

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 2, 2013

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

Re: **SOAH Docket No. 582-12-7936; TCEQ Docket No. 2012-0996-PSTG-E;**
In Re: Executive Director of the Texas Commission on Environmental Quality
v. Yahya Jafreh a/k/a John Jafreh

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 July 22, 2013. Any replies to exceptions or briefs must be filed in the same manner no later than August 1, 2013.

This matter has been designated **TCEQ Docket No. 2012-0996-PST-E; SOAH Docket No. 582-12-7936**. 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 black ink, appearing to read "Richard R. Wilfong".

Richard R. Wilfong
Administrative Law Judge

RRW/lb
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: YAHYA JAFREH AKA JOHN JAFREH
SOAH DOCKET NUMBER: 582-12-7936
REFERRING AGENCY CASE: 2012-0996-PST-E

STATE OFFICE OF ADMINISTRATIVE
HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ RICHARD WILFONG

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bc coy@tceq.texas.gov

OFFICE OF PUBLIC INTEREST COUNSEL

STEVEN FISHBURN
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
P.O. BOX 13087 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0635 (PH)
(512) 239-3434 (FAX)
mike.fishburn@tceq.texas.gov

EXECUTIVE DIRECTOR

JAMES D. HURST
JAMES D. HURST, P.C.
1202 SAM HOUSTON AVENUE, SUITE 9
HUNTSVILLE, TX 77340
(936) 295-5091 (PH)
(936) 295-5792 (FAX)
jdhurst@sbcglobal.net

YAHYA JAFREH AKA JOHN JAFREH

SOAH DOCKET NO. 582-12-7936
TCEQ DOCKET NO. 2012-0996-PST-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
v.	§	OF
	§	
YAHYA JAFREH A/K/A JOHN JAFREH,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

On July 26, 2012, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) filed his First Amended Report and Petition (EDFARP), alleging that Yahya Jafreh a/k/a John Jafreh (Respondent) violated applicable law by failing to: (1) renew a previously issued TCEQ delivery certificate by submitting a properly completed underground storage tank (UST) registration and self-certification within 30 days of the expiration; (2) make available to a common carrier a valid TCEQ delivery certificate before accepting delivery of a regulated substance into his USTs; (3) monitor the USTs for releases at a frequency of at least once every month and provide proper release detection for pressurized piping associated with his USTs; and (4) maintain UST records and make them immediately available upon request by TCEQ personnel.

The USTs at issue are located at a convenience store with retail sales of gasoline at 525 11th Street in Huntsville, Walker County, Texas (Facility). In its EDFARP, the ED sought an order requiring Respondent to: (1) pay an administrative penalty of \$7,741.00; (2) cease accepting fuel until a valid delivery certificate is obtained; (3) begin maintaining all UST records and assure they are immediately available for inspection by agency personnel; (4) install and maintain release detection for the USTs and the piping associated with the USTs; and (5) submit written certification of compliance.

The matter was referred to the State Office of Administrative Hearings (SOAH) for hearing. The Administrative Law Judge (ALJ) concluded that the ED established that Respondent committed the alleged violations. The Commission should find that the violations occurred, assess Respondent an administrative penalty of \$7,741.00, and order that Respondent take the corrective actions recommended by the ED.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are addressed in the Findings of Fact and Conclusions of Law in the Proposed Order without further discussion.

The hearing on the merits convened on April 3, 2013, before ALJ Richard R. Wilfong in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Attorney Steve Fishburn represented the ED. Attorney James Hurst represented Respondent. The record closed on May 22, 2013, following the submission of the parties' closing briefs.

III. DISCUSSION

The ED offered 13 exhibits that were admitted without objection and presented the testimony of Daniel Hamilton, an investigator with the University of Texas at Austin petroleum storage tank program, who testified about his investigation and the violations, and Katy Schumann, a TCEQ enforcement coordinator, who testified about the determination of the amount of the penalty.

Respondent stipulated to all material facts. Specifically, Respondent stipulated that the violations occurred, the accuracy of the penalty calculation, and that he was the owner of the Facility when the violations occurred. He further stipulated to his liability for the USTs themselves. Respondent only disputed his responsibility for violations committed by: (1) Ryan Lanka, Inc., who was the operator/lessee of the Facility when the violations occurred; and (2) the company that delivered fuel to the Facility when the Facility's delivery certificate was expired.

Respondent claimed that as the owner/lessor he had no control over the operation of the Facility and therefore, should not be responsible for the violations. Respondent argued that the ED should have pursued an enforcement action against the operator/lessee for the record keeping violations and the company that delivered fuel to the Facility when the Facility's delivery certificate was expired.

The ED asserted that Respondent was the proper party to this enforcement case because each of the violations was enforceable against the owner or operator.¹ The ED further asserted it was within his discretion to decide not to enforce against the operator/lessee of the Facility since the TCEQ investigator was informed that the operator/lessee was going out of business the day after the investigation.² According to the ED, because the operator was no longer available, it was reasonable to look to the owner for responsibility for the UST system and the associated violations. With regard to the fuel distributor, the ED noted that any enforcement case against the distributor would be a different violation and a separate case having no bearing on this enforcement case against the owner for failing to make a valid delivery certificate available before a fuel delivery is made.³

The proposed penalty for the Facility of \$7,741.00 was calculated under the terms of the Commission's 2002 Penalty Policy.⁴ Respondent did not dispute the accuracy of the ED's calculation of the penalty.

¹ Tex. Water Code § 26.3513(b); 30 Tex. Admin. Code (TAC) § 334.8(c)(4) (an owner or operator who owns or operates a regulated UST is responsible for completing and filing the UST registration and self-certification form necessary to renew a delivery certificate); 30 TAC § 334.8(5)(A)(1) (the owner and operator of regulated USTs must make available to a common carrier a valid, current TCEQ delivery certificate before delivery of a regulated substance into a UST); 30 TAC § 50(a)(1) (owners and operators of new and existing UST systems shall provide a method, or combination of methods, of release detection); and 30 TAC § 334.10(b)(1)(A) (owners and operators of UST systems are responsible for developing and maintaining all records required by the provisions of this chapter).

² *State v. Malone Serv. Co.*, 829 S.W.2d 765, 769 (Tex. 1992).

³ 30 TAC § 334.8(5)(A)(i).

⁴ ED Ex.11, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

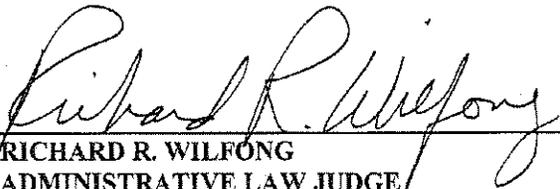
Based on the above analysis, the ALJ concludes that a penalty of \$7,741.00 is consistent with the factors in Texas Water Code § 7.053,⁵ which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy. The penalty proposed by the ED and recommended by the ALJ is commensurate with the severity of the violations found to have occurred and is reasonable.

Based on the stipulated facts and the plain meaning of the Texas Water Code and TCEQ rules, the ALJ finds that Respondent is responsible for the violations, the administrative penalty of \$7,741.00, and the corrective actions required to achieve compliance.

IV. RECOMMENDATION

Based on the evidence and applicable law, the ALJ recommends that the Commission find Respondent has violated state laws and regulations as alleged by the ED, and adopt the ALJ's Proposed Order, which assesses \$7,741.00 in administrative penalties against Respondent, and requires Respondent to undertake specified actions necessary to bring the Facility into compliance.

SIGNED July 2, 2013.


RICHARD R. WILFONG
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁵ Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
YAHYA JAFREH A/K/A JOHN JAFREH
TCEQ DOCKET NO. 2012-0996-PST-E,
SOAH DOCKET NO. 582-12-7936**

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 Yahya Jafreh a/k/a John Jafreh (Respondent). A Proposal for Decision (PFD) was presented by Richard R. Wilfong, 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 April 3, 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. Respondent is the owner of a convenience store with an underground storage tank (UST) system used for retail sales of gasoline located at 525 11th Street in Huntsville, Walker 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. On December 21, 2011, Daniel Hamilton, an investigator with the University of Texas at Austin petroleum storage tank program, conducted a UST inspection of the Facility. Based on his inspection Mr. Hamilton documented the following violations:

- Failure to have a current and valid UST delivery certificate.
 - Failure to provide proper release detection for USTs.
 - Failure to provide proper release detection for piping associated with the USTs.
 - Failure to maintain records pertaining to the UST system and to make them available for inspection by TCEQ personnel.
4. Respondent's failure to provide release detection for its USTs and associated piping created a potential for a release of contaminants that could cause major harm to groundwater.
 5. On July 26, 2012, the ED filed his First Amended Report and Petition and mailed a copy of it to Respondent at his last address of record known to the Commission.
 6. In the First Amended Report and Petition, the ED alleged that Respondent had violated Texas Water Code §§ 26.3467(a), and 26.3475(a) and (c)(1); and 30 TAC §§ 334.8(c)(4)(A)(vii), (c)(5)(A)(i), and (c)(5)(B)(ii); 334.10(b); and 334.50(b)(1)(A) and (b)(2). The ED proposed administrative penalties of \$7,741.00 for these violations.
 7. The ED also recommended that Respondent be required to take the corrective actions that are set out in the Ordering Provisions below.
 8. The Commission has adopted a Penalty Policy effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
 9. The ED accurately calculated the \$7,741.00 administrative penalty in accordance with the Commission's Penalty Policy.
 10. On July 6, 2012, Respondent requested a hearing.
 11. On August 8, 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 August 20, 2012.
 12. On September 11, 2012, the Chief Clerk mailed a notice of hearing to the Respondent, the ED, and the Office of Public Interest Counsel (OPIC).
 13. 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.

14. On October 11, 2012, the ALJ convened a preliminary hearing at the SOAH hearing facility in Austin, Texas, to establish jurisdiction over the contested case and to establish a procedural schedule leading to a hearing on the merits.
15. On April 3, 2013, the ALJ convened the hearing on the merits at the SOAH hearing facility in Austin, Texas. Closing arguments were submitted in writing, and the record closed May 22, 2013.
16. At the hearing, the ED appeared through his attorney, Steven M. Fishburn, and Respondent appeared through his attorney, James Hurst.
17. Respondent failed to renew a previously issued TCEQ delivery certificate.
18. Respondent failed to make available to a common carrier a valid delivery certificate before accepting delivery of a regulated substance into the USTs.
19. Respondent failed to monitor the USTs and associated piping for releases at least once every month.
20. Respondent failed to maintain UST records and make them immediately available upon request by TCEQ personnel.

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 1977, 75th Leg., R.S., Ch. 1072, Section 2, eff. September 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 (TAC) § 80.17(d).
7. As required by Texas Water Code § 7.055 and 30 TAC §§ 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 TAC § 155.401; and 30 TAC §§ 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. As the owner of the Facility, Respondent is responsible for its compliance with TCEQ rules pursuant to 30 TAC §§ 334.1(b)(3) and 334.2(73).
10. Respondent violated Texas Water Code §§ 26.3467(a), 26.3475(a) and (c)(1); and 30 TAC §§ 334.8(c)(4)(A)(vii), (c)(5)(A)(i), and (c)(5)(B)(ii); 334.10(b); 334.50(b)(1)(A) and (b)(2).
11. The penalty and corrective action that the ED proposed for Respondent's violations considered in this case conform to the requirements of the Texas Water Code, ch. 7, and the Commission's Penalty Policy.
12. The Respondent should be assessed a total of \$7,741.00 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, Yahya Jafreh a/k/a John Jafreh shall pay an administrative penalty in the amount of \$7,741.00 for its violations of Texas Water Code §§ 26.3467(a) and 26.3475(a) and (c)(1); and 30 TAC §§ 334.8(c)(4)(A)(vii), (c)(5)(A)(i), and (c)(5)(B)(ii); 334.10(b); and 334.50(b)(1)(A) and (b)(2).

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: Yahya Jafreh a/k/a John Jafreh., TCEQ Docket No. 2012-0996-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. Immediately upon the effective date of the Commission Order, Respondent shall: (1) cease accepting fuel until such time as a valid delivery certificate is obtained from TCEQ by submitting a properly completed UST registration and self-certification form, in accordance with 30 TAC § 334.8; and (2) begin maintaining all UST records and ensure they are made immediately available for inspection upon request by TCEQ personnel, in accordance with 30 TAC § 334.10
5. Within 30 days after the effective date of this Order, Respondent shall: (1) install and implement a release detection method for the USTs at the Facility, in accordance with 30 TAC § 334.50; and (2) install and implement a release detection method for the piping associated with the USTs at the Facility, in accordance with 30 TAC § 334.50.
6. Within 45 days after the effective date of this Order, Respondent shall submit written certification to demonstrate compliance with Ordering Provision Nos. 4 and 5. 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."

7. 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

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 TAC § 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**