

**SOAH DOCKET NO. 582-12-3504
TCEQ DOCKET NO. 2011-0882-PST-E**

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

VS.

**ACCEL QUICK STOP, INC.
DBA LIBBY FOOD,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Executive Director, by and through his attorney, Steven M. Fishburn, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

FINDINGS OF FACT

1. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to substitute the date, May 11, 2011, with the date, "May 20, 2011" in Findings of Fact Nos. 4, 7, and 8 to reflect the correct date of the record review.
2. The Executive Director respectfully requests that the extra period be removed from the end of the sentence for Finding of Fact No. 14. Additionally, the Executive Director respectfully requests that the Findings of Fact paragraphs following Finding of Fact No. 14 be re-numbered because Finding of Fact No. 15 was omitted.
3. The Executive Director respectfully requests that the word "on" be inserted before the date, "May 29, 2012" in Finding of Fact No. 21.

CONCLUSIONS OF LAW

1. The Executive Director respectfully requests that the citation to 1 TEX. ADMIN. CODE § 155.27 in Conclusion of Law No. 4 be replaced with a citation to 1 TEX. ADMIN. CODE § 155.401. Section 155.27 was repealed in 2008 when SOAH adopted Subchapter I rules including 1 Tex. Admin. Code § 155.401, Notice of Hearing, among others. 33 TEX REG 9451, November 26, 2008.
2. The Executive Director respectfully requests that an "s" be added to "Conclusion" in Conclusions of Law No. 6.
3. The Executive Director respectfully requests that Conclusion of Law No. 7 be deleted it

its entirety. The section of 30 TEX. ADMIN. CODE 334.50 which is cited was not alleged in the Executive Director's petition and the remaining Conclusions of Law paragraphs be re-numbered.

ORDERING PROVISIONS

1. The Executive Director respectfully requests that Ordering Provision No. 5 be changed to delete the reference to "Enforcement ID No. 42114," which appears to be a reference included from another issued Order and is not relevant to this Order.

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

Zak Covar,
Executive Director

Caroline M. Sweeney, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by



Steven M. Fishburn
State Bar of Texas No. 24050600
Litigation Division, MC 175
P.O. Box 13087
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(512) 239-3400
(512) 239-3434 (FAX)
Mike.Fishburn@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2012, the original 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 true and correct copies of the foregoing Exceptions were sent to the following persons by the method of service indicated:

Hung Vu, Director
ACCEL QUICK STOP, INC.
3419 North Main Street
Fort Worth, Texas 75474

Via First Class Mail and Certified Mail,
Article No. 7011 0470 0003 6425 5528

The Honorable Anne K. Perez
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Electronically filed

I further certify that on this day a true and correct copy of the foregoing Exceptions were electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



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

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER
Assessing Administrative Penalties against
ACCEL QUICK STOP, INC. DBA
LIBBY FOOD STORE
TCEQ DOCKET NO. 2011-0882-PST-E
SOAH DOCKET NO. 582-12-3504

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Accel Quick Stop, Inc. dba Libby Food Store (Respondent). A Proposal for Decision (PFD) was presented by Anne K. Perez, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the EDPRP on May 17, 2012, in Austin, Texas.

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Accel Quick Stop, Inc. dba Libby Food Store owns and operates a convenience store with retail sales of gasoline at 3419 North Main Street in Fort Worth, Tarrant County, Texas (the Station).

2. Prior to May 30, 2012, Respondent's four underground storage tanks (USTs) at the Station were not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.

3. Respondent's USTs contained a regulated petroleum substance as defined in the rules of the Commission.

4. During an investigation on September 24, 2010 and a record review on May 20, 2011, both conducted by a University of Texas at Arlington (UTA) Petroleum Storage Tank (PST) investigator (Investigator), the Investigator documented that Respondent was not complying with the statutes and rules within the Commission's jurisdiction.

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5. On September 24, 2010, Respondent failed to monitor its USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring). Specifically, Respondent was not performing automatic tank gauge (ATG) tests and inventory control on its four USTs.

6. On September 24, 2010, Respondent had no inventory and reconciliation records for the USTs located on the Station's premises.

7. On May 20, 2011, the date of record review, Respondent had no ATG printouts with passing results, nor any UST inventory and reconciliation records available for the Investigator's review.

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8. On May 20, 2011, Respondent's continuing failure to implement a method of tank release detection for its USTs was confirmed by Respondent's lack of available ATG and inventory control records.

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9. On May 20, 2011, the Executive Director (ED) mailed a notice of enforcement (NOE) to Respondent by certified mail, return receipt requested.

10. This NOE was delivered to Respondent on May 28, 2011.

11. On October 17, 2011, the ED issued and served Respondent with an EDPRP in accordance with Tex. Water Code § 7.054, chs. 7 and 26, and 30 Tex. Admin. Code (TAC) chs. 70 and 334.

12. The EDPRP alleges the following violation was discovered during the investigations:

On September 24, 2010, Respondent violated 30 TAC § 334.50(b)(1)(A) and Tex. Water Code § 26.3475(c)(1) by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring). Specifically, ATG tests and inventory control were not being performed on the four USTs at the Station.

13. The EDPRP incorporates a Penalty Calculation Worksheet. Based on the penalty calculation worksheet, the ED recommends that the Commission enter an order assessing a total administrative penalty of \$3,000.00.

14. The total administrative penalty sought in the EDPRP includes a \$2,500.00 base penalty and a 20% upward adjustment (\$500.00) owing to Respondent's compliance history.

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15. On November 9, 2011, Respondent requested a contested case hearing on the EDPRP.

16. On December 13, 2011, the Commission's Chief Clerk referred this case to SOAH for a hearing.

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17. On January 3, 2012, the Chief Clerk mailed notice of the scheduled hearing to Respondent, the ED, and the Office of Public Interest Counsel. The notice of hearing:

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- Indicated the time, date, place, and nature of the hearing;
- Stated the legal authority and jurisdiction for the hearing;

- Indicated the statutes and rules the ED alleged Respondent violated;
- Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED;
- Referred to the ED's penalty calculation worksheet, which alleged how the Commission should calculate a penalty for the alleged violations; and
- Advised Respondent, in 12-point bold-faced type, that the failure to appear at the preliminary hearing would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted in default.

18. An evidentiary hearing was held in this case on May 17, 2012, at which the ED appeared through Staff Attorney Steven M. Fishburn, and Respondent appeared through its principal owner, Hung Vu. The Office of Public Interest Counsel did not participate in the hearing. The evidentiary record was held open until May 31, 2012, for the filing of additional evidence and/or recommendations.

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19. Prior to the record closing date, Respondent provided evidence establishing that on May 30, 2012, a firm employing a licensed UST contractor certified that the four USTs at Respondent's convenience store meet the definition of "empty" in 30 TAC § 334.54(d)(2).

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20. Prior to the record closing date, the ED provided evidence establishing that on May 29, 2012, an environmental services company removed 2,061 gallons of used petroleum substances from the USTs at Respondent's convenience store.

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21. As of May 30, 2012, Respondent's USTs are considered "temporarily out of service" under 30 TAC § 334.54(d) and exempt from the release detection requirements of 30 TAC ch. 334.

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22. On May 31, 2012, the ED withdrew the corrective action ordering provision contained in the EDPRP. The ED does not currently recommend that Respondent be required to implement a method of release detection for its USTs.

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23. The removal of 2,061 gallons of used petroleum substances from Respondent's USTs on May 29, 2012, establishes that prior to this date, the USTs: (a) did not meet the definition of "empty" in 30 TAC § 334.54(d)(2); (b) could not be considered "temporarily out of service" under 30 TAC § 334.54(d); and (c) were not exempt from the release detection requirements of 30 TAC ch. 334.

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CONCLUSIONS OF LAW

1. Tex. Water Code § 7.051 authorizes the Commission to assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction, any rules adopted under such statutes, or any orders or permits issued under such statutes.
2. Under Tex. Water Code § 7.052, the penalty may not exceed \$10,000.00 per violation, per day for each violation.
3. Based on the above Findings of Fact and Conclusions of Law, and as required by Tex. Water Code § 7.055 and 30 Tex. Admin. Code §§ 1.11 and 70.104, Respondent was timely notified of the EDPRP and of the opportunity to request a hearing on the alleged violation.
4. Based on the above Findings of Fact and Conclusions of Law, and as required by Tex. Gov't Code § 2001.052, Tex. Water Code § 7.058, 1 Tex. Admin. Code § 155.401, and 30 Tex. Admin. Code §§ 1.11 and 39.25, Respondent was timely notified of the hearing on the alleged violations and the proposed penalty.

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5. 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 ch. 2003.

6. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 Tex. Admin. Code § 334.50(b)(1)(A) and Tex. Water Code § 26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring). Specifically, automatic tank gauge tests and inventory control were not being performed on four USTs.

7. In determining the amount of an administrative penalty, Tex. Water Code § 7.053 requires the Commission to consider the following:

- The 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.

8. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

9. Based on consideration of the above Findings of Fact and Conclusions of Law, the factors set out in Tex. Water Code § 7.053, and the Commission's Penalty Policy, an administrative penalty in the amount of \$3,000.00 is justified.

Deleted: <#>Based on the above Findings of Fact and Conclusion of Law, Respondent violated 30 Tex. Admin. Code § 334.50(d)(1)(B) and Tex. Water Code § 26.3475(c)(1), by failing by failing to properly monitor USTs for releases through release detection equipment and inventory control measures.¶

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

1. Respondent is assessed an administrative penalty in the amount of \$3,000.00 for violation of the Commission's rules.
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.
3. The Commission shall not be restricted in any manner from requiring corrective actions or penalties for any other violations not raised here.
4. All checks submitted to pay the penalty imposed by this Order shall be made out to "The Texas Commission on Environmental Quality."
5. The administrative penalty assessed by this Order shall be paid within 30 days after the effective date of this Order and shall be sent with the notation "Re: Accel Quick Stop, Inc. dba Libby Food Store; Docket No. 2011-0882-PST-E" to:

Deleted; Enforcement ID No. 42114

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

6. All relief not expressly granted in this order is denied.

7. The provisions of this Order shall apply to and be binding upon Respondent.
8. The Executive Director may grant an extension of any deadline in this Order or in any plan, report, or other document submitted pursuant to this Order, upon a written and substantiated showing of good cause. All requests for extensions by Respondent shall be made in writing to the Executive Director. Extensions are not effective until Respondent receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.
9. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
10. The Chief Clerk shall provide a copy of this Order to each of the parties.
11. By law, the effective date of this Order shall be the date the Order is final, as provided by 30 Tex. Admin. Code § 70.106 and 30 Tex. Gov't Code § 2001.144.
12. 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

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

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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