

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

October 17, 2011

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

Re: SOAH Docket No. 582-11-5376; TCEQ Docket No. 2010-1775-PST-E;
Executive Director of the Texas Commission on Environmental Quality v.
David Harden

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 November 7, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than November 17, 2011.

This matter has been designated **TCEQ Docket No. 2010-1775-PST-E; SOAH Docket No. 582-11-5376**. 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 cursive script that reads "Roy G. Scudday".

Roy G. Scudday
Administrative Law Judge

RGS/ap
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: DAVID HARDEN
SOAH DOCKET NUMBER: 582-11-5376
REFERRING AGENCY CASE: 2010-1775-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ ROY SCUDDAY

REPRESENTATIVE / ADDRESS

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DAVID HARDEN

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

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

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BEFORE THE STATE OFFICE

v.

**DAVID HARDEN,
Respondent**

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$3,500 in administrative penalties against and obtain corrective action from David Harden (Respondent) for violations of 30 TEX. ADMIN. CODE (TAC) §§ 334.47(a)(2), 334.7(d)(3), and 334.22(a). Simply stated, the ED alleges that Respondent failed to permanently remove from service underground storage tank (UST) systems, failed to notify the agency of a change in status of the UST systems, and failed to timely pay administrative fees.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. The Commission should find that the violations occurred, assess Respondent an administrative penalty of \$3, 500, and order Respondent to take corrective action.

II. PROCEDURAL HISTORY AND JURISDICTION

The hearing convened on October 6, 2011, before ALJ Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Steven M. Fishburn, Attorney, Litigation Division. Respondent was represented by Alesia Harden who appeared on Respondent's behalf by telephone. No one appeared on behalf of the Office of Public Interest Counsel. The record closed on the date of the hearing.

Jurisdiction was proved as found in the order dated June 16, 2011. Undisputed procedural facts are set out in findings in the Proposed Order.

III. DISCUSSION

A. Violations

David Harden is the registered owner of a closed grocery store located at 453 FM 1971, Huntsville, Walker County, Texas (Facility). On June 17, 2010, TCEQ Investigator Randy Breaux, conducted a petroleum storage tank (PST) compliance and out of service inspection of the Facility. As a result of his inspection, Investigator Breaux determined that Respondent had violated rules within the Commission's jurisdiction as follows:

Respondent failed to update TCEQ UST Registration Form to show a change in status; and

Respondent failed to perform the permanent removal of a UST that has not met upgrade requirements.

On September 14, 2010, Investigator Breaux conducted a record review after the issuance of a Notice of Violation on June 29, 2010. Investigator Breaux determined that the Facility had been issued a Notice of Violation on August 13, 2007, for the same violations as found in his inspection.

As part of his investigations, Investigator Breaux found the UST Registration for the Facility dated May 9, 1993, signed by Respondent as Owner. In addition, he found that the records of the Walker County Appraisal District showed Respondent and Alesia Harden as the owners of the Facility.

Mrs. Harden testified that they did not remove the tanks as they had indicated they would on September 17, 2007, in response to the August 2007 Notice of Violation because they could not afford to do so. She further stated that they still could not afford to do so.

Under TEX. WATER CODE (Code) § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Code.¹ Additionally, the Commission may order the violator to take corrective action.²

In this case, Respondent is alleged to have violated 30 TAC §§ 334.47(a)(2), 334.7(d)(3), and 334.22(a), which are rules within the Commission's authority. Specifically, the ED alleges that Respondent violated 30 TAC § 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements. Respondent is further alleged to have violated 30 TAC § 334.7(d)(3) by failing to notify the agency of the change or additional information regarding the UST system within 30 days from the date of the occurrence of the change or addition by not updating the registration to change the operational status from "in use" to "temporarily out of service." In addition, Respondent is alleged to have violated 30 TAC § 334.22(a) and TEX. WATER CODE § 5.702 by failing to pay the outstanding UST fees and associated late fees for the Facility for fiscal years 1996 through 2007.

The rule at 30 TAC § 334.1(b)(3) provides that the requirements and provisions of the rules regarding USTs apply equally to all owners of UST systems. "Owner" is defined in the rule at 30 TAC § 334.2(73) as follows:

Any person who holds legal possession or ownership of an interest in an underground storage tank (UST) system or an aboveground storage tank (AST). For the purposes of this chapter, if the actual ownership of a UST system or an AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a

¹ Code § 7.052(c).

² Code § 7.073.

deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a UST system or AST with the commission under § 334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration.

Based on the evidence in the record, Respondent is the owner of the Facility, and, as a result, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED. Further, the State Office of Administrative Hearings (SOAH) has jurisdiction over this matter as reflected in the Conclusions of Law that are in the attached Order.

Respondent does not dispute that the UST system has not been permanently removed, that the registration was not updated, or that he has not paid the outstanding UST fees and associated late fees for the Facility.

B. Penalties

The total administrative penalty sought for the first two violations is \$3,500. The penalty amount for the first violation, failure to permanently remove a UST, comprises a penalty of \$2,500 for one monthly violation event. The penalty amount for the second violation, failure to notify the agency of a change in operational status, comprises a penalty of \$1,000 for one single violation event. No penalty was assessed for the third violation as the fees would be billed as part of the routine fee billing process.

The proposed penalty for the Facility of \$3,500 was assessed under the terms of the Commission's 2002 Penalty Policy.³ Respondent did not dispute the overall accuracy of the ED's calculation of the penalty.

³ ED Ex.13, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

Based on the above analysis, the ALJ concludes that a penalty of \$3,500 is consistent with the factors in Code § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.⁴ The penalty recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable. Because the penalty amount is below the minimum penalty that can be imposed in cases of financial inability to pay, no adjustment can be made for Respondent's financial condition.

In addition, based on the evidence, the ALJ recommends that Respondent be ordered to permanently remove the UST system from service, in accordance with 30 TAC § 334.55.

SIGNED October 17, 2011.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁴ Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

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; Docket No. 2010-1075-PST-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
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 US 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**