

SOAH DOCKET NO. 582-13-5790
TCEQ DOCKET NO. 2012-2263-PST-E

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	OF
VS.	§	
	§	
BRUSHY LANDING, LLC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

TO THE HONORABLE CRAIG R. BENNETT:

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exception to the Administrative Law Judge's ("ALJ") Proposed Order:

The Executive Director respectfully requests that the ALJ's Proposed Order be amended to delete Ordering Provision No. 4, requiring Respondent to submit written certification of compliance, and that the remaining Ordering Provisions be re-numbered, accordingly. Because the Executive Director recognized compliance and the only remaining requirement is payment of the administrative penalty, Ordering Provision No. 4 is unnecessary.

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with this recommended modification, 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 modification. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended change.

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: 
Tammy L. Mitchell
State Bar of Texas No. 24058003
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 12th day of May 2014, the original 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 true and correct copies of the foregoing Exceptions were sent to the following persons by the method of service indicated:

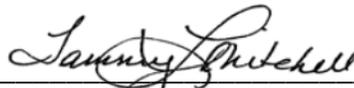
Jeff Ellis
Brushy Landing, LLC
600 Pine Wood Drive
Marshall, Texas 75672

Via First Class Mail

The Honorable Craig R. Bennett
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Electronically filed

I further certify that on this day a true and correct copy of the foregoing Exceptions were electronically submitted Mr. Garret Arthur, Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Tammy L. Mitchell
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST
BRUSHY LANDING, LLC
TCEQ DOCKET NO. 2012-2263-PST-E
SOAH DOCKET NO. 582-13-5790**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Report and Petition (EDSARP) recommending that the Commission assess administrative penalties against Brushy Landing, LLC (Respondent). A Proposal for Decision (PFD) was presented by Craig R. Bennett, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDSARP on March 25, 2014, 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 owns and operates a convenience store with retail sales of gasoline located at 5121 Farm-to-Market Road 726 in Jefferson, Texas (the facility). The facility includes three underground storage tanks (USTs) with a capacity of 2,000 gallons each.
2. The facility is considered a minor source facility because it has less than 50,000 gallons throughput monthly.
3. Respondent has no previous adverse compliance history.
4. The USTs at the facility are not exempt or excluded from regulation under the Texas Water Code or the Commission's rules.
5. On April 11, 2012, a University of Texas at Arlington Petroleum Storage Tank (PST) Program investigator, Norman Norwood, came onto the premises of the facility and conducted an inspection on behalf of the TCEQ.

6. During the inspection, Mr. Norwood documented that Respondent failed to:
 - a. monitor USTs for releases at least once each month (not to exceed 35 days between each monitoring);
 - b. maintain legible copies of all required records pertaining to an UST in a secure location on the premises of the facility, immediately available for inspection by Commission personnel; and
 - c. provide corrosion protection for the UST system.
7. On October 23, 2012, the Executive Director (ED) of the TCEQ provided a notice of enforcement (NOE) to Respondent regarding the violations documented by Mr. Norwood.
8. On June 3, 2013, the ED filed his initial EDPRP and mailed a copy of it to Respondent at its address of record.
9. In the EDPRP, the ED alleged that Respondent had violated the Texas Water Code and the Commission's rules, due to Respondent failing to monitor USTs for releases at least once each month and for failing to provide corrosion protection for the UST system. In this initial EDPRP, the ED proposed an administrative penalty of \$7,500 for these violations and requested corrective action by Respondent.
10. On June 19, 2013, Mr. Jeff Ellis, acting on behalf of Respondent, requested a hearing.
11. On July 25, 2013, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk subsequently referred it to SOAH.
12. On September 10, 2013, the Chief Clerk mailed a notice of hearing to the Respondent, the ED, and the Office of Public Interest Counsel.
13. The notice of hearing stated the time, place, and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; the particular sections of the statutes and rules involved; and the matters asserted.
14. The preliminary hearing in this docket was waived upon joint motion of the parties.
15. On March 4, 2014, the ED filed the EDSARP and mailed a copy to Respondent at its address of record. Unlike the initial EDPRP, the EDSARP alleged only that Respondent violated Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A) due to Respondent's failure to monitor the USTs for releases at least once each month and proposed a penalty of \$3,750.

16. On March 25, 2014, the ALJ convened the hearing on the merits at the SOAH hearing facility in Austin, Texas. Staff attorney Stephanie Frazee represented the ED. Respondent appeared pro se through its owner/operator, Jeff Ellis. The record closed at the conclusion of the hearing that same day.
17. Respondent failed to monitor its USTs for releases at least once each month (not to exceed 35 days between each monitoring). This failure lasted approximately 80 days and is considered a single, quarterly violation.
18. The Commission has adopted a Penalty Policy effective September 1, 2011, setting forth its policy regarding the computation and assessment of administrative penalties.
19. The ED accurately calculated the \$3,750 base penalty and the reduced total penalty of \$2,813 due to Respondent's good faith for having come into compliance, in accordance with the Commission's Penalty Policy. The ED requested this good faith reduction at the hearing on the merits.
20. Respondent corrected the violation in issue, and no corrective action is sought by the ED.

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 \$25,000 per violation, per day, for each of the violations at issue in this case. Tex. Water Code § 7.052.
3. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors, and the Commission's Penalty Policy implements those factors.
4. 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.
5. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).
6. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code § 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein. Proper notice of the EDSARP was also provided.

7. As required by Texas Government Code §§ 2001.051 and 2001.052; Texas Water Code § 7.058; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violation and the proposed penalty.
8. As the owner of the facility, Respondent is responsible for its compliance with TCEQ rules. 30 Tex. Admin. Code §§ 334.1(b)(3) and 334.2(73).
9. Respondent violated Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A).
10. The penalty that the ED proposed for Respondent's violation considered in this case conforms to the requirements of Texas Water Code Chapter 7 and the Commission's Penalty Policy.
11. The Respondent should be assessed a total administrative penalty of \$2,813 for the violations considered in this case, as requested by the ED at the hearing on the merits.

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, Brushy Landing, LLC shall pay an administrative penalty in the amount of \$2,813 for its violations of Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A).
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: Brushy Landing, LLC, TCEQ Docket No. 2012-2263-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 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. 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
San Antonio Regional Office
14250 Judson Road
San Antonio Texas 78233-4480~~

~~5.4.~~ 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 Order.

~~6.5.~~ 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.

~~7.6.~~ 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.

~~8.7.~~ The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

~~9.8.~~ 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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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. 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.
7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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