

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 7, 2012

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

Re: **SOAH Docket No. 582-11-7891; TCEQ Docket No. 2011-0025-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Joe Westmoreland d/b/a Athens Radiator & Tire, Respondent**

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 **March 9, 2012**. Any replies to exceptions or briefs must be filed in the same manner no later than **March 19, 2012**.

This matter has been designated **TCEQ Docket No. 2011-0025-PST-E; SOAH Docket No. 582-11-7891**. 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

Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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300 West 15th Street Suite 502

Austin, Texas 78701

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: JOE WESTMORELAND / RADIATOR & TUBE

SOAH DOCKET NUMBER: 582-11-7891

REFERRING AGENCY CASE: 2011-0025-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ LILO D. POMERLEAU

REPRESENTATIVE / ADDRESS

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EXECUTIVE DIRECTOR

JOE WESTMORELAND
OWNER
ATHENS RADIATOR & TIRE
701 WEST CORSICANA STREET
ATHENS, TX 75751

ATHENS RADIATOR & TIRE

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

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
v.	§	OF
	§	
JOE WESTMORELAND D/B/A	§	
ATHENS RADIATOR & TIRE,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess administrative penalties against and obtain corrective action from Joe Westmoreland d/b/a Athens Radiator & Tire (Respondent) for violations of 30 Tex. Admin. Code § 334.47(a)(2). Simply stated, the ED alleges that Respondent failed to permanently remove underground storage tanks (USTs) from service or properly upgrade the USTs.

The Administrative Law Judge (ALJ) finds 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 \$105, and order that Respondent take corrective action.

II. PROCEDURAL HISTORY AND JURISDICTION

The hearing convened on December 16, 2011, before ALJ Lilo D. Pomerleau in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Sharesa Y. Alexander, Attorney. Respondent appeared on his own behalf. The record closed that same day. Proper notice is not disputed. However, Respondent argues that the United States Constitution gives him the right to a trial by jury. He also argues that he never owned the USTs, and he is exempted from responsibility because this matter falls under a

legislative provision that permits an exemption based upon a preexisting condition. In other words, he contends his tanks are grandfathered under the law.

The evidence indicates that Respondent purchased the property and all improvements on the property in 1989. The USTs were not excluded from the purchase.¹ Although Respondent argues that the USTs are grandfathered or excluded, he has not provided evidence or support for this position. The ALJ notes that the following law and rules provide jurisdiction in this matter:

- Tex. Water Code (Water Code) § 26.011 confers all necessary powers on the Commission to carry out its responsibilities under Water Code Ch. 26, which governs, among other things, underground and above ground storage tanks.
- Water Code § 26.021 confers on the Commission the authority to refer matters under Water Code Ch. 26 to SOAH for hearing.
- Water Code § 26.345 empowers the Commission to develop a regulatory program, including the adoption of rules, concerning underground and above ground storage tanks.
- 30 Tex. Admin. Code § 334.3(c), a Commission rule adopted pursuant to Water Code § 26.345, requires an owner and operator, such as Respondent, of a tank claimed to be exempt from regulation to provide documentation and other information to support that claim.
- Water Code § 7.051 authorizes the Commission to assess administrative penalties against a person that violated a provision of the Water Code or rule adopted by the Commission.
- Water Code § 7.073 authorizes the Commission to order a person who violated the Water Code or a rule adopted by the Commission to take corrective action.

As to a right for a trial by jury, it is well settled that jury trials are not required in administrative proceedings.²

¹ ED Ex. 2.

² Tex. Ass'n of Business v. Air Control Board, 852 S.W.2d 440, 450-51 (Tex. 1993); Pretzer v. Motor Vehicle Board, 125 S.W.3d 23, 40 (Tex. App.—Austin 2003).

III. DISCOVERY MATTERS

ED Requests for admissions 1-25 were deemed admitted because Respondent failed to timely and adequately file response to the ED's written discovery requests. The factual admissions are discussed in detail below.

IV. APPLICABLE LAW

Beginning in December 1998, USTs for which installation began or was completed on or before December 22, 1988, had to be upgraded, improved, or replaced with equipment or components which met or exceeded specified requirements, including cathodic protection for steel tanks.³ USTs not brought into timely compliance with the specified requirements must be permanently removed from service no later than 60 days after the prescribed implementation date.⁴ The fee simple owner of the surface estate is presumed to own USTs located on the estate unless the fee simple owner demonstrates that someone else owns the USTs.⁵ The Commission's rules at 30 Tex. Admin. Code ch. 334 apply to the owner of the USTs.

The Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder.⁶ The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Water Code.⁷ Additionally, the Commission may order the violator to take corrective action.⁸

³ Tex. Admin. Code § 334.47(a)(1).

⁴ 30 Tex. Admin. Code § 334.47(a)(2). The permanent removal from service must be conducted in accordance with the applicable provisions of 30 Tex. Admin. Code § 334.55.

⁵ Water Code § 26.342(9) and 30 Tex. Admin. Code § 334.2(73).

⁶ Water Code § 7.051.

⁷ Water Code § 7.052(c).

⁸ Water Code § 7.073.

V. FACTS

Respondent owns the property at 710 W. Corsicana Street, Athens, Texas, where his business, Athens Radiator & Tire, is located. There are three USTs on the property, although no gasoline has been dispensed and sold from those tanks since 1962. According to Respondent, Billy Mac was the original owner, and he sold gasoline. Mr. Mac removed the pumps and sold the property to Joe McKinsey, who did not ever dispense fuel. When Lester G. Westmoreland bought the property, he wanted to fix it up but did not have enough funds to do so. In 1989, Respondent bought the property from Mr. Westmoreland and has owned it since that time.⁹ Respondent has never used the USTs.

On September 8, 1992, Respondent filled out a TCEQ UST registration form, indicating that he owned the property but “Gulf” owned the tanks. Again, on September 20, 1999, he filled out a TCEQ UST registration form, denying financial responsibility and stating “we have been forced against our Constitutional rights.”¹⁰

On April 13, 2010, Robert James Reagins, a TCEQ investigator, conducted an on-site investigation of the property.¹¹ The TCEQ PST database indicated the status of the three tanks as “Temporarily out of use” as of August 31, 1987. Mr. Reagins found that the tanks had not been removed and did not have required technical upgrade requirements.¹² He did not inspect the USTs and could not testify whether or not they were locked. TCEQ Staff sent a Notice of Violation (NOV) letter to Respondent, dated May 25, 2010. On December 13, 2010, Mr. Reagins reviewed the files and determined that Respondent failed to timely respond to the NOV.¹³

⁹ See ED Ex. 2.

¹⁰ ED Ex. 6 and ED Ex. 5.

¹¹ Although the inspection date is listed as April 13, 2009, on Page 1 of the Investigation report, other references in the record list the date as April 13, 2010. See ED 4 at 1 and 2.

¹² ED Ex. 4.

¹³ ED Ex. 7.

Mr. Reagins explained that there are two ways to secure the USTs. One method is to fill the tank in place. The second method, which is less expensive, is to remove the tanks from the ground. He estimated it would cost from \$5,000 to \$12,000 to remove the tanks. In response, Respondent testified that he is aware of the need for environmental cleanup because he has participated in the removal of tires in several area lakes. However, he stated that he does not have the money to remove the USTs.

James Nowland, a TCEQ Enforcement Coordinator, testified concerning the appropriate penalty in this matter. The ED had initially calculated a \$3,675 penalty based on two violations; however, at the hearing, the ED pursued only one violation—failure to remove the USTs. Mr. Nowland calculated a penalty of \$2,625, based on the Commission's 2002 Penalty Policy¹⁴ and Water Code § 7.053.¹⁵

According to Mr. Nowland, this violation is categorized as a major potential harm because contaminants could be leaking out from the USTs, which could impact human health or the environment. Specifically, he testified that gasoline is not water soluble and, if any leakage has occurred, it could affect underground water. Although Respondent testified that he had the USTs pressure checked in 1998, he offered no documents showing that the pressure check was performed properly. Thus, Mr. Nowland could not establish that the tanks had not leaked. As to the fact that Respondent testified there was no smell of gasoline in the tanks, Mr. Nowland stated that smell is not a good indicator. However, Mr. Nowland admitted that gasoline evaporates more rapidly than water in some conditions.

¹⁴ ED Ex. 11, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

¹⁵ Under Water 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.

VI. ALJ'S DISCUSSION AND ANALYSIS

Respondent claimed but offered no proof that "Gulf" or anyone else owned the tanks; therefore, as owner of the surface estate, he is presumed to own them.¹⁶ The Commission required existing USTs to meet upgrade requirements that became effective on December 22, 1998, or be permanently removed from service within 60 days.¹⁷ Owners also had another option: leave the USTs temporarily out-of-service indefinitely and meet protection and monitoring requirements.¹⁸

Respondent acknowledges that the USTs have not been upgraded and also admits that the USTs have not been permanently removed. Therefore, it is undisputed that Respondent violated 30 TAC § 334.47(a)(2).

The administrative penalty sought by the ED for the violation is \$2,625. The ED calculated the penalty based upon a major potential harm from a minor source. However, the evidence in the record indicates the potential for harm is minimal at most. The tanks were last used before 1962, almost 40 or more years ago. According to Respondent, who exhibited some knowledge about USTs and gasoline, the tanks were pressure checked in 1998 and showed no signs of leakage. It is unknown if they are locked, but there is no evidence in the record that the USTs had been tampered with or used in any way. They remain empty today. There is no smell of gasoline, and there are no dispensers.

The ALJ is aware of a similar case at the TCEQ where the ALJ found the penalty should have been calculated based on a minor potential for harm.¹⁹ The ALJ finds that there are similar facts in this case, chiefly that the USTs have not been used for 40 years (whereas in the other

¹⁶ Water Code § 26.342(9) and 30 Tex. Admin. Code § 334.2(73).

¹⁷ 30 Tex. Admin. Code § 334.47(a)(2).

¹⁸ 30 TAC § 334.54(c).

¹⁹ In the Matter of an Enforcement Action Concerning Gary Lee and Marilu Lee Corpian; TCEQ Docket No. 2009-1720-PST-E; SOAH Docket No. 582-10-5165 (final order pending).

case, the tanks had not been in use for 15 years and were documented as closed). Accordingly, using the 2002 Penalty Policy, the ALJ calculates the administrative penalty as \$105.

The ALJ concludes that a penalty of \$2,625 is not consistent with the factors in Water Code § 7.053 and with the Commission's 2002 Penalty Policy. A penalty of \$105 would conform to the 2002 Penalty Policy and the factors in Water Code § 7.053. The ALJ concludes that the potential threat is best addressed by permanent removal of the USTs from service. Respondent should be compelled to take the corrective action proposed by the ED to permanently remove the USTs from service.

SIGNED February 7, 2012.



LALO 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
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. No gasoline has been delivered or dispensed from the USTs since 1962.
5. Respondent never operated a service station at the location and never used the USTs.
6. In 1987 or 1988, the tanks were opened and pressure checked. At that time, there was no smell of gasoline. There are no documents to confirm that the tanks had no leakage.
7. The dispensers are removed; however, field ports and vent pipes still remain.
8. There is no evidence that the USTs have been tampered with or vandalized.
9. On April 13, 2009, 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.
10. 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.
11. On December 14, 2010, Mr. Reagins conducted a file review of the Facility and determined that Respondent failed to address the alleged violations.
12. On December 20, 2010, the ED mailed a Notice of Enforcement to Respondent.
13. 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.
14. 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.

15. On June 2, 2011, Respondent requested a contested case hearing on the allegations in the EDPRP.
16. On July 18, 2011, the case was referred to SOAH for a contested case hearing.
17. 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.
18. At the preliminary hearing that was held on August 25, 2011, the ED established jurisdiction to proceed.
19. The hearing on the merits was conducted on December 16, 2011, in Austin, Texas, by ALJ Lilo D. Pomerleau.
20. The ED was represented by Sharesa Y. Alexander, Attorney, Litigation Division. Respondent appeared on his own behalf.
21. At the hearing, the ED dropped the alleged violation of 30 Tex. Admin. Code § 334.7(d)(3), concerning registration.
22. Based upon the evidence presented at the hearing on the merits, the Facility is a minor source and the violation has a minor 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 \$105 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 \$105 for violation of 30 Tex. Admin. Code § 334.7(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