and TEX. WATER CODE ANN. § 26.3467(a) for the failure to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance;

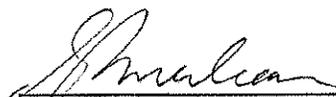
Violation No. 5: 30 TEX. ADMIN. CODE § 37.815(a) and (b) for the failure to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from petroleum UST operation;

Violation No. 6: 30 TEX. ADMIN. CODE § 334.50(b) and (b)(2)(A)(i)(III) and TEX. WATER CODE ANN. § 26.3475(a) for failure to provide proper release detection for the pressurized piping associated with USTs; and

Violation No. 7: 30 TEX. ADMIN. CODE § 334.42(i) for the failure to inspect all sumps, manways, overspill containers or catchment basins associated with a UST system at least once every 60 days to assure that they are liquid-tight and free of liquid and debris.

As a result, the ALJ recommends that the Commission assess a \$19,868 administrative penalty against Respondent, payable over a three year period. The ALJ further recommends that Respondent undertake the ED's suggested corrective actions, which were not disputed.

**SIGNED November 15, 2011.**

  
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**LILO D. POMERLEAU**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
Ali Zulfiqar d/b/a Mini Mart 102 and ZQS Corporation, Inc.  
TCEQ DOCKET NO. 2010-1326-PST-E  
SOAH DOCKET NO. 582-11-3204**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action from Ali Zulfiqar d/b/a Mini Mart 102 (Respondent) and ZQS Corporation, Inc. Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on September 1, 2011, in Austin, Texas, and presented the Proposal for Decision.

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. Ali Zulfiqar d/b/a Mini Mart 102 (Respondent) owns and operates a convenience store, including gasoline pumps and tanks, located at 2311 25<sup>th</sup> Avenue, Texas City, Galveston County, Texas (Facility).
2. Respondent owns three underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

3. On January 12, 2010, TCEQ Investigator Lisa E. Merritt conducted an inspection of the Facility and determined that Respondent had committed four violations of the TCEQ rules regarding USTs.
4. On February 18, 2010, the TCEQ sent a Notice of Violation to Respondent and to Binh Tran, the owner of the property at 2311 25<sup>th</sup> Avenue, Texas City, Galveston County.
5. On June 16, 2010, Ms. Merritt conducted a follow-up inspection and determined that Respondent remained in violation of several TCEQ rules, the Texas Water Code, and the Texas Health and Safety Code.
6. Ms. Merritt referred the matter to the TCEQ Enforcement Division because some of the violations found on her June 16, 2010 inspection were Category A violations, which are of a serious nature.
7. On or about June 16, 2010, Respondent was responsible for the following violations at the Facility:
  - a. The super unleaded tank was out of service, and there were no locks on the tank to prevent access, tampering, and vandalism;
  - b. There were no overflow corrosion protection records available to ensure that the overfill prevention equipment was properly working;
  - c. The UST registration records had not been amended to reflect the current operator and out-of-service status of the super unleaded storage tank and the delivery certificate had not been properly renewed;
  - d. A valid delivery certificate was not available at the time of gas deliveries for fuel delivered between January 12 and June 16, 2010;
  - e. There was no documentation to show that the Facility was insured to compensate any third party for bodily injury and/or property damage caused by accidental releases arising from the operation of petroleum USTs;
  - f. There was no record showing that the gasoline lines were tested or monitored monthly for releases or that the line leak detector was tested at least once per year; and

- g. There was water in the fuel spill bucket and no documentation that any overspill containers or catchment basins were being inspected every 60 days.
8. On July 26, 2010, the TCEQ sent a Notice of Enforcement to Mr. Tran and sent a copy to Respondent.
9. On December 14, 2010, the ED filed a Preliminary Report and Petition (EDPRP) with the Commission's Chief Clerk and mailed a copy of it by U.S. first class mail and certified mail, return receipt requested, to Respondent at 2311 25<sup>th</sup> Avenue, Texas City, Texas 77590. The Preliminary Report and Petition alleged that Respondent violated TEX. WATER CODE ANN. §§ 26.3467(a) and 26.3475(a) and (c)(1); TEX. HEALTH & SAFETY CODE ANN. § 382.085(b); and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b), 115.226(1), 334.7(d)(3), 334.8(c)(5)(A)(i), 334.8(c)(5)(B)(ii), 334.10(b), 334.42(i), 334.48(c), 334.49(c)(4), 334.50(b), 334.50(b)(2)(A)(i)(III), 334.50(d)(1)(B)(ii), 334.50(d)(1)(B)(iii)(I), and 334.54(b)(2).
10. On December 30, 2010, Respondent requested a contested case hearing on the allegations in the EDPRP, and on January 31, 2011, the Chief Clerk referred this dispute to SOAH for hearing.
11. A Notice of Preliminary Hearing was issued on February 9, 2011.
12. A preliminary hearing was held on March 10, 2011, before ALJ William G. Newchurch at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas.
13. The evidentiary hearing convened on September 1, 2011, before ALJ Lilo D. Pomerleau at SOAH, William P. Clements Building, Fourth Floor, 300 West 15th Street, Austin, Texas. The ED was represented by Staff Attorney Stephanie Frazee. Respondent was represented by attorney Mark W. Stevens. The record closed that day.

14. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$19,868 payable over a three-year period.
15. An administrative penalty of \$19,868 takes into account the factors contained in TEX. WATER CODE § 7.053 and the Commission's 2002 Penalty Policy.
16. Respondent failed to provide sufficient documentation detailing an inability to pay the proposed penalty.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. §§ 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 ANN. 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 ANN. § 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 ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, 70.104, and 80.6(c).
5. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE ANN. §§ 26.3467(a) and 26.3475(a) and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b),

334.7(d)(3), 334.8(c)(5)(A)(i), 334.8(c)(5)(B)(ii), 334.10(b), 334.42(i), 334.50(b), 334.50(b)(2)(A)(i)(III), and 334.54(b)(2).

6. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE ANN. § 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.
7. Based on the above findings of fact, the elements set forth in TEX. WATER CODE ANN. §§ 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 \$19,868.
8. The ED met his burden of proof to show an administrative penalty of \$19,868 is warranted for the violations found and should be assessed against Respondent.
9. Respondent failed to meet his burden to show that he has an inability to pay the recommended administrative penalty, pursuant to 30 TEX. ADMIN. CODE § 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 \$19,868 for violations of the following statutes and rules: TEX. WATER CODE ANN. §§ 26.3467(a) and 26.3475(a) and 30 TEX. ADMIN. CODE §§ 37.815(a) and (b), 334.7(d)(3), 334.8(c)(5)(A)(i), 334.8(c)(5)(B)(ii), 334.10(b), 334.42(i), 334.50(b), 334.50(b)(2)(A)(i)(III), and 334.54(b)(2).

2. Within 30 days after the effective date of this Order, Respondent shall pay the first monthly payment of \$552. The remaining amount of the administrative penalty shall be payable in 35 monthly payments of \$552 each. 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. Within 30 days from the effective date of the Commission Order, Respondent shall begin conducting bimonthly inspections of all sumps, manways, and overflow containers or catchment basins in accordance with 20 TEX. ADMIN. CODE 334.42.
  
4. The payment of this administrative penalty and compliance with all the terms and conditions set forth in this Order will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Ali Zulfiqar d/b/a Mini Mart 102 and ZQS Corporation, Inc., TCEQ DOCKET NO. 2010-1326-PST-E" to:  
  

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088
  
5. Within 60 days after the effective date of this Order, Respondent shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering

Provision paragraph 3. 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 or 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  
Houston Regional Office  
Texas Commission on Environmental Quality  
5425 Polk Avenue, Suite H  
Houston, Texas 77023-1486

6. 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 Order.
7. 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, are denied.
8. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

9. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
  
10. 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**

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