

according to the terms of Agreed Order Docket No. 2009-1238-PST-E, was March 25, 2010, as opposed to March 25, 2013. Specifically, the Executive Director recommends that Finding of Fact No. 5 be revised to read as follows.

5. "As of March 25, 2010, the UST system had not been permanently removed from service and had no form of corrosion protection, as required by 30 Texas Administrative Code § 334.47(a)(2)."

FINDING OF FACT NO. 12.b.

The Executive Director respectfully recommends that Finding of Fact No. 12.b., page 2, be revised to reflect the base penalty in effect under the TCEQ Penalty Policy, September 1, 2002 revision and that "violations" be revised to "violation" since there was only one alleged violation. Specifically, the Executive Director recommends that Finding of Fact 12.b. be revised to read as follows:

- 12.b. "The base penalty for its violation is \$10,000 per violation, per day. After adjustment, the amount assessed per violation, per day is \$2,500, which for 22 months would total \$55,000."

CONCLUSION OF LAW NO. 2

The Executive Director respectfully recommends that Conclusion of Law No. 2, page 3, be revised to correct the citation to the legislative history of Tex. Water Code § 7.052, as it relates to the history of the \$10,000 per violation, per day base penalty, which was utilized to calculate the administrative penalty assessed in this matter. The legislative history provided by the Administrative Law Judge relates to the current \$25,000 per violation, per day base penalty. Specifically, the Executive Director recommends that the citation be revised to read as follows:

2. "The penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case. Texas Water Code § 7.052; Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.

ORDERING PROVISION NO. 1

The Executive Director respectfully recommends that Ordering Provision No. 1., page 4 be revised to modify the entity name of the Respondent to reflect the entity name on file with the Secretary of State. In addition, it is respectfully recommended that the word, "Commission" in the phrase "Commission Order" be deleted as none of the following Ordering Provisions contain that word. Specifically, the Executive Director recommends that the citation be revised to read as follows:

1. "Within 30 days after the effective date of this Order, SHAWNA INC. shall pay an administrative penalty in the amount of \$68,750 for its violations of 30 Texas Administrative Code § 334.47(a)(2) and TCEQ Agreed Order Docket No. 2009-1238-PST-E, Ordering Provision No. 2.a., considered in this case."

ORDERING PROVISION NO. 2

The Executive Director respectfully recommends that Ordering Provision No. 2., page 4 be revised to modify the entity name of the Respondent to reflect the entity name on file with the Secretary of State. Specifically, the Executive Director recommends that the citation be revised to read as follows:

2. "Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: SHAWNA INC., TCEQ Docket No. 2011-2299-PST-E" to:"

ORDERING PROVISION NO. 7

The Executive Director points out that there is an Ordering Provision No. 7 in the original Order that is located next to an address, which is actually part of Ordering Provision No. 6. The Executive Director respectfully recommends that Ordering Provision No. 7 be deleted, which will have the effect of re-numbering all of the following Ordering Provisions such that the total number of Ordering Provisions will be eleven, as opposed to the twelve in the original 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
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Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)
Mike.Fishburn@tceq.texas.gov

**CERTIFICATE OF SERVICE
SHAWNA INC.
SOAH Docket No. 582-13-0645
TCEQ Docket No. 2011-2299-PST-E**

I hereby certify that on this 16th day of May, 2013, 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 William G. Newchurch
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

**Via Certified Mail, Postage Prepaid
Article No. 7004 1350 0002 7542 5724**

Scott Gray
Guest & Gray, Attorneys at Law
P. O. Box 1896
Forney, Texas 75126

Via electronic mail

Mr. Eli Martinez
Office of the Public Interest Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Eli.Martinez@tceq.texas.gov



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

ATTACHMENT A



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
SHAWNA INC.,
TCEQ DOCKET NO. 2011-2299-PST-E,
SOAH DOCKET NO. 582-13-0645**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by ~~Shawna Inc.~~ SHAWNA INC. (Respondent). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the First Amended Report and Petition on March 28, 2013, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The Respondent owns and operates an underground storage tank (UST) system off West Highway 36 in Rising Star, Eastland County, Texas (Facility).
2. The USTs at the Facility are not exempt or excluded from regulation under the Texas Water Code or the Commission's rules.
3. The USTs contain a regulated petroleum substance as defined in the Commission's rules.
4. On February ~~23~~10, ~~2009~~2010, the Commission issued TCEQ Agreed Order Docket No. 2009-1238-PST-E (Agreed Order) to which the Respondent had consented on November 3, 2009. Ordering Provision No. 2.a. of the Agreed Order required the

Respondent to permanently remove the Facility's UST system from service by ~~January~~ March 25, 2010.

5. As of March 25, ~~2013~~ 2010, the UST system had not been permanently removed from service and had no form of corrosion protection, as required by 30 Texas Administrative Code § 334.47(a)(2).
6. The Respondent's failure to remove its tanks or protect them from corrosion created a potential for a release of contaminants that could cause major harm to groundwater.
7. On May 14, 2012, the ED filed his First Amended Report and Petition and mailed a copy of it to the Respondent at its last address of record known to the Commission.
8. In the First Amended Report and Petition, the ED alleged that the Respondent had violated 30 Texas Administrative Code § 334.47(a)(2) and Agreed Order, Ordering Provision No. 2.a., by failing to permanently remove from service a UST system that had not been brought into timely compliance with upgrade requirements. The ED proposed administrative penalties of \$68,750 for these violations.
9. The ED also recommended that the Respondent be required to take the corrective actions that are set out in the Ordering Provisions below.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. In calculating a penalty, the ED treated the Respondent's two violations as one and calculated a penalty that assumed only one penalty event per month for 22 months, which represented the number of months between the effective date of the Agreed Order and the date this case was screened for enforcement action by the ED.
12. In accordance with the Commission's Penalty Policy:
 - a. The Respondent's UST system is a minor source;
 - b. The base penalty for its violations is ~~\$2,500~~ \$10,000 per violation, per day. After adjustment, the amount assessed per violation, per day is \$2,500, ~~before adjusting for other factors,~~ which for 22 months would total \$55,000;
 - c. The ED increased the base-penalty total by five percent because the Respondent had been given a notice of violation for the same or a similar violation in the past, and by another 20 percent because an agreed order had previously been issued; and
 - d. The combined 25-percent upward adjustment of the \$55,000 subtotal resulted in the \$68,750 penalty that the ED proposes.

13. On August 28, 2012, the Respondent filed an answer to the First Amended Report and Petition and requested a hearing.
14. On October 4, 2012, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk referred it to SOAH on October 16, 2012.
15. On November 13, 2012, the Chief Clerk mailed a notice of hearing to the Respondent, the ED, and the Office of Public Interest Counsel (OPIC).
16. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
17. On December 7, 2012, the Parties filed an agreed motion stipulating to jurisdiction, waiving the preliminary hearing, and proposing a case schedule, which the ALJ approved.
18. On March 28, 2013, the ALJ convened the hearing as indicated in the scheduling order.
19. The hearing was concluded and the record was closed on that same day.
20. At the hearing, the ED appeared through his attorneys, Steven M. Fishburn and Kari Gilbreth, and the Respondent appeared through its attorney, Scott Gray.

II. CONCLUSIONS OF LAW

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or the Texas Health & Safety Code within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.
2. The penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case. Texas Water Code § 7.052; Acts 2011, 82nd Leg., R.S., Ch. 1021, Sections 4.10 and 4.31(b), eff. September 1, 2011; Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.
3. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors, and the Penalty Policy implements those factors.
4. The Commission may order a violator to take corrective action. Tex. Water Code § 7.073.

5. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code, ch. 2003.
6. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).
7. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the First Amended Report and Petition and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein.
8. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), the Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
9. The Respondent violated 30 Texas Administrative Code § 334.47(a)(2) and the Agreed Order, Ordering Provision No. 2.a., for 22 months.
10. The penalty and corrective action that the ED proposed for the Respondent's violations considered in this case conform to the requirements of the Texas Water Code, ch. 7, and the Commission's Penalty Policy.
11. The Respondent should be assessed a total of \$68,750 in penalties for the violations considered in this case and ordered to take the corrective actions proposed by the ED and described in the Ordering Provisions below.

III. ORDERING PROVISIONS

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. Within 30 days after the effective date of this ~~Commission Order, Shawna Inc.~~ SHAWNA INC., shall pay an administrative penalty in the amount of \$68,750 for its violations of 30 Texas Administrative Code § 334.47(a)(2) and TCEQ Agreed Order Docket No. 2009-1238-PST-E, Ordering Provision No. 2.a., considered in this case.
2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: ~~Shawna Inc.~~ SHAWNA INC., TCEQ Docket No. 2011-2299-PST-E" to:

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

3. The payment of the administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
4. Within 30 days after the effective date of this Order, the Respondent shall permanently remove the UST system at its Facility from service, in accordance with 30 Texas Administrative Code § 334.55.
5. Within 45 days after the effective date of this Order, Respondent shall submit written certification to demonstrate compliance with Ordering Provision No. 4. The certification shall be accompanied by detailed supporting documentation, including photographs, receipts, and other records; shall be notarized by a State of Texas Notary Public; and shall 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."

6. Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

7.

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

with a copy to:

Waste Section Manager
Texas Commission on Environmental Quality
Abilene Regional Office
1977 Industrial Boulevard

Formatted: Indent: Left: 0.25", No bullets or numbering

Abilene, Texas 79602-7833

- | ~~8.7.~~ 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.

- | ~~9.8.~~ 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.

- | ~~10.9.~~ The effective date of this Order is the date the Order is final. 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.

- | ~~11.10.~~ The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

- | ~~12.11.~~ 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



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
SHAWNA INC.,
TCEQ DOCKET NO. 2011-2299-PST-E,
SOAH DOCKET NO. 582-13-0645**

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5. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code, ch. 2003.
6. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).
7. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the First Amended Report and Petition and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein.
8. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), the Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective actions.
9. The Respondent violated 30 Texas Administrative Code § 334.47(a)(2) and the Agreed Order, Ordering Provision No. 2.a., for 22 months.
10. The penalty and corrective action that the ED proposed for the Respondent's violations considered in this case conform to the requirements of the Texas Water Code, ch. 7, and the Commission's Penalty Policy.
11. The Respondent should be assessed a total of \$68,750 in penalties for the violations considered in this case and ordered to take the corrective actions proposed by the ED and described in the Ordering Provisions below.

III. ORDERING PROVISIONS

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. Within 30 days after the effective date of this Order, SHAWNA INC. shall pay an administrative penalty in the amount of \$68,750 for its violations of 30 Texas Administrative Code § 334.47(a)(2) and TCEQ Agreed Order Docket No. 2009-1238-PST-E, Ordering Provision No. 2.a., considered in this case.
2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: SHAWNA INC., TCEQ Docket No. 2011-2299-PST-E" to:

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Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

3. The payment of the administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
4. Within 30 days after the effective date of this Order, the Respondent shall permanently remove the UST system at its Facility from service, in accordance with 30 Texas Administrative Code § 334.55.
5. Within 45 days after the effective date of this Order, Respondent shall submit written certification to demonstrate compliance with Ordering Provision No. 4. The certification shall be accompanied by detailed supporting documentation, including photographs, receipts, and other records; shall be notarized by a State of Texas Notary Public; and shall 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."

6. Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Waste Section Manager
Texas Commission on Environmental Quality
Abilene Regional Office
1977 Industrial Boulevard
Abilene, Texas 79602-7833

7. 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.
8. 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.
9. The effective date of this Order is the date the Order is final. 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.
10. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
11. 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