

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 22, 2014

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

Re: **SOAH Docket No. 582-13-5790; TCEQ Docket No. 2012-2263-PST-E; In Re:
Executive Director of the Texas Commission on Environmental Quality v.
Brushy Landing, LLC**

Dear Ms. Idsal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 12, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than May 22, 2014.

This matter has been designated **TCEQ Docket No. 2012-2263-PST-E; SOAH Docket No. 582-13-5790**. 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 "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

CRB/ls
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: BRUSHY LANDING, LLC

SOAH DOCKET NUMBER: 582-13-5790

REFERRING AGENCY CASE: 2012-2263-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ CRAIG R. BENNETT

REPRESENTATIVE / ADDRESS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JEFF ELLIS
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MARSHALL, TX 75672

BRUSHY LANDING, LLC

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

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,**
Petitioner

v.

BRUSHY LANDING, LLC,
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess an administrative penalty against Brushy Landing, LLC (Respondent) for its alleged failure to comply with the Texas Water Code and the Commission's rules adopted pursuant to the Water Code. Specifically, the ED alleges that Respondent failed to conduct required release detection for its underground petroleum storage tanks, in violation of Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A). The ED requests a total administrative penalty of \$2,813, but seeks no corrective action because Respondent is now in compliance with the applicable rules. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) finds that the evidence establishes the violation alleged and concludes that the Commission is warranted in imposing the requested administrative penalty of \$2,813.

However, the ALJ also notes that the evidence indicates that Petitioner's violation was unknowing and that Petitioner has demonstrated good faith efforts to comply not only with the violated provisions but also with all other applicable rules throughout its interaction with the ED. Accordingly, while the ALJ finds that the requested penalty is justified, he also notes that the Commission could choose to consider Respondent's actions as an additional factor, under the "other factors as justice may require" component of the penalty calculation worksheet, and impose a lesser administrative penalty.

I. PROCEDURAL HISTORY AND JURISDICTION

The hearing on the merits convened on March 25, 2014, before ALJ Craig R. Bennett in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff attorney Stephanie Frazee represented the ED. Respondent appeared pro se through its owner/operator, Jeff Ellis. The record closed that same day. Respondent did not dispute the adequacy of notice nor the jurisdiction of the TCEQ or the State Office of Administrative Hearings (SOAH).

II. DISCUSSION

A. Background

The key facts are undisputed. Respondent owns and operates an underground storage tank (UST) system and convenience store with retail sales of gasoline, located at 5121 Farm-to-Market Road 726 in Jefferson, Texas (the facility). Respondent acquired the facility in 2011 and, prior to such acquisition, had no background or experience in operating such a facility. The facility is considered a minor source facility since it has less than 50,000 gallons throughput monthly. Respondent has no adverse compliance history, except for this action.

On April 11, 2012, a University of Texas at Arlington Petroleum Storage Tank (PST) Program investigator, Norman Norwood, came onto the facility for purposes of an inspection on behalf of the TCEQ. Mr. Norwood observed that Respondent lacked any release detection records, so Mr. Norwood could not verify Respondent's compliance with the requirement to monitor its USTs for releases. Ultimately, at the conclusion of his inspection, Mr. Norwood found that Respondent was failing to (1) monitor USTs for releases at least once each month (not to exceed 35 days between each monitoring), (2) maintain legible copies of all required records pertaining to an UST in a secure location on the premises of the facility and immediately available for inspection by Commission personnel, and (3) provide corrosion protection for the UST system.¹

¹ ED Ex. 6 at 2-3.

Respondent took steps to correct the noticed violations and came into compliance with the Commission's rules by June 30, 2012. On October 23, 2012, the Commission issued a notice of enforcement, advising Respondent of the ED's intention to seek enforcement against Respondent for its previous failure to properly monitor the USTs for releases.²

B. Failure to Monitor USTs for Releases

Owners and operators of USTs must comply with certain Commission requirements, including monitoring their UST systems for releases at least once per month.³ Respondent has three USTs each with a capacity of 2,000 gallons.⁴ Respondent's UST system has a total capacity of 6,000 gallons and is considered a minor source.

At the hearing on the merits, Mr. Ellis testified on behalf of Respondent. He admitted that for a period of time Respondent was not in compliance with the requirement to conduct UST monitoring. Mr. Ellis stressed that this noncompliance was due to a lack of knowledge about such a requirement, and he noted that no actual releases had occurred. Mr. Ellis testified that he has since taken courses regarding the requirements for USTs, and that Respondent is currently in compliance with the applicable rules and regulations. At the hearing, the ED conceded that Respondent did promptly correct the violations after they were brought to its attention, and that no corrective action is currently being sought by the ED.

It is undisputed that Respondent did not comply with the Commission's requirement to monitor its UST system each month. The violation lasted from the inspection on April 11, 2012, until June 30, 2012, at which time compliance was demonstrated.⁵ While Mr. Ellis's testimony demonstrates that Respondent used good faith efforts to comply with the Commission's rules, Respondent's lack of knowledge is not a defense to this enforcement action against it.

² ED Ex. 6 at 11-12.

³ 30 Tex. Admin. Code § 334.50(b)(1)(A).

⁴ ED Ex. 6 at 2.

⁵ ED Ex. 10 at 3.

Owners and operators of regulated facilities are expected to know and comply with all applicable regulations, and the legislature has given the Commission the power to assess an administrative penalty against any person who violates a provision of the Texas Water Code or a rule adopted under the Code.⁶ Because Respondent undisputedly violated the Commission's rule requiring Respondent to monitor its USTs monthly, the Commission may assess an administrative penalty against it.

C. Penalty Calculation Summary

The maximum administrative penalty for the violation alleged in this case is \$25,000 per violation per day, before adjusting for other factors.⁷ The base penalty of \$25,000 was reduced by the ED to \$3,750 in accordance with the 2011 Penalty Policy, because Respondent's violation was classified as a "major potential" violation.⁸ Respondent was in noncompliance for 80 days, from the investigation on April 11, 2012, until June 30, 2012, at which time compliance was demonstrated.⁹ However, the number of violation events was determined quarterly in calculating Respondent's penalty, in accordance with the 2011 Penalty Policy.¹⁰ Thus, there was just a single quarterly violation. The penalty for this single violation was further reduced by 25% due to Respondent coming into compliance before the ED issued a notice of enforcement on October 23, 2012.¹¹ This resulted in a total administrative penalty of \$2,813.¹² The ALJ finds that this penalty is warranted based upon the facts and the law, and the Commission may properly impose it against Respondent.

⁶ Tex. Water Code § 7.051.

⁷ See Tex. Water Code § 7.052(c), Tex. Water Code § 7.056.

⁸ ED Ex. 10 at 3. Witnesses for the ED explained the reasons for this classification at the hearing on the merits. The witnesses emphasized the importance of monitoring USTs after releases for the purposes of protecting the public health and environment, and a lack of regular monitoring deprives a facility and regulators of this useful information in the event of an actual release.

⁹ ED Ex. 10 at 3.

¹⁰ ED Ex. 10 at 3.

¹¹ ED Ex. 10 at 3, *see also* Ex. 6 at 11-14.

¹² ED Ex. 10 at 3.

Respondent argues that it should not be penalized because it has shown efforts throughout the process to try to comply with the Commission's rules. The ALJ notes that the Commission has discretion under its penalty policy to make additional adjustments for "other factors that justice may require."¹³ Accordingly, if the Commission finds Respondent's lack of knowledge and subsequent good faith efforts to proactively comply with all applicable Commission rules going forward to be sufficiently mitigating, it could choose to reduce the penalty further. The ALJ makes no recommendation for such a reduction, but leaves such a determination to the discretion of the Commission.

III. CONCLUSION

Based on the undisputed evidence in the record, the ALJ finds that Respondent violated Texas Water Code § 26.3475(c)(1) and 30 Texas Administrative Code § 334.50(b)(1)(A) and is subject to an administrative penalty for such violation. Further, the ALJ finds that a total administrative penalty of \$2,813 for such violation is consistent with Texas Water Code § 7.053, TCEQ rules, and the 2011 Penalty Policy.

SIGNED April 22, 2014.



CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

¹³ ED Ex. 10 at 1.

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. 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. 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. 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. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. 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