

**SOAH DOCKET NO. 582-11-5376
TCEQ DOCKET NO. 2010-1775-PST-E**

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

V.

**DAVID HARDEN,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
PROPOSAL FOR DECISION**

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Administrative Law Judge's Proposal for Decision and files the following exceptions before the State Office of Administrative Hearings ("SOAH").

ORDERING PROVISION NO. 2

The Executive Director respectfully recommends that Ordering Provision No. 2.b., page 6, be revised to reflect that payments toward outstanding fees should refer to Respondent's TCEQ Financial Administration Account No. 0040612U to enable TCEQ to track payments received on the account, which is separate from accounts established for administrative penalty payments. Specifically, the Executive Director recommends that Ordering Provision 2.b. be revised to read as follows:

2. b. Submit payment for all outstanding fees, including any associated penalties and interest with the notation "Re David Harden, TCEQ Financial Administration Account No. 0040612U," to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P. O. Box 13089
Austin, Texas 78711-3087.

The Executive Director also respectfully recommends that a subsection "c." be added to emphasize that payments made toward the administrative penalty assessed should refer to Respondent's TCEQ Docket Number and should be sent to a different TCEQ post office box. Specifically, the Executive Director recommends that a new subsection "c." be added at Ordering Provision No. 2 to read as follows:

2. c. All checks submitted to pay the penalty imposed by this Order shall be made out to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: David Harden; Docket No. 2010-1775-PST-E" to:

Financial Administration Division, Revenues Section
Texas Commission on Environmental Quality
Attention: Cashier's Office, MC 214
P.O. Box 13088
Austin, Texas 78711-3088

ORDERING PROVISION NO. 3

The Executive Director respectfully recommends that Order Provision No. 3 be revised to correct a typographical error resulting in the omission of the letter, "T" in the acronym "UST." Specifically, the Ordering Provision should be revised to read as follows:

"Within 45 days after the effective date of the Commission Order, Respondent shall submit an amended registration to reflect the current operational status of the UST system, in accordance with 30 Tex. Admin. Code § 334.7 to:"

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

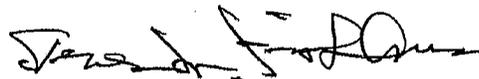
Respectfully Submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division



Steven M. Fishburn
State Bar of Texas No. 24050600
Litigation Division, MC 175
P.O. Box 13087
Austin, TX 78711
(512) 239-0635
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE
David Harden
SOAH Docket No. 582-11-5376
TCEQ Docket No. 2010-1775-PST-E

I hereby certify that on this 25th day of October, 2011, the original and 7 copies of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions were sent to the following:

Via Telefax to (512) 322-2061

The Honorable Roy G. Scudday
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

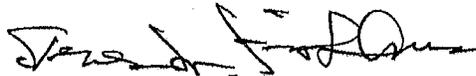
Via Certified Mail, Postage Prepaid

Article No. 7002 2030 0005 7059 4253

Mr. David Harden
772-B Bowden Road
Huntsville, Texas 77340

Via electronic mail

Blas Coy, Public Interest Counsel



Steven M. Fishburn
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against and
Requiring Corrective Action by
David Harden
TCEQ DOCKET NO. 2010-1775-PST-E
SOAH DOCKET NO. 582-11-5376**

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 enforcement order assessing administrative penalties against and requiring corrective action from David Harden (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on October 6, 2011, in Austin, Texas, and presented the Proposal for Decision.

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

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. David Harden (Respondent) is the record owner of a closed grocery store located at 453 FM 1971, Huntsville, Walker County, Texas (Facility).

2. On June 17, 2010, TCEQ Investigator Randy Breaux, conducted a petroleum storage tank (PST) out of service inspection of the Facility. As a result of his inspection, Investigator Breaux determined that Respondent had committed two violations of the TCEQ rules regarding underground storage tanks (UST).
3. On September 14, 2010, Investigator Breaux conducted a record review after the issuance of a Notice of Violation on June 29, 2010, which set forth two violations: failure to update TCEQ UST Registration Form to reflect a change in operational status; and failure to perform the permanent removal of a UST that has not met upgrade requirements. As a result of his review, Investigator Breaux determined that the Facility had received a Notice of Violation for the same violations on August 13, 2007.
4. The UST Registration for the Facility dated May 9, 1993, was signed by Respondent as Owner.
5. The records of the Walker County Appraisal District show Respondent and his wife Alesia Harden as the owners of the Facility.
6. Respondent is the owner of the Facility and responsible for its compliance with the rules of TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) §§ 334.1(b)(3) and 334.2(73).
7. On October 8, 2010, the ED issued a Notice of Enforcement for the Facility to Respondent regarding the violations found in the review on September 14, 2010.
8. On March 8, 2011, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated 30 TAC §§ 334.47(a)(2), 334.7(d)(3), and 334.22(a), and Code § 5.702, specifically for failing to permanently remove UST systems

from service, failing to notify the agency of a change in operational status, and failing to timely pay annual fees.

9. The ED recommended the imposition of an administrative penalty in the total amount of \$3,500, and corrective action to bring the site into compliance.
10. Respondent violated 30 TAC §§ 334.47(a)(2), 334.7(d)(3), and 334.22(a), and Code § 5.702, specifically for failing to permanently remove UST systems from service, failing to notify the agency of a change in operational status, and failing to timely pay annual fees.
11. The penalty amount for the Facility for the first violation, failing to permanently remove a UST system from service, comprises a penalty of \$2,500 for one monthly violation event, for a total of \$2,500. The penalty amount for the Facility for the second violation, failing to notify the agency of a change in operational status, comprises a penalty of \$1,000 for one single violation event, for a total of \$3,500.
12. No penalty was requested for the third violation as the fees would be billed as part of the routine fee billing process.
13. An administrative penalty of \$3,500 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
14. On March 22, 2011, Respondent requested a contested case hearing on the allegations in the EDPRP.
15. On May 10, 2011, the case was referred to SOAH for a hearing.

16. On May 18, 2011, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
17. On June 16, 2011, the preliminary hearing was held, and the ED established jurisdiction to proceed.
18. The hearing on the merits was conducted on October 6, 2011, in Austin, Texas, by ALJ Roy G. Scudday.
19. Respondent was represented at the hearing by his wife Alesia Harden, appearing by telephone. The ED was represented by Steven M. Fishburn, attorney in TCEQ's Litigation Division. No one appeared for the Office of Public Interest Counsel.

II. CONCLUSIONS OF LAW

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002. Additionally, the Commission may order the violator to take corrective action, pursuant to Code § 7.073.
4. As required by Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, or the penalties and the corrective actions proposed therein.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.401, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact, Respondent violated 30 TAC §§ 334.47(a)(2), 334.7(d)(3), and 334.22(a), and Code § 5.702.
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
 - The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violations and a total administrative penalty of \$3,500 is justified and should be assessed against Respondent.

11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. David Harden is assessed an administrative penalty in the amount of \$3,500 for violation of 30 TAC §§ 334.47(a)(2) and 334.7(d)(3). The payment of this administrative penalty and David Harden's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality."

2. Within 30 days from the effective date of the Commission Order, Respondent shall:

a. Permanently remove the UST system from service, in accordance with 30 TAC § 334.55; and

b. Submit payment for all outstanding fees, including any associated penalties and interest with the notation, "Re David Harden, TCEQ Financial Administration Account No. 0040612U," to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13089
Austin, Texas 78711-3087

c. All checks submitted to pay the penalty imposed by this Order shall be made out to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: David Harden; Docket No. 2010-1775-PST-E" to:

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Financial Administration Division, Revenues Section
Texas Commission on Environmental Quality
Attention: Cashier's Office, MC 214
P.O. Box 13088
Austin, Texas 78711-3088

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3. Within 45 days after the effective date of the Commission Order, Respondent shall submit an amended registration to reflect the current operational status of the UST system, in accordance with 30 TAC § 334.7 to:

Registration and Reporting Section
Permitting and Remediation Support Division, MC 138
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

4. Within 60 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Nicolle Beale, Waste Section, Manager
Texas Commission on Environmental Quality
Houston Regional Office
5425 Polk St., Ste. H
Houston, Texas 77023-1452

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by Code. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



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David Harden
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Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
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Nicolle Beale, Waste Section, Manager
Texas Commission on Environmental Quality
Houston Regional Office
5425 Polk St., Ste. H
Houston, Texas 77023-1452

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6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by Code. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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