Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Zak Covar, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 26, 2013

Electronically Filed

The Honorable Rebecca S. Smith
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: Texas Commission on Environmental Quality Enforcement Proceeding Against
MAGIC PRO INC D/B/A Pro Quick Lube
TCEQ Docket No. 2012-0486-PST-E
SOAH Docket No. 582-13-2091

Dear Judge Smith:

Enclosed please find the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order in the above-referenced matter. If you have any questions, please do not hesitate to call me at (512) 239-3400. Thank you for your attention to this matter.

Sincerely,

Rebecca M. Combs

Rebecca M. Combs, Attorney
Litigation Division

Enclosure

cc: TCEQ Chief Clerk (original)
Blas Coy, Office of the Public Interest Counsel, TCEQ
David Carney, Enforcement Division, TCEQ
Ali al-Shammari, President, MAGIC PRO INC, 530 N. Plano Road, Garland, Texas 75042

SOAH DOCKET NO. 582-13-2091
TCEQ DOCKET NO. 2012-0486-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
Vs.	§	**OF**
MAGIC PRO INC D/B/A PRO QUICK LUBE, Respondent	§	**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, Rebecca M. Combs of the Litigation Division, and hereby files the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "the Commission") against MAGIC PRO INC d/b/a Pro Quick Lube ("Respondent"), is for violations of TEX. WATER CODE § 26.3475(b), (c)(1), and (d) and 30 TEX. ADMIN. CODE §§ 334.49(c)(4)(C), 334.50(b)(1)(A) and (b)(2), for failure to have corrosion protection for the underground storage tank ("UST") system and failure to have release detection for both the USTs and the piping associated with the UST system.

On July 11, 2013, the evidentiary hearing for this matter was convened at the State Office of Administrative hearings ("SOAH"). The ED's requests for admissions 1-56 were deemed admitted.[1] Respondent did not challenge the evidence of the violations, the amount of the assessed penalty, or that it could afford to pay the assessed penalty[2], and there is no dispute that the two violations occurred. However, Respondent argues that it should not be penalized for violations that occurred before Mr. Ali al-Shammari ("Mr. al-Shammari"), who is the owner, president, and registered agent of MAGIC PRO INC[3] purchased the corporation and that he has attempted to comply with the requirements.[4]

On September 6, 2013, the Administrative Law Judge ("ALJ") issued her proposal for decision ("PFD"), finding that MAGIC PRO INC violated TEX. WATER CODE

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[1] ED-Ex. 7 at pg. 2.
[2] ED-Ex. 6 at pgs. 17-23 and ALJ's Proposal for Decision ("PFD") at pg. 5.
[3] ED-Ex. 1 at pg. 24.
[4] PFD pg. 5.

§ 26.3475 (b), (c)(1), and (d) and 30 TEX. ADMIN. CODE §§ 334.49(c)(4)(C), 334.50(b)(1)(A) and (b)(2). However the ALJ recommended that the penalty be reduced from $5,137 to $4,000 based on other factors as justice may require. Specifically, the ALJ reduced the administrative penalty under "any other matters that justice may require"[5] ("Other Factors") because (1) the corporate Respondent's president and owner, Mr. al-Shammari, is a recent refugee, (2) he has difficulty communicating in English, (3) ownership and control of MAGIC PRO INC changed after the investigation, and (4) the Respondent made some effort (successfully for one of the two violations) to come into compliance. The Executive Director respectfully disagrees with any penalty reduction for this Respondent and files exceptions to the ALJ's Proposed Order.

I.

Other Factors as Justice May Require

The ALJ identified four factors she believes warrant an Other Factors adjustment; however, the Executive Director does not believe a reduction should be given to the Respondent for the reasons identified by the ALJ. Not only does the Penalty Policy and Commission precedent provide clear direction on when an Other Factors adjustment is appropriate, but there is a manner in determining the amount of the reduction. In this case, the ALJ has not only established new categories, but she recommended a $1,137 reduction, with no explanation as to how she arrived at that amount.

The Commission's 2002 Penalty Policy[6] ("Penalty Policy") states that "staff may recommend adjustment of the penalty amount, on a case-by-case basis, upon a consideration of **factors unique to the situation**" [emphasis added]. There is nothing "unique" about the Respondent's situation. Specifically, many respondent representatives/owners have difficulty communicating in English. Similarly, many cases, especially petroleum storage tank ("PST") cases, involve various factors regarding business entities, business relationships, business dealings, etc. Finally, efforts at compliance are not at all unique to MAGIC PRO INC's situation and are specifically addressed in the Penalty Policy under Good Faith Effort to Comply[7]. All of the reasons identified by the ALJ in this case are not "unique" and have not resulted in reductions for other respondents similarly situated.

Further, the Penalty Policy[8] provides three examples of what may be considered Other Factors. First, a downward adjustment can be appropriate when a respondent notifies TCEQ of a violation; if the notification is not required by statute, permit, or rule. Second, a downward adjustment may be appropriate when

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[5] TEX. WATER CODE § 7.053(4).
[6] ED-Ex. 3.
[7] ED-Ex. 3 at pg. 17.
[8] ED-Ex. 3 at pgs. 19-20.

a respondent purchased a non-compliant water or wastewater facility as part of regionalization of service. This option specifically references Compliance History. Third, an upward adjustment can occur when a respondent does not conduct all emission tests when issuing state inspections for a motor vehicle inspection; if it is determined that the failure to conduct required emission testing was intentional. None of these scenarios are remotely similar to the Respondent's situation. The Executive Director, for instance, has used Other Factors to capture the avoided costs of compliance and has also used Other Factors to reduce the impact of self reported Discharge Monitoring Reports ("DMRs") in wastewater treatment plant cases. Again, none of these historical reasons for reducing a penalty apply to this Respondent.

During the Enforcement Coordinator, Mr. David Carney's ("EC") testimony he listed and explained each statutory factor in TEX. WATER CODE § 7.053. He discussed how he considered each statutory factor in this case and followed the Penalty Policy to apply Other Factors. He testified that the penalty recommended by the ED was appropriate in this case and consistent with other cases of this type. If any of the following items are recognized as legitimate, unique Other Factors that support penalty adjustments, it will be difficult to apply the Penalty Policy transparently, consistently and fairly to all respondents.

II.

None of the reasons the ALJ has provided warrant an Other Factors reduction.

A. Status as a Recent Refugee and Difficulty Communicating in English

The Executive Director makes every effort to assess penalties consistently and fairly. To allow a reduction in the penalty because the Respondent's representative is a recent refugee and has difficulty communicating in English will lead to inconsistencies.

In this case, the Respondent's representative did have the assistance of individuals who were able to translate for him. Further, as noted by the ALJ, the Respondent did order some testing for the UST system and therefore, was able to attempt to achieve compliance. Mr. al-Shammari testified that he arrived in this country as a refugee in 2010 and speaks limited English. At first he could not understand what the EC was telling him regarding the violations, penalty and corrective action necessary for compliance. However he also testified that many friends helped him communicate with TCEQ by handling conversations and explaining issues to him. After he received the final settlement offer from the EC in March 2012, Mr. al-Shammari understood enough to hire a company to conduct compliance tests and send the results to TCEQ after the final settlement offer from the EC. While his refugee status and communication difficulties were considered in this case, they are not unique but common in many enforcement cases.

B. Ownership and Control Over MAGIC PRO INC Has Changed Since the Investigation

Mr. al-Shammari, the Respondent's owner, like all potential business owners, should have engaged in due diligence prior to purchasing MAGIC PRO INC. Ownership of the corporation did change; nevertheless, the corporation itself remained in existence the entire time. MAGIC PRO INC was the owner and operator of this Facility at the time of the inspection and it remains so today.[9] In addition to understanding what potential liabilities he was purchasing, the Respondent's owner should have also learned about the State's environmental statutes, rules and regulations so he would be able to operate the Facility in compliance, which he still has failed to do. The Executive Director does not, nor should he, evaluate the soundness of business decisions of respondents when assessing administrative penalties. Lack of knowledge of petroleum storage tank regulations and corporate laws is not an excuse for non-compliance.

C. Compliance Efforts

The Penalty Policy provides direction as to when penalties can be reduced for compliance. Specifically, Good Faith Effort to Comply reductions are allowed when compliance is timely achieved.[10] In this case, the Respondent did not qualify for a good faith reduction because it is still not in full compliance for one violation and because it failed to timely come into compliance for the other violation.

Violation Number 1 is for the Respondent's failure to provide release detection for both the USTs and the piping associated with the UST system. Despite coming into **partial compliance** by conducting and reporting the results of the release detection test for the piping, MAGIC PRO INC received no reduction because, as the EC testified, full compliance with all of Violation No. 1 is required to receive a reduction for good faith efforts to comply. In addition, the Respondent's partial compliance efforts were not timely.

The EC testified that for Violation Number 1 MAGIC PRO INC came into compliance for piping release detection by sending documentation showing that a triennial piping test had been performed in April 2012, after the March 2012 settlement offer. To receive a good faith reduction respondents must prove compliance before the final settlement offer. MAGIC PRO INC also sent documents for release detection for the USTs, in the form of tank tightness tests, which is not an approved release detection method for this Facility. Since the USTs are still non-compliant with the release detection requirements, MAGIC PRO INC is not **fully** in compliance.

It is troubling to allow an Other Factors reduction when the Respondent remains out of compliance. Even viewing the facts most favorable to the

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[9] PFD pgs. 5-6.
[10] ED-Ex. 3 at pg. 17.

Respondent, it has been out of compliance with release detection for the tanks since June 29, 2011 (the date of purchase). Failing to have release detection is a serious violation since regulated substances could be leaking, undetected, into the environment. The Texas Legislature has considered this violation so egregious that they have authorized the Commission to shut down facilities that are not in compliance with this requirement. To reward the Respondent with an Other Factors reduction when it is non-compliant sends the wrong message to this Respondent and to the regulated community.

Violation Number 2 is for the Respondent's failure to test the cathodic protection system. The EC testified that similar to the first violation, Respondent came into compliance for corrosion protection by sending documentation showing that the test was performed after the final settlement offer was sent. Although full compliance was finally achieved for Violation Number 2, it was not timely and therefore did not qualify for a good faith reduction.

Despite the fact that the Respondent does not meet the requirements for a good faith reduction, the ALJ has given one to the Respondent. A respondent who is not in compliance should not be allowed any reduction in the penalty amount.

III.

The Commission has made resources available to all respondents, including those who may have difficulties understanding the Commissions' rules and regulations, through Small Business and Environmental Assistance ("SBEA"). In addition, respondents who have financial hardships can avail themselves of the financial review process. Further, the Penalty Policy provides several mechanisms (high performer reduction, good faith, and, when appropriate, Other Factors) for reducing penalty amounts.

The Respondent did not avail itself of the financial review process and it does not qualify for any of the reductions delineated in the Penalty Policy. The administrative penalty of $5,137 was calculated in accordance with the Penalty Policy and is appropriate in this case.

IV.

The Executive Director supports the adoption of the majority of the ALJ's Findings of Fact and Conclusions of Law, with the following suggested Exceptions, Changes and Modifications incorporated into the Proposed Order, as outlined below.

1. The Executive Director respectfully excepts to the ALJ reducing the administrative penalty amount from $5,137 to $ 4,000 for other factors that justice may require. This penalty reduction contradicts the Executive Director's established method of calculating a penalty under the Commission's 2002 Penalty Policy. While communication difficulties,

ownership changes, and attempted compliance, were considered in this case, they do not support the penalty reduction.

2. Based on No. 1, the Executive Director respectfully requests that the ALJ's Proposed Order, Conclusion of Law No. 10, be amended to remove "$4,000" and insert "$5,137".

3. Based on No. 1, the Executive Director respectfully requests that the ALJ's Proposed Ordering Provision No. 1 be amended to remove "$4,000" and insert "$5,137".

4. The Executive Director respectfully excepts to the first paragraph of the ALJ's Proposed Order because although there are technical requirements in this case, it does not include the language, "and requiring certain actions of", prior to Respondent's name. Therefore, the Executive Director respectfully requests that the first paragraph of the ALJ's Proposed Order, be amended by inserting, "and requiring certain actions of", prior to Respondent's name.

5. The Executive Director respectfully excepts to the ALJ's Proposed Finding of Fact No. 1 because it does not refer to the Respondent as the owner and operator of the underground storage tank system. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Finding of Fact No. 1 be amended to insert "an underground storage tank ("UST") system and" after the word "operates" and delete the "an" before "oil".

6. The Executive Director respectfully excepts to the ALJ's Proposed Finding of Fact No. 9 because it does not include the cathodic protection test that was performed. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Finding of Fact No. 9 be amended to insert, "a cathodic protection test and" after the word "that".

7. The Executive Director respectfully excepts to the ALJ's Proposed Finding of Fact No. 12 because it does not clarify the type of release detection needed. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Finding of Fact No. 12 be amended to insert "for the USTs" after the word "detection."

8. The Executive Director respectfully excepts to the ALJ's Proposed Finding of Fact No. 15 because the correct date is January 7th instead of January 23rd. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Finding of Fact No. 15 be amended to insert "7" and delete "23".

9. The Executive Director respectfully requests that the following be added as Proposed Finding of Fact No. 20: "The Commission has adopted a Penalty Policy effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties."

10. The Executive Director respectfully requests that the following be added as Proposed Finding of Fact No. 21: "The ED accurately calculated the $5,137.00 administrative penalty in accordance with the Commission's Penalty Policy."

11. The Executive Director respectfully requests that the following be added as the ALJ's Proposed Finding of Fact No. 22: "As owner and operator of the Facility, Respondent is responsible for its compliance with TCEQ rules pursuant to 30 Texas Administrative Code §§ 334.1(b)(3) and 334.2(73) and (70)."

12. The Executive Director respectfully requests that the following be added as the ALJ's Proposed Finding of Fact No. 23: "Respondent failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and failed to provide proper release detection for the suction piping associated with the UST system."

13. The Executive Director respectfully requests that the following be added as Proposed Finding of Fact No. 24: "Respondent failed to test the cathodic protection system for operability and adequacy of protection at least once every three years."

14. The Executive Director respectfully excepts to the ALJ's Proposed Ordering Provision No. 1 because it lacks a time period for payment. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Ordering Provision No. 1 be amended by inserting, "Within 30 days after the effective date of this Commission Order," at the beginning and "shall pay" after "Lube", and deleting "is assessed."

15. The Executive Director respectfully excepts to the ALJ's Proposed Ordering Provision No. 2 because it requires that Respondent implement a release detection method for both the USTs and piping. Release detection for piping has been implemented by Respondent. Therefore, the Executive Director respectfully requests that the ALJ's Proposed Ordering Provision No. 2 be amended to delete, "and the piping associated with the USTs", and that the "(b)" after § 26.3475 is deleted and replaced with "(c)(1)", and that the "(b)(2)" at the end of the sentence is deleted.

16. The Executive Director respectfully requests that for consistency the ALJ's Proposed Order title and paragraph 1, Finding of Fact Nos. 9 and 10, and Ordering Provision No. 1, be amended to correctly identify the Respondent as "MAGIC PRO INC".

PRAYER

The Executive Director respectfully requests that the Commission assess the full penalty amount of $5,137 against the Respondent. 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 a copy of the Redline/Strikeout Version of Administrative Law Judge's Proposed Order Delineating the Executive Director's Recommended Changes and Modifications. Attachment "B" is a copy of the Proposed Order Incorporating the Executive Director's Recommended Changes and Modifications.

Respectfully submitted,
Texas Commission on Environmental Quality

Zak Covar,
Executive Director

Caroline M. Sweeney, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by Rebecca M. Combs

Rebecca M. Combs
State Bar of Texas No.04638450
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2013, the original foregoing "Executive Director's Exceptions To The Administrative Law Judge's Proposed Order" was 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 was sent to the following parties by the method indicated:

The Honorable Judge Rebecca S. Smith State Office of Administrative Hearings P.O. Box 13025 Austin, Texas 78711-3025	Via Electronic Filing
Ali al-Shammari, President MAGIC PRO INC 530 N. Plano Road Garland, Texas 75042	Via First Class mail and via Certified Mail Article No. 7004 1350 0002 7551 9959
Blas Coy Office of the Public Interest Counsel, MC 103 TCEQ P.O. Box 13087 Austin, Texas 78711-3087 blas.coy@tceq.texas.gov	Via Electronic Mail

Rebecca M. Combs

Rebecca M. Combs
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment "A"

Redline/Strikeout Version of Administrative Law Judge's Proposed Order Delineating the Executive Director's Recommended Changes and Modifications

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against
MAGICagie PROro. INCnc. d/b/a Pro Quick Lube
TCEQ DOCKET NO. 2012-0486-PST-E
SOAH DOCKET NO. 582-13-2091

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring certain actions of MAGICagie PROro. INCnc. d/b/a Pro Quick Lube (Respondent). Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on July 11, 2013, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel (OPIC).

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. Respondent owns and operates an underground storage tank ("UST") system and an oil change facility located at 530 North Plano Road, Garland, Dallas County, Texas (Facility).

2. On January 24, 2011, Respondent was owned by Ahmed al-Rashed.

3. On January 24, 2011, an environmental investigator from the University of Texas at Arlington Petroleum Storage Tank Program conducted an investigation of the facility. The investigator observed several violations of the TCEQ rules regarding underground storage tanks (USTs).

4. The inspector noted that Respondent had failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and had failed to provide proper release detection for the suction piping associated with the UST system.

5. The inspector also noted that Respondent had failed to test the cathodic protection system for operability and adequacy of protection at least once every three years.

6. Ali al-Shammari, who had come to the United States in 2010 as a refugee from Iraq, purchased Respondent from Mr. al-Rashed on June 29, 2011. Mr. al-Rashed did not tell Mr. al-Shammari about the testing issues.

7. Mr. al-Shammari, has difficulty communicating in English.

8. On January 5, 2012, UTA issued a Notice of Enforcement regarding the violations found in the January 24, 2011 investigation.

9. In May 2012, MAGICagie PROro, INC provided the enforcement coordinator with documentation showing that a cathodic protection test and triennial piping test had been performed.

10. MAGICagie PROro, INC also sent proof of other testing, but this other testing did not meet TCEQ requirements.

11. On November 15, 2012, the ED issued the EDFARP in accordance with Texas Water Code § 7.054, alleging, among other items, that Respondent violated Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2), specifically for failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), failing to provide proper release detection for the suction piping associated with the UST system, and failing to test the cathodic protection system for operability and adequacy of protection at least once every three years.

12. Respondent has corrected the testing violations so corrective action regarding those violations is no longer necessary. Corrective action regarding release detection for the USTs is still needed.

13. The ED recommended the imposition of an administrative penalty in the amount of $5,137, and corrective action to bring the site into compliance.

14. On November 30, 2012, Respondent requested a contested case hearing on the allegations in the EDFARP.

15. On January 7 ~~23~~, 2013, the case was referred to SOAH for a hearing.

16. On January 28, 2013, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

17. At the preliminary hearing that was held on February 28, 2013, the ED established jurisdiction to proceed.

18. The hearing on the merits was conducted on July 11, 2013, in Austin, Texas, by ALJ Smith.

19. Respondent was represented at the hearing by Mr. al-Shammari. The ED was represented by Rebecca Combs, attorney in TCEQ's Litigation Division.

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

21. The ED accurately calculated the $5,137.00 administrative penalty in accordance with the Commission's Penalty Policy.

22. As owner and operator of the Facility, Respondent is responsible for its compliance with TCEQ rules pursuant to 30 Texas Administrative Code §§ 334.1(b)(3) and 334.2(73) and (70).

23. Respondent failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and failed to provide proper release detection for the suction piping associated with the UST system.

24. Respondent failed to test the cathodic protection system for operability and adequacy of protection at least once every three years.

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 Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under the version of Texas Water Code § 7.052 in effect on the date of the violations, a penalty may not exceed $10,000 per violation, per day, for the violations at issue in this case. Tex. Water Code § 7.052; Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.

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

4. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations, and the penalties and the corrective actions proposed therein.

5. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.27; 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 violations and the proposed penalties and corrective action.

6. 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 Texas Government Code, ch. 2003.

7. Based on the above Findings of Fact, Respondent violated Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2).

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

   - Its 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.

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

10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of $5,137 ~~$4,000~~ is justified and should be assessed against Respondent, and the corrective action proposed by the ED should be implemented.

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. Within 30 days of the effective date of this Commission Order MAGICagie PROro, INCnc. d/b/a Pro Quick Lube shall pay is assessed an administrative penalty in the amount of $5,137 $4,000 for violation of Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2). The payment of this administrative penalty and MAGICagie PROro, INCnc.'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: MAGICagie PROro, INCMagic Pro, Inc. d/b/a Pro Quick Lube; Docket No. 2012-0486-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

2. Within 30 days from the effective date of the Commission Order, Respondent shall implement a release detection method for the USTs and the piping associated with the USTs at the Facility, in accordance with Texas Water Code § 26.3475(b)(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A) and (b)(2).

3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification to demonstrate compliance with Corrective Action Ordering Provision No. 2. The certification required by this Corrective Action Ordering Provision shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or 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."

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:

Sam Barrett, Waste Section, Manager
Texas Commission on Environmental Quality
Dallas / Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

4. 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 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 herein, are hereby 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. As required by Texas Water Code § 7.059, 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.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

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

Attachment "B"

Administrative Law Judge's Proposed Order Incorporating the Executive Director's Recommended Changes and Modifications

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Assessing Administrative Penalties Against
MAGIC PRO INC d/b/a Pro Quick Lube
TCEQ DOCKET NO. 2012-0486-PST-E
SOAH DOCKET NO. 582-13-2091

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2. On January 24, 2011, Respondent was owned by Ahmed al-Rashed.

3. On January 24, 2011, an environmental investigator from the University of Texas at Arlington Petroleum Storage Tank Program conducted an investigation of the facility. The investigator observed several violations of the TCEQ rules regarding underground storage tanks (USTs).

4. The inspector noted that Respondent had failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and had failed to provide proper release detection for the suction piping associated with the UST system.

5. The inspector also noted that Respondent had failed to test the cathodic protection system for operability and adequacy of protection at least once every three years.

6. Ali al-Shammari, who had come to the United States in 2010 as a refugee from Iraq, purchased Respondent from Mr. al-Rashed on June 29, 2011. Mr. al-Rashed did not tell Mr. al-Shammari about the testing issues.

7. Mr. al-Shammari, has difficulty communicating in English.

8. On January 5, 2012, UTA issued a Notice of Enforcement regarding the violations found in the January 24, 2011 investigation.

9. In May 2012, MAGIC PRO INC provided the enforcement coordinator with documentation showing that a cathodic protection test and triennial piping test had been performed.

10. MAGIC PRO INC also sent proof of other testing, but this other testing did not meet TCEQ requirements.

11. On November 15, 2012, the ED issued the EDFARP in accordance with Texas Water Code § 7.054, alleging, among other items, that Respondent violated Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2), specifically for failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), failing to provide proper release detection for the suction piping associated with the UST system, and failing to test the cathodic protection system for operability and adequacy of protection at least once every three years.

12. Respondent has corrected the testing violations so corrective action regarding those violations is no longer necessary. Corrective action regarding release detection for the USTs is still needed.

13. The ED recommended the imposition of an administrative penalty in the amount of $5,137, and corrective action to bring the site into compliance.

14. On November 30, 2012, Respondent requested a contested case hearing on the allegations in the EDFARP.

15. On January 7, 2013, the case was referred to SOAH for a hearing.

16. On January 28, 2013, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

17. At the preliminary hearing that was held on February 28, 2013, the ED established jurisdiction to proceed.

18. The hearing on the merits was conducted on July 11, 2013, in Austin, Texas, by ALJ Smith.

19. Respondent was represented at the hearing by Mr. al-Shammari. The ED was represented by Rebecca Combs, attorney in TCEQ's Litigation Division.

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

21. The ED accurately calculated the $5,137.00 administrative penalty in accordance with the Commission's Penalty Policy.

22. As owner and operator of the Facility, Respondent is responsible for its compliance with TCEQ rules pursuant to 30 Texas Administrative Code §§ 334.1(b)(3) and 334.2(73) and (70).

23. Respondent failed to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and failed to provide proper release detection for the suction piping associated with the UST system.

24. Respondent failed to test the cathodic protection system for operability and adequacy of protection at least once every three years.

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 Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under the version of Texas Water Code § 7.052 in effect on the date of the violations, a penalty may not exceed $10,000 per violation, per day, for the violations at issue in this case. Tex. Water Code § 7.052; Acts 1997, 75th Leg., ch. 1072, Sec. 2, eff. Sept. 1, 1997.

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

4. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the EDFARP and of the opportunity to request a hearing on the alleged violations, and the penalties and the corrective actions proposed therein.

5. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.27; 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 violations and the proposed penalties and corrective action.

6. 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 Texas Government Code, ch. 2003.

7. Based on the above Findings of Fact, Respondent violated Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2).

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

   - Its 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.

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

10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, a total administrative penalty of $5,137 is justified and should be assessed against Respondent, and the corrective action proposed by the ED should be implemented.

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. Within 30 days of the effective date of this Commission Order MAGIC PRO INC d/b/a Pro Quick Lube shall pay an administrative penalty in the amount of $5,137 for violation of Texas Water Code § 26.3475(b), (c)(1), and (d), and 30 Texas Administrative Code §§ 334.49(c)(4)(C), and 334.50(b)(1)(A) and (b)(2). The payment of this administrative penalty and MAGIC PRO INC'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: MAGIC PRO INC d/b/a Pro Quick Lube; Docket No. 2012-0486-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

2. Within 30 days from the effective date of the Commission Order, Respondent shall implement a release detection method for the USTs at the Facility, in accordance with Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A).

3. Within 45 days after the effective date of the Commission Order, Respondent shall submit written certification to demonstrate compliance with Corrective Action Ordering Provision No. 2. The certification required by this Corrective Action Ordering Provision shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or 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."

   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:

Sam Barrett, Waste Section, Manager
Texas Commission on Environmental Quality
Dallas / Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

4. 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 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 herein, are hereby 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. As required by Texas Water Code § 7.059, 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.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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