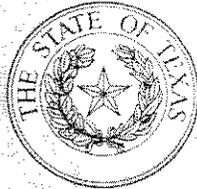


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 7, 2013

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

Re: **SOAH Docket No. 582-13-0645; TCEQ Docket No. 2011-2299-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v.
Shawna, Inc., 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 **May 28, 2013**. Any replies to exceptions or briefs must be filed in the same manner no later than **June 7, 2013**.

This matter has been designated **TCEQ Docket No. 2011-2299-PST-E; SOAH Docket No. 582-13-0645**. 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 "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: SHAWNA INC.

SOAH DOCKET NUMBER: 582-13-0645

REFERRING AGENCY CASE: 2011-2299-PST-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH

REPRESENTATIVE / ADDRESS

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SHAWNA INC.

**SOAH DOCKET NO. 582-13-0645
TCEQ DOCKET NO. 2011-2299-PST-E**

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V. SHAWNA INC., Respondent		

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Shawna Inc. (Respondent) violated 30 Texas Administrative Code § 334.47(a)(2) and TCEQ Agreed Order Docket No. 2009-1238-PST-E (Agreed Order), Ordering Provision No. 2.a., by failing to permanently remove from service an underground storage tank (UST) system that had not been brought into timely compliance with upgrade requirements. The ED recommends that the Commission assess an administrative penalty of \$68,750.00 for these violations and order the Respondent to take corrective actions.

The Respondent does not dispute jurisdiction, the alleged violations, the proposed corrective actions, or that the proposed penalty was calculated in general accordance with the Commission’s Penalty Policy (Penalty Policy).¹ Nevertheless, it maintains that the proposed penalty is unjustly high when all circumstances are considered.²

The Administrative Law Judge (ALJ) finds that the Respondent committed the alleged violations and the proposed penalty and corrective actions are just and in accordance with

¹ ED Ex. 11.

² Additionally, the Respondent claimed during the hearing that it lacked adequate financial resources to pay the penalty and to take the corrective actions. It did not press this argument. Because the Respondent failed to respond to the ED’s discovery requests concerning the claimed inability to pay, the ED moved to bar the Respondent from introducing evidence concerning that claim. The Respondent did not oppose the motion, and the ALJ granted it.

applicable law and the Penalty Policy. The ALJ recommends that the Commission assess the penalty and order the corrective actions recommended by the ED.

II. THE VIOLATIONS

The Respondent owns and operates a UST system off West Highway 36 in Rising Star, Eastland County, Texas (Facility). The prior owner had failed to pay taxes on the Facility, and the Respondent acquired the Facility for \$35,000 at a sheriff's sale on July 13, 2007.³ The Respondent still owned the Facility as of March 5, 2013,⁴ and it stipulated during the hearing that it still owns and operates the Facility.

On December 16, 2008, a Commission inspector, Darla Ward, inspected the Facility. The USTs at the Facility contained a regulated petroleum substance as defined in the Commission's rules. They were not exempt or excluded from regulation under the Texas Water Code or the Commission's rules. Ms. Ward found the USTs at the Facility had no form of corrosion protection. She recommended either that the USTs be removed or corrosion protection be installed.⁵ On January 29, 2009, Commission staff issued a notice of violation to the Respondent, alleging that it had neither removed the USTs nor protected them from corrosion.⁶

Another Commission inspector, Patty Gough, conducted a record review of the Facility on March 6, 2009. She found nothing indicating that the USTs had been removed or protected from corrosion. After Ms. Gough conferred with Don Harris and Tom Verell, the Respondent's president and secretary, the Respondent was given until July 28, 2009, to come into compliance.⁷

³ ED Ex. 7.

⁴ ED Ex. 6.

⁵ ED Ex. 4.

⁶ ED Ex. 13.

⁷ ED Ex. 3.

It failed to comply by that date as well. The Commission staff issued a notice of enforcement on July 29, 2009.⁸

On February 23, 2010, the Commission issued the 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 25, 2010.⁹ As of November 9, 2011, the Respondent still had failed to comply. Another notice of enforcement was sent to the Respondent on December 5, 2011,¹⁰ which led to this case.

Ms. Gough testified that she inspected the Facility on March 25, 2013. On that date, the USTs still had not been permanently removed from service or protected from corrosion, and they were filled with a combination of water and regulated product.

III. PROPOSED PENALTY

For the violations considered in this case, the penalty may not exceed \$10,000 per day for each violation.¹¹ However, the penalty that the ED calculated, in accordance with the Penalty Policy, is far below that ceiling.

Keith Frank is an enforcement coordinator for the Commission. He testified and presented the ED's proposed penalty. Under the Penalty Policy, the Respondent's UST system, with a capacity of 33,000 gallons, is considered a minor source. However, its violations created the potential for a release of contaminants into the environment that could cause major harm.

⁸ ED Ex. 2.

⁹ ED Ex. 14.

¹⁰ ED Ex. 1.

¹¹ Tex. Water Code § 7.052(c), as it existed prior to Sept. 1, 2011. Acts 2011, 82nd Leg., R.S., Ch. 1021, Sections 4.10 and 4.31(b), eff. September 1, 2011.

The base penalty for such violations is \$2,500 per violation, per day, before adjusting for other factors. In calculating a penalty, the ED treated the Respondent's two violations as one. The ED calculated a penalty that assumed only one penalty event per month for 22 months, which is 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. A penalty of \$2,500 per month for 22 months would total \$55,000. The ED increased that by five percent because the Respondent had been given notices 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. The combined 25-percent upward adjustment of the \$55,000 subtotal resulted in the \$68,750 penalty that the ED proposed.¹²

For the most part, the Respondent does not quarrel with the ED's assertion that the \$68,750 proposed penalty was calculated in accordance with the penalty factors set out in Texas Water Code § 7.053 and the Penalty Policy. However, it argues that the Facility is located in arid western Texas where there is little or no water that could be impacted due to the violations.

Ms. Gough has a bachelor's degree in environmental science with a minor in biology, and nine years of experience as an inspector for the TCEQ in the region of the state where the Facility is located. Much of her work experience has involved the inspection of USTs. She testified that the violations could result in groundwater impacts because the USTs have not been removed or protected from corrosion and contain regulated substances that could leak into the groundwater if any of them is corroded. The Respondent offered no evidence to contradict Ms. Gough's expert testimony.

The ALJ concludes that Ms. Gough has sufficient expertise to offer a reliable expert opinion that the Respondent's violations create a potential for major groundwater harm. The ALJ concludes that the violations have the potential to result in a release of pollutants in excess of levels that are protective of human health or environmental receptors and cause major harm.

¹² ED Ex. 10.

Despite the above, the Respondent contends the proposed penalty is unjust and it should pay little or no penalty. It claims that the cost of paying the proposed penalty and removing the tanks would exceed what it paid for the Facility. It contends that it knew nothing about the possibility of UST violations when it acquired the property. It also faults the Commission for failing to take enforcement action or put it on notice of the violations before it acquired the Facility.

The ALJ does not agree with the Respondent's claim that the proposed penalty is inherently unjust. While the combined costs of the penalty and the corrective action could exceed the amount the Respondent paid to acquire the Facility, there is no evidence concerning the value the property would have after remediation. Once remediated, the Facility could be worth more than the Respondent paid. Moreover, the Respondent points to no specific law or Commission policy that would absolve it of the obligation to pay a penalty and take corrective action if that would result in a net financial loss to the Respondent.

Even less compelling is the Respondent's claim that it should be absolved of responsibility because the Commission did not take enforcement action or notify the Respondent of the violations before it bought the property. That suggests the Commission should have the impossible task of continuously monitoring the current compliance status of every parcel of land in the state and notifying all potential purchasers of that status. The Respondent points to no law assigning the Commission those responsibilities.

The ALJ concludes that the proposed penalty complies with applicable law and the Penalty Policy and is not unjust.

IV. SUMMARY

The ALJ recommends that the Commission adopt the attached proposed order, assessing the Respondent a total of \$68,750 in penalties for the violations proven in this case and requiring the Respondent to take the corrective actions proposed by the ED.

SIGNED May 7, 2013.



**WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**

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. (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, 2009, 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 25, 2010.

5. As of March 25, 2013, 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 per violation, per day, 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.
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. 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:

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
Abilene, Texas 79602-7833

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

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