SOAH DOCKET NO. 582-11-7891
TCEQ DOCKET NO. 2011-0025-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;	§	**BEFORE THE**
PETITIONER	§	
	§	**TEXAS COMMISSION ON**
VS.	§	
JOE WESTMORELAND D/B/A ATHENS RADIATOR & TIRE AND;	§	**ENVIRONMENTAL QUALITY**
RESPONDENT	§	

THE EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES, the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. INTRODUCTION

Joe Westmoreland d/b/a Athens Radiator & Tire ("Respondent") an underground storage tank ("UST") system and a former gasoline service station located at 710 W. Corsicana Street, Athens, Texas (the "Facility"). On December 13, 2010, a TCEQ Tyler Regional investigator documented that Respondent violated 30 TEX. ADMIN. CODE § 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. The Executive Director is seeking an administrative penalty two thousand six hundred twenty-five dollars ($2,625.00) and corrective actions as outlined in the Executive Director's Preliminary Report and Petition ("EDPRP").

II. EXCEPTIONS

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJ") findings and conclusions. The ALJ concluded that the Executive Director established that Respondent violated 30 TEX. ADMIN. CODE § 334.47(a)(2) and recommended the corrective actions outlined in the EDPRP. However, the Executive Director respectfully disagrees with the administrative penalty of one hundred five dollars ($105.00) recommended by the ALJ.

Penalty Calculation: Minor Potential for Harm

The Executive Director respectfully disagrees with the ALJ's characterization of the violation as "minor potential for harm." Proposed Order, Findings of Fact No. 22. The violation for the failure to permanently remove a UST system from service is properly calculated in the Penalty Calculation Worksheet ("PCW") as a potential release with major harm under the Environmental, Property and Human Health matrix. See ED-A, EDPRP.

The ALJ states in her Proposal for Decision ("PFD") that "evidence in the record indicates the potential for harm is minimal at most" because the USTs were last used before 1962; the tanks were pressure checked in 1998 and showed no signs of leakage and there is no evidence in the record that indicates the USTs had been tampered with or used in anyway. PFD at 5. In addition, the ALJ found that the facts of this case are similar to another TCEQ case (the "Corpian Case") where the ALJ found the penalty should have been calculated based on a minor potential for harm; thus, the penalty should be reduced. PFD at 5.

The Executive Director agrees with the ALJ's assessment that this violation should be categorized as a potential release. The Penalty Policy of the Texas Commission on Environmental Quality ("Penalty Policy") categorizes two types of release: actual and potential. ED-11, Penalty Policy at 10. Because there is no evidence of an actual release, this violation is properly categorized as a potential release. The Penalty Policy further subcategorizes potential releases into three categories by degree of harm: major, moderate and minor. ED-11 at 10.

Accordingly, the remoteness of the potential for a release cannot be considered under the Penalty Policy, only the degree of the harm of the release. The record clearly shows that petroleum substance is a pollutant that would exceed levels that are protective of human health or environmental receptors as a result the release from the UST system. ED-11 at 11. TCEQ investigator, Robert Reagins testified that when steel tanks are in the ground without corrosion protection, condensation sets in and causes them to corrode and leak into the groundwater. Mr. Regains explained that tanks similar to the ones located at the Facility can generally hold one thousand gallons or more of gasoline. Since there are three tanks at the Facility without corrosion protection, it is likely that three thousand gallons of fuel or more could have leaked into the soil. Because of the unknown condition of the tanks, it is likely that petroleum substance or any future product could subsequently create a major harm to the surrounding environment. An environment that is a well populated area with businesses, residential communities, parks and restaurants. In addition, the TCEQ enforcement coordinator, James Nolan testified that petroleum is a volatile substance that contains carcinogens and dangerous chemicals that could leak into the groundwater and cause significant

contamination. Consequently, a potential release of petroleum substance from the UST system is correctly categorized as major harm.

Because the Penalty Policy does not categorize degrees of potential release based on the likelihood of an event actually occurring, the Executive Director respectfully disagrees with the ALJ's conclusion, which is based on this erroneous methodology. Any further categorization of potential release contradicts the Executive Director's established method of categorization of release pursuant to the Penalty Policy.

Although the ALJ relied upon the Corpian Case for support in lowering the administrative penalty, the Corpian Case PFD was not adopted by the Commission. In fact, the Commission disagreed with the ALJ's decision to lower the penalty based on a finding of minor harm. Rather, the Commission agreed with the Executive Director's characterization of the violation and determined that the failure to remove tanks violation was appropriately calculated as a potential major harm rather than a potential minor harm. The Order adopted by the Commission in the Corpian Case reflects this potential major categorization.

Penalty Calculation : Adjustments

The Executive Director also respectfully disagrees with the ALJ's adjustments to the penalty for culpability, economic benefit, good faith effort to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE § 7.052 and in the Penalty Policy. Proposed Order, Conclusion of Law No. 12. The ALJ recommends an administrative penalty of one hundred five dollars ($105.00) but fails to elaborate on how she applied the adjustments from the Penalty Policy. Proposed Order, Finding of Fact No. 22. The Executive Director properly calculated the administrative penalty pursuant to the Penalty Policy and recommends an administrative penalty of two thousand six hundred twenty-five ($2,625.00). The Executive Director's recommended administrative penalty takes into consideration all the adjustments available in the Penalty Policy. The Executive Director reviewed all the adjustments in the Penalty Policy and recommends one upward adjustment of 5% for compliance history. The Penalty Policy recommends an upward adjustment of 5% for a compliance history with one notice of violation ("NOV") with "same or similar violations as those in the current enforcement action." ED-11 at 16. Respondent's compliance history lists one NOV, dated May 25, 2010, containing a violation of 30 TEX. ADMIN. CODE § 334.47(a)(2). ED-12, Compliance History.

Respondent failed to meet the Penalty Policy criteria for any downward adjustments. Pursuant to the Penalty Policy, culpability and economic benefit only enhance a penalty adjustment. ED-11 at 17 and 19. Consequently a downward adjustment for culpability and economic benefit is inappropriate. Respondent's compliance history is rated as average. ED-12. A downward adjustment for

compliance history is appropriate for intended audits and disclosure of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995; environmental management systems in place for one year or more; voluntary on-site compliance assessments conducted by the Executive Director under a special assistance program; participation in a voluntary pollution reduction program; and early compliance with, or offer of a product that meets future state of federal governmental environmental requirements. ED-11 at 17. Respondent failed to meet any of the downward adjustments for compliance history listed in the Penalty Policy. Thus, a downward adjustment for compliance history is also inappropriate. Further, Respondent failed to meet a downward adjustment for good faith effort to comply. This adjustment is applied when a respondent completes action to correct the violation before the issuance of the EDPRP or NOV. ED-11 at 18. Here, Respondent failed to qualify for a good faith effort to comply reduction because Respondent has yet to correct the violation. Finally, the categorization of potential release and major harm in the PCW appropriately considers any adjustment for release potential and extent of possible harm.

Pursuant to the Penalty Policy, the Executive Director does not recommend a reduction in the penalty based on culpability, economic benefit, good faith efforts to comply, or compliance history because Respondent failed to meet the criteria for these downward adjustments. Respondent also failed to adequately assert a claim for financial inability to pay. Pursuant to 30 TEX. ADMIN. CODE § 70.8, Respondent possesses the burden of proof for a financial inability to pay claim and waived this claim by failing to raise the claim. Further, pursuant to TCEQ policy, even if the Respondent had timely raised this claim, a finding of financial inability to pay would only lower the administrative penalty to three thousand six hundred dollars ($3,600.00). Any penalty reduction from the recommended administrative penalty of two thousand six hundred twenty-five dollars ($2,625.00) contradicts the Executive Director's established method of applying adjustments to the administrative penalty pursuant to the Penalty Policy.

III. OTHER SUGGESTED MODIFICATIONS

The Executive Director suggests the following changes be made to the ALJ's Proposed Order:

1. The Executive Director recommends replacing "d/b/a/" in the opening paragraph with "d/b/a".

2. The Executive Director recommends striking Finding of Fact No. 4 and renumbering the remaining paragraphs. Respondent's testimony was not persuasive and there is no documentation to support that gasoline was not delivered to or dispensed from the USTs since 1962.

3. The Executive Director recommends striking Finding of Fact No. 5 and renumbering the remaining paragraphs. Respondent's testimony was not persuasive there is no documentation to support that Respondent never operated a service station or used the USTs at the Facility.

4. The Executive Director recommends that Finding of Fact No. 6 be modified by striking "In 1987 or 1988, the tanks were opened and pressure checked. At the time, there was no smell of gasoline". Respondent provided no documentation that the USTs were pressure checked, nor did he provide results of such a test.

5. The Executive Director recommends that Finding of Fact No. 8 be modified to add "The tanks are unlocked, but" to the beginning of the sentence; and remove "tampered with or" since Respondent testified that he opened the tanks.

6. The Executive Director recommends that Finding of Fact No. 9 be modified by replacing "April 13, 2009" with "April 13, 2010" to reflect the correct investigation date.

7. The Executive Director recommends that Finding of Fact No. 10 be modified by changing "30 Tex. Admin. Code 334.47" to "30 Tex. Admin. Code § 334.47".

8. The Executive Director recommends that Finding of Fact No. 11 be modified by replacing "December 14, 2010" with "December 13, 2010" to reflect the correct file review date.

9. The Executive Director recommends that Finding of Fact No. 13 be modified by changing "TEX. Water CODE Ann." to "Tex. Water Code Ann.".

10. The Executive Director recommends that Finding of Fact No. 15 be modified by replacing "June 2, 2011" with "June 6, 2011" to reflect the correct answer date.

11. The Executive Director recommends that Finding of Fact No. 16 be modified by replacing "July 18, 2011" with "July 12, 2011" to reflect the correct SOAH referral date.

12. The Executive Director recommends that Finding of Fact No. 22 be modified to replace "minor potential" with "major potential" to reflect the correct categorization of the violation.

13. The Executive Director recommends that Conclusion of Law No. 12 be modified by changing the penalty amount from one hundred five dollars

($105.00) to two thousand six hundred twenty-five dollars ($2,625.00).

14. The Executive Director recommends that Ordering Provision No. 1 be modified by changing the penalty amount from one hundred five dollars ($105.00) to two thousand six hundred twenty-five dollars ($2,625.00), and replacing 30 Tex. Admin. Code § 334.7(a)(2) with 30 Tex. Admin. Code § 334.47(a)(2) to reflect the correct violated rule citation.

IV. CONCLUSION

The Executive Director respectfully requests that the Commission adopt the ALJ's proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is hereby included as Attachment A.

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

by Sharesa Y. Alexander

Sharesa Y. Alexander
State Bar of Texas No. 24064197
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3503
(512) 239-3434 (FAX)
Sharesa.Alexander@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 2012, an original and seven (7) copies of the foregoing "Executive Director's Exceptions and Suggested Modifications 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 was mailed via Certified Mail, Return Receipt Requested, 70110470000024214124, and via First Class Mail, postage prepaid, to:

Joe Westmoreland d/b/a Athens Radiator & Tire
710 W. Corsicana Street
Athens, Texas 75751

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via Facsimile Transmission (512) 322-2061, to:

The Honorable Lilo D. Pomerleau
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Mr. Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.

Sharesa Y. Alexander

Sharesa Y. Alexander
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 Joe Westmoreland d/b/a Athens Radiator & Tire TCEQ DOCKET NO. 2011-0025-PST-E SOAH DOCKET NO. 582-11-7891

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 seeking corrective action from Joe Westmoreland d/b/a Athens Radiator & Tire (Respondent). Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on December 16, 2011, in Austin, Texas, and presented the Proposal for Decision. The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

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. Joe Westmoreland d/b/a Athens Radiator & Tire (Respondent) currently owns the property located at 710 West Corsicana Street, Athens, Henderson County, Texas (Facility), where he operates a radiator business.

2. Respondent purchased the property in 1984. The property includes three underground storage tanks (USTs) installed and used by a previous owner.

3. There is no evidence to show that anyone other than Respondent owns the USTs.

4. There are no documents to confirm that the tanks had no leakage.

5. The dispensers are removed; however, field ports and vent pipes still remain.

6. The tanks are unlocked, but there is no evidence that the USTs have vandalized.

7. On April 13, 2010, Robert Reagins, a Commission investigator, conducted a field investigation for the TCEQ to determine whether the USTs complied with the applicable petroleum storage tank (PST) requirements.

8. On May 25, 2010, the Commission sent Respondent a Notice of Violation (NOV) citing alleged violations: (a) failure to amend the site's PST registration; and (b) failure to permanently remove the USTs or provide documentation for the technical upgrade requirements in accordance with 30 Tex. Admin. Code § 334.47.

9. On December 13, 2010, Mr. Reagins conducted a file review of the Facility and determined that Respondent failed to address the alleged violations.

10. On December 20, 2010, the ED mailed a Notice of Enforcement to Respondent.

11. On May 31, 2011, the ED issued the EDPRP to Respondent in accordance with Tex. Water Code Ann. (Water Code) § 7.054, alleging that Respondent violated 30 Tex. Admin. Code § 334.47(a)(2) by failing to permanently remove the USTs from service and 30 Tex. Admin. Code 334.7(d)(3) by failing to update the UST registration to reflect the current out-of-service status of the UST.

12. The ED recommended the imposition of an administrative penalty in the total amount of $3,675.00, and corrective action to bring the Facility into compliance.

13. On June 6, 2011, Respondent requested a contested case hearing on the allegations in the EDPRP.

14. On July 12, 2011, the case was referred to SOAH for a contested case hearing.

15. On July 22, 2011, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondent, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

16. At the preliminary hearing that was held on August 25, 2011, the ED established jurisdiction to proceed.

17. The hearing on the merits was conducted on December 16, 2011, in Austin, Texas, by ALJ Lilo D. Pomerleau.

18. The ED was represented by Sharesa Y. Alexander, Attorney, Litigation Division. Respondent appeared on his own behalf.

19. At the hearing, the ED dropped the alleged violation of 30 Tex. Admin. Code § 334.7(d)(3), concerning registration.

20. Based upon the evidence presented at the hearing on the merits, the Facility is a minor source and the violation has a major potential for harm.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority pursuant to Water Code § 7.002.

2. Pursuant to Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

3. Under Water Code § 7.052, a penalty may not exceed $10,000 per violation, per day, for the violation at issue in this case.

4. Pursuant to Water Code § 7.073, the Commission may order Respondent to take

corrective action.

5. Respondent is responsible for compliance with the rules of TCEQ pursuant to 30 Tex. Admin. Code §§ 334.1(b)(3) and 334.2(73).

6. As required by Water Code § 7.055 and 30 Tex. Admin. Code §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.

7. As required by Tex. Gov't Code Ann. §§ 2001.051(1) and 2001.052; Water Code § 7.058; 1 Tex. Admin. Code § 155.27; and 30 Tex. Admin. Code §§ 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.

8. 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.

9. Based on the above Findings of Fact, Respondent violated 30 Tex. Admin. Code § 334.47(a)(2).

10. In determining the amount of an administrative penalty, Water 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.

11. The Commission has adopted a Penalty Policy setting forth its policy regarding the

computation and assessment of administrative penalties, effective September 1, 2002.

12. Based on consideration of the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of two thousand six hundred twenty-five dollars ($2,625.00) is justified and should be assessed against Respondent.

13. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the ED 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. Joe Westmoreland d/b/a Athens Radiator & Tire (Respondent) is assessed an administrative penalty in the amount of two thousand six hundred twenty-five dollars ($2,625.00) for violation of 30 Tex. Admin. Code § 334.47(a)(2). The payment of this administrative penalty and Respondent'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." Administrative penalty payments shall be sent with the notation "Re: Joe Westmoreland d/b/a Athens Radiator & Tire; TCEQ Docket No. 2011-0025-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

2. Within 30 days after the effective date of the Commission Order, Respondent shall permanently remove the UST system from service, in accordance with 30 Tex. Admin. Code § 334.55.

3. Within 45 days after the effective date of the Commission 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 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:

Michael Brashear, Waste Section Manager
Tyler Regional Office
Texas Commission on Environmental Quality
2916 Teague Drive
Tyler, Texas 78701-3734.

4. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.

6. 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.

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

8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Bryan W. Shaw, PhD, Chairman
For the Commission