SOAH DOCKET NO. 582-12-6882
TCEQ DOCKET NO. 2012-0327-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
V.	§	**OF**
CADDELL STEPHENSON, Respondent	§	**ADMINISTRATIVE HEARINGS**

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Administrative Law Judge's Proposal for Decision and files the following exceptions before the State Office of Administrative Hearings ("SOAH").

FINDING OF FACT NO. 1

The Executive Director respectfully recommends that Finding of Fact No. 1, page 1, be revised to reflect that the Executive Director alleged only that Respondent "owns" the Facility. Specifically, the Executive Director recommends that Finding of Fact No. 1 be revised to read as follows:

1. "Caddell Stephenson (Respondent) owns an underground storage tank ("UST") system and a former gas station with retail sales of gasoline located at Highway 59 and Todd Street in Timpson, Shelby County Texas (the "Facility)."

FINDING OF FACT NO. 2

The Executive Director respectfully recommends that Finding of Fact No. 2, page 1, be revised to reflect the date that Respondent became the owner of the property as shown in the Shelby County Clerk's certified copy of the deed as October 31, 1990 (ref. Ex. ED-4). October 22, 1990 is a date from the UST registration submitted to TCEQ (red. Ex. ED-5) and is the date Respondent indicated that ownership of the UST system transferred to Respondent. Specifically, the Executive Director recommends that Finding of Fact No. 2 be revised to read as follows.

2. "Respondent purchased the Facility on October 31, 1990."

CONCLUSION OF LAW NO. 7

The Executive Director respectfully recommends that Conclusion of Law No. 7, page 3, be revised to update the citation to a section of the Texas Administrative Code. Currently, there is a citation to 1 Texas Administrative Code § 155.27, which no longer exists. Specifically, the Executive Director recommends that the citation be revised to read as follows:

7. "1 Texas Administrative Code § 155.401."

ORDERING PROVISION NO. 1

The Executive Director respectfully recommends that Ordering Provision No. 1., page 4 be revised to correct a typographical error in the citation to the TCEQ rule contained in the first sentence of No. 1. Specifically, the Executive Director recommends that the citation be revised to read as follows:

1. "Caddell Stephenson (Respondent) is assessed an administrative penalty in the amount of $3,600 for violation of 30 Texas Administrative Code § 334.47(a)(2)."

ORDERING PROVISION NO. 3

The Executive Director respectfully recommends that part of Ordering Provision No. 3 be revised to correct a typographical error in the name of the TCEQ Beaumont Regional Office Waste Section Manager. Specifically, the relevant part of the Ordering Provision should be revised to read as follows:

"with a copy to:

Ronald Hebert, Waste Section Manager
Beaumont Regional Office
Texas Commission on Environmental Quality
P. O. Box 13087
Austin, Texas 78711-3053"

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.

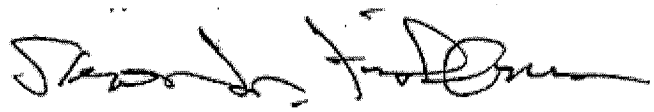
Respectfully submitted,

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
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)
Mike.Fishburn@tceq.texas.gov

CERTIFICATE OF SERVICE
Caddell Stephenson
SOAH Docket No. 582-12-6882
TCEQ Docket No. 2012-0327-PST-E

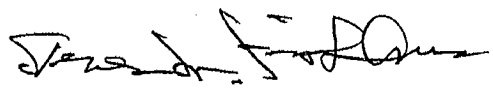
I hereby certify that on this 30th day of April, 2013, the original and 7 copies of the foregoing "Executive Director's Exceptions to the Administrative Law Judge's Proposed Order ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

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 Lilo D. Pomerleau
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 7544 3483
Mr. Caddell Stephenson
P. O. Box 223
Timpson, Texas 75975

Via electronic mail
Blas Coy, Public Interest Counsel



Steven M. Fishburn
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 Caddell Stephenson
TCEQ DOCKET NO. 2012-0327-PST-E
SOAH DOCKET NO. 582-12-6882

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 Caddell Stephenson (Respondent). Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a hearing on this matter on December 6, 2012, 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.~~ Caddell Stephenson (Respondent) owns~~ed~~ an underground storage tank ("UST") system and a former gas station with retail sales of gasoline located at Highway 59 and Todd Street, Timpson, Shelby County, Texas (the "Facility"). ~~and operated a gasoline station and convenience store on the corner of Highway 59 and Todd Street, Timpson, Shelby County, Texas (Facility).~~

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2. Respondent purchased the Facility on October 31, ~~22,~~ 1990.

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3. Four steel underground storage tanks and a steel oil tank (USTs) were installed in 1984. The tanks have a total capacity of 19,250 gallons. These USTs are subject to corrosion.

4. Respondent quit selling gasoline in the early 1990s.

5. Respondent filed for bankruptcy in 1992 and closed the convenience store located at the Facility.

6. The Facility lender and mortgage holder did not foreclose on the Facility and did not accept a surrender of the property.

7. After the bankruptcy proceeding, the ownership of the Facility remained in Respondent's name.

8. On September 1, 2009, Shelby County set the property for sale for delinquent taxes. However, no one sought to buy the property, and Shelby County canceled the sale.

9. The deed records in the Shelby County Clerk's Office list Respondent as the owner of record of the Facility.

10. On December 20, 2000, TCEQ investigator Larry Hagen inspected the Facility and found that Mr. Stephenson had not updated a required TCEQ registration form and failed to remove the USTs, which had been out of service for several years.

11. On February 9, 2011, TCEQ investigator Jeremy Quiros investigated the Facility. He also found that Mr. Stephenson had not removed the USTs. The ED issued a notice of violation on February 24, 2011.

12. On July 25, 2011, TCEQ investigator Esker Sawyer began a follow-up investigation of the Facility. He conducted a record review and on-site compliance investigation on December 1, 2011. He also found that the USTs had not been removed or upgraded.

13. On December 20, 2011, the Commission sent Respondent a notice of enforcement citing the alleged violation of failure to permanently remove the USTs or provide documentation for the technical upgrade requirements in accordance with 30 Texas Administrative Code § 334.47.

14. On March 22, 2012, the ED issued the EDPRP to Respondent in accordance with Texas Water Code § 7.054, alleging that Respondent violated 30 Texas Administrative Code § 334.47(a)(2) by failing to permanently remove the USTs from service.

15. The ED initially recommended the imposition of an administrative penalty in the total amount of $5,250.00, and corrective action to bring the Facility into compliance.

16. On May 12, 2012, Respondent replied to the ED claiming that he no longer owns the property.

17. Respondent provided the ED with supplementary documentation concerning his ability to pay the recommended fine. The ED now recommends the minimum allowable penalty of $3,600.

18. On July 14, 2012, the case was referred to SOAH for a contested case hearing.

19. On July 2, 2012, 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.

20. At the preliminary hearing that was held on August 2, 2012, the ED established jurisdiction to proceed.

21. The hearing on the merits was conducted on December 6, 2012, in Austin, Texas, by ALJ Lilo D. Pomerleau.

22. The ED was represented by Steven M. Fishburn and Jennifer Cook, attorneys with the TCEQ Litigation Division. Respondent appeared on his own behalf by telephone.

II. CONCLUSIONS OF LAW

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

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

3. Under Texas 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 Texas Water Code § 7.073, the Commission may order Respondent to take corrective action.

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

6. As required by Texas Water Code § 7.055 and 30 Texas Administrative 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 Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.40127; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violation and the proposed penalty.

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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. Tex. Gov't Code ch. 2003.

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

10. In determining the amount of an administrative penalty, Texas 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 Texas Water Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of $3,600, 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, which are set out below in the Order.

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. Caddell Stephenson (Respondent) is assessed an administrative penalty in the amount of $3,600 for violation of 30 Texas Administrative 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 will 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: Caddell Stephenson; TCEQ Docket No. 2012-0327-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 Texas Administrative 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:

Ronald Herbert, Waste Section Manager
Beaumont Regional Office
Texas Commission on Environmental Quality
3870 Eastex Freeway
Beaumont, Texas 77703-1830.

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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 ED 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 Texas Administrative Code § 80.273 and Texas Government Code § 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, Ph.D., Chairman
For the Commission

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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10. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors including:

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- The history and extent of previous violations by the violator;
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11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

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1. Caddell Stephenson (Respondent) is assessed an administrative penalty in the amount of $3,600 for violation of 30 Texas Administrative 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 will 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: Caddell Stephenson; TCEQ Docket No. 2012-0327-PST-E" to:

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Enforcement Division, MC 149A
Texas Commission on Environmental Quality
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with a copy to:

Ronald Hebert, Waste Section Manager
Beaumont Regional Office
Texas Commission on Environmental Quality
3870 Eastex Freeway
Beaumont, Texas 77703-1830.

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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.

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ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

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