

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 24, 2015

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

**Re: SOAH Docket No. 582-15-1630; TCEQ Docket No. 2014-0894-PST-E; In Re:
Assessing Administrative Penalties Against VASAN, Inc. d/b/a Mr. D's
Convenience Store**

Dear Mr. Royall:

On July 7, 2015, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) filed exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) issued on June 17, 2015. The Respondent, VASAN, Inc. d/b/a Mr. D's Convenience Store, filed a post-hearing pleading on July 17, 2015. The ALJ has reviewed the parties' filings and amends the Proposed Order to reflect Respondent's failure to comply with the TCEQ's rules regarding piping-tightness tests. However, the ALJ recommends that the Commission overrule the remaining exceptions.

1. The ED's Exceptions

a. Corrosion Protection

The ED excepted to the ALJ's conclusion that the ED failed to meet his burden of proof regarding the alleged violation of Texas Water Code § 26.3475(d) and 30 Texas Administrative Code § 334.49(a)(1). As stated in the PFD, the ALJ could not conclude that Respondent violated section 334.49(a)(1) because section 334.49(b) allows an underground storage tank (UST)

system “to be protected from corrosion *by one or more of* [seven allowable] methods”¹ From the evidence and arguments produced at hearing, the ALJ could not determine whether Respondent failed to meet all seven of the allowable methods or which of the seven methods could or could not have applied to his system.

On pages 15 through 17 of his 65-page exceptions, the ED provides the needed explanation that was not provided at hearing. However, the ED’s evidentiary basis for his exception presents concerns that precludes the ALJ from changing her recommendation in the PFD.²

(1). ED Ex. B

The ED argues that Respondent’s answer in this case and found at ED Ex. B is evidence that Respondent admitted to the violation. However, Respondent’s answer is not in the evidentiary record for the truth of the matter asserted. Therefore, it is no evidence of an admission of the violation.

On January 15, 2015, ALJ William G. Newchurch convened the preliminary hearing in this case. The ED and Respondent were both present at the preliminary hearing in Austin, Texas. After the ED offered Respondent’s answer for admission into the record, Judge Newchurch admitted the answer “for purposes of notice and jurisdiction.”³ At preliminary hearings, ALJs typically admit documents for the limited purpose of demonstrating that notice is sufficient and jurisdiction is proper. As occurred in this case, Judge Newchurch admitted the jurisdictional documents for that limited purpose, and the ALJ restated this at the hearing on the merits.⁴ Therefore, the ED cannot rely on Respondent’s answer to meet his burden of proof because the Judge expressly limited the use of the answer to the determination of notice and jurisdiction.

¹ Emphasis added.

² See ED Exceptions at 34.

³ Prelim. Recording at 6:40-43.

⁴ HOM Recording 1 at 7:40-8:00.

(2). ED Exs. 5.7, 5.8, and 6

The ED argues that Respondent's "records" demonstrate that Respondent had "no method" of corrosion protection.⁵ ED Exs. 5.7 and 5.8 contain a bid and proposal for work submitted to Respondent by contractors. ED Ex. 6 at 1 is an invoice for work to "Repair and Restart of a Cathodic Protection System."

The "records" found in ED Exs. 5.7, 5.8, and 6 are hearsay and do not meet the business record exception found in Texas Rules of Evidence 803(6), which provides:

A record of an act, event, condition, opinion, or diagnosis if:

- (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge;
- (B) the record was kept in the course of a regularly conducted business activity;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by an affidavit or unsworn declaration that complies with Rule 902(10); and
- (E) the opponent fails to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

The bids and proposals from contractors to do work do not meet the definition of a business record. These documents contain out-of-court statements offered in evidence to prove the truth of the matter asserted.⁶ The statements made regarding the noncompliance of Respondent's system were made by a contractor attempting to secure work from Respondent. However, the bid and proposal are in the evidentiary record as unobjected-to hearsay and can be used as the basis of a finding of fact if the Commission chooses to do so. Furthermore, ED Ex. 6 indicates that Respondent had a "cathodic protection" system in need of repair, which tends to

⁵ ED Exceptions at 34.

⁶ Tex. R. Evid. 801(d).

contradict the ED's allegation that Respondent did not have corrosion protection at all. For these reasons, the ALJ gives very little weight to ED Exs. 5.7, 5.8, and 6.

The ALJ also disagrees with the ED's analysis of the application of Rule 407 of the Texas Rules of Evidence regarding Respondent's subsequent remedial measures. The ED states that "[Rule 407] *only applies in one situation*," when a tort, accident, or injury has occurred.⁷ However, the cases cited by the ED are themselves tort cases and do not stand for the broad proposition that Rule 407 can *only* apply in tort cases. Furthermore, Rule 407 is not limited to issues of mental state as argued by the ED.⁸ The rule directly applies to "culpable conduct" as alleged in this case, i.e. Respondent's alleged conduct in failing to comply with the TCEQ's rules regarding corrosion protection.⁹

The Texas Administrative Procedure Act and the TCEQ's rules require the ALJ to apply the Texas Rules of Evidence in contested case hearings.¹⁰ Nothing in the Texas Rules of Evidence or in the case law cited by the ED prohibits the application of Rule 407 in the context of a contested case hearing. In this case, the ED is relying on the evidence to show that Respondent violated the rule (culpable conduct) because it did not have corrosion protection (harm) as demonstrated by the work subsequently performed. From an evidentiary standpoint, this is an impermissible use of ED Exs. 5.7, 5.8, and 6. From a policy perspective, use of such evidence could discourage voluntary compliance and quick resolution of environmental concerns, as pointed out in the PFD.¹¹ For these reasons, the ALJ declines to amend her recommendation in response to the ED's exceptions.

Nevertheless, Respondent did not object to the admission of ED Exs. 5.7, 5.8, and 6. Therefore, the exhibits are part of the evidentiary record and can form the basis for a finding of fact if the Commission agrees with the ED.¹²

⁷ ED Exceptions at 27 (emphasis added).

⁸ ED Exceptions at 28.

⁹ Tex. R. Evid. 407(a).

¹⁰ Tex. Gov't Code § 2001.081; 30 Tex. Admin. Code § 80.127(a)(1).

¹¹ PFD at 8.

¹² Tex. Gov't Code § 2001.141(c).

(3). ED Ex. 5.4 at 22

The ED cites to ED Ex. 5.4 at 22 for the proposition that Respondent “could not produce records to show the TCEQ investigator whether or not adequate corrosion protection existed,” and this was a violation of 30 Texas Administrative Code § 334.49(e)(1) and (e)(2).¹³ The ED concludes that “[n]aturally, absence [sic] other information, the investigator determined that Respondent’s UST system did not have corrosion protection.”¹⁴

The ALJ disagrees with the ED that ED Ex. 5.4 at 22 demonstrates that Respondent did not have records of corrosion protection, thereby, demonstrating that the corrosion-protection violation occurred. ED Ex. 5.4 at 22 shows that the investigator, Isaac Foss, made an “RR” or record request, regarding a “PV” or possible violation, and advised Respondent to email the records to Mr. Foss’s email address. Mr. Foss did not testify at the hearing, and the exhibit does not state the basis for Mr. Foss’s request. Although a lack of records may have caused Mr. Foss to make such a “record request,” evidence of whether Respondent had the records available is not in the record. It is simply not apparent from ED Ex. 5.4 at 22 that the records were in fact unavailable in violation of the TCEQ’s rules.¹⁵ Nor does an unpled record violation prove the section 334.49(a) violation because records could be unavailable for a number of reasons. For these reasons, the ALJ does not consider ED Ex. 5.4 at 22 as some evidence that Respondent violated the TCEQ’s rules regarding corrosion protection.

(4). Respondent’s Deemed Admissions

The ED relies on Respondent’s deemed admissions as evidence that Respondent admitted the corrosion-protection violation.¹⁶ During discovery, the ED sent 103 written discovery requests to Respondent, including 59 requests for admissions. On April 9, 2015, the ED moved to compel Respondent to respond to the discovery requests, and the ALJ granted the ED’s

¹³ ED Exceptions at 9, 10.

¹⁴ ED Exceptions at 10.

¹⁵ The ED did not plead a records violation in his ED Preliminary Report and Proposal.

¹⁶ ED Exceptions at 34.

motion.¹⁷ When Respondent failed to respond to the requests, the ED moved for sanctions, and the ALJ again granted the ED's request.¹⁸ Requests for admissions are automatically deemed admitted on the day the answers are due without the need for an order from the ALJ.¹⁹ Although the ALJ advised Respondent of its opportunity to have the deemed admissions withdrawn, Respondent did not formally attempt to do so. However, Respondent's representative stated at the hearing on the merits that he could not answer the questions because he would have signed something and that the ED asked him a hundred questions. He also stated that he runs a very small business and cannot take the time out of his business to answer all the discovery requests. In addition, the ED's discovery requests made him angry.²⁰

By failing to respond to the ED's requests for admissions, the requests are deemed admitted. However, the Texas Supreme Court has held that requests for admissions were not intended to be used by a party to meet its burden of proof, but to simplify trials by "addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents."²¹ As shown on page 21 of the ED's Exceptions, his requests for admission go beyond uncontroverted matters or authenticity but go to the very elements of the case he needs to prove.²² The Third Court of Appeals has held that "[o]verly broad, merits-preclusive requests for admissions are improper and may not result in deemed admissions."²³ The ALJ recognizes that the self-represented Respondent was not precluded from presenting his case and he did not formally seek to withdraw the deemed admissions, although he did explain why he did not answer the ED's requests. However, in the ALJ's opinion, the ED's requests go beyond the proper scope of requests for admissions, and the ALJ declines to rely on the deemed admissions to determine whether the ED has met his burden of proof.

¹⁷ Order No. 2 (Apr. 27, 2015).

¹⁸ Order No. 4 (May 18, 2015).

¹⁹ Tex. R. Civ. P. 198.2(c).

²⁰ HOM Recording 1 at 13:00-16:00.

²¹ *Marino v. King*, 355 S.W.3d 629, 635 (Tex. 2011).

²² See also ED Ref. C.

²³ *Lucas v. Clark*, 347 S.W.3d 800, 804 (Tex. App.—Austin 2011, pet. denied).

(5). Respondent's Testimony

The ED asserts that Sivagnana Manickavasagar testified on behalf of Respondent and admitted the violations.²⁴ However, the ALJ disagrees with the ED's assessment of Mr. Manickavasagar's testimony. As an initial matter, the ALJ was unable to correlate the ED's citation to the recording with his assertions that Mr. Manickavasagar admitted the corrosion-protection violation.²⁵ At the 42-minute mark on the recording, Mr. Manickavasagar was discussing the line and leak-detector tests, although he subsequently stated that Mr. Foss looked at the sump and pointed things out.²⁶

Furthermore, after listening to Mr. Manickavasagar's testimony, the ALJ cannot conclude that he admitted the corrosion-protection violation. He stated he "did not know about the tanks" but he just did what Mr. Foss, the inspector, told him to do.²⁷ That is why Respondent had the "corrosion protection" done in July 2014,²⁸ but Mr. Manickavasagar also stated that the tanks already had corrosion protection when they were installed in 1985 before the law changed in 1993.²⁹ Therefore, the ALJ does not read Mr. Manickavasagar's testimony as an admission that Respondent violated section 334.49(b) because Respondent had no corrosion protection. In the ALJ's opinion, his testimony does not relieve the ED of proving that Respondent did not utilize any of the seven allowable methods authorized by the rule.

(b) Piping Tightness Test

The ED asserts that the ALJ incorrectly concluded that he did not meet his burden to prove that Respondent violated Texas Water Code § 26.3475(a) and 30 Texas Administrative Code § 334.50(b)(2) regarding the piping tightness test. The basis of the ALJ's conclusion is that section 334.50(b)(2)(A)(ii) provides that pressurized lines must be tested in accordance "with at least one of the following methods" As with the corrosion-protection violation, the

²⁴ ED Exceptions at 14.

²⁵ See ED's Exceptions at n. 71 (44 min.), 72 (42 min), 73 (42 min).

²⁶ HOM Recording 2 at 43:40.

²⁷ HOM Recording 2 at 39:50.

²⁸ HOM Recording 2 at 40:59-41:15.

²⁹ HOM Recording 2 at 41:10.

ALJ concluded that the ED needed to prove that Respondent did not comply with any of the three allowable methods.

On pages 40 through 42 of his exceptions, the ED now provides the needed discussion to show that Respondent did not meet any of the three allowable methods, and the ALJ agrees that the ED met his burden to show that Respondent violated 30 Texas Administrative Code § 334.50(b)(2). Accordingly, the ALJ recommends the deletion of Conclusion of Law (COL) No. 10 and amends proposed COL Nos. 8 and 9 as follows:

- COL No. 8: Based on the above findings of fact, Respondent violated Texas Water Code § 26.3475(a) and 30 Texas Administrative Code § 334.50(b)(2) by failing to perform the line leak detector test annually as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III) and by failing to conduct the piping tightness test as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(ii).
- COL No. 9: The ED met his burden of proof to show that an administrative penalty is warranted for the violation of Texas Water Code § 26.3475(a) and 30 Texas Administrative Code § 334.50(b)(2) by failing to perform the line leak detector test annually as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III)) and by failing to conduct the piping tightness test as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(ii).

(c). Administrative Penalty

The ED disagrees with the ALJ's recommended penalty. After reviewing the ED's exceptions, the ALJ maintains that \$2,000 is an appropriate penalty pursuant to Texas Water Code § 7.053. At the hearing on the merits, Respondent presented his case out of order and left before the ED presented the testimony of the enforcement coordinator. Therefore, Respondent did not contest the ED's penalty calculation. However, after reviewing the evidence and as stated in the PFD, the ALJ recommends a reduction in the administrative penalty as justice may require.

For the first violation, the ALJ recommends that the Commission overrule this exception because the ALJ did not conclude that Respondent violated the TCEQ's rules regarding corrosion protection. Regarding the second violation, the ALJ recommends a \$2,000 penalty because the evidence shows that Respondent properly and promptly responded to the investigation. As Mr. Manickavasagar stated, he attempted to schedule the tests before the inspection, but his consultant was unable to perform the tests. As pointed out in the PFD, Respondent argued that he thought the tests needed to be done during a calendar year.³⁰ From the evidence presented, the ALJ determined that Respondent did not intentionally violate the rules and it completed the testing only 17 days after the inspection.

In the ALJ's opinion, the evidence indicates that the imposition of a lower penalty than that recommended by the ED may be warranted in this case. However, if the Commission disagrees, the ED's penalty calculation is uncontested and provides a sufficient evidentiary basis for the imposition of the ED's recommended penalty of \$7,177 for the second violation.

(d). Revisions to Proposed Order

The ED recommends several revisions to the ALJ's Proposed Order.³¹ The ALJ agrees with the following revisions as proposed by the ED:

1. Revision to caption and introductory paragraph.
2. Revision to proposed Finding of Fact (FOF) No. 3.
3. Revision to proposed FOF No. 6.
4. Revision to proposed FOF No. 10.
5. Revision to proposed FOF No. 16.
6. Revision to proposed COL No. 8 as set out above on page 8 of this letter.

³⁰ PFD at 11-12.

³¹ ED Exceptions at 60-64.

7. Revision to proposed COL No. 9 as set out above on page 8 of this letter. However, the ALJ does not recommend the inclusion of Texas Water Code § 26.3475(d) in the conclusion of law because the ED did not plead a violation of that subsection.
8. The deletion of COL No. 10 as set out above on page 8 of this letter.

The ALJ recommends that the Commission reject the other revisions to the Proposed Order recommended by the ED, as follows:

1. The ALJ recommends that the Commission reject the ED's proposed revision to FOF No. 13. Respondent's actions in scheduling the tests is not "legally irrelevant" as argued by the ED.³² Texas Water Code § 7.053(4) allows for consideration of "other matters as justice may require." In the ALJ's opinion, Respondent's efforts to schedule the testing is relevant to the imposition of an administrative penalty.
2. The ALJ recommends that the Commission reject the ED's proposed revision to FOF No. 17 as discussed above in this letter.
3. The ALJ recommends that the Commission reject the ED's proposed revision to FOF No. 18 as discussed above in this letter.
4. The ALJ recommends that the Commission reject the ED's proposed revision to COL No. 7 as discussed above in this letter.
5. The ALJ recommends that the Commission reject the ED's proposed revision to COL No. 11 as discussed above in this letter.

³² ED Exceptions at 62.

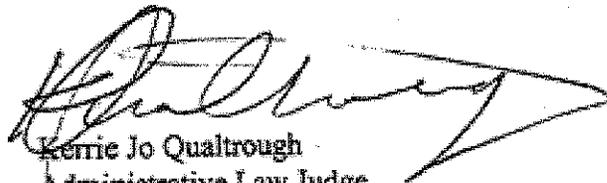
6. The ALJ recommends that the Commission reject the ED's proposed revision to Ordering Provision No. 1 as discussed above in this letter. In addition, the ALJ does not recommend the addition of Texas Water Code § 26.3475(d) because the ED did not plead a violation of that subsection.

2. Respondent's Exceptions

On July 17, 2015, Respondent filed a letter regarding the PFD. Pursuant to 30 Texas Administrative Code § 80.257(a), exceptions to the PFD were due on July 7, 2015, and the due date for replies to exceptions was July 17, 2015. If Respondent was responding to the ED's exceptions, then his July 17, 2015 filing is timely.

Regardless of the characterization of Respondent's July 17 filing, much of the information contained in Allegation 2, items 1 through 5 is not contained in the evidentiary record. Evidence regarding Item 4 may be in the record, but the ALJ does not understand the statement "upgraded to the current slandered by the Clean earth solutions' recommendation." Accordingly, the ALJ does not recommend any changes to the PFD or the Proposed Order based on Respondent's July 17, 2015 filing.

Sincerely,



Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/vg
cc: Mailing List

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SOAH DOCKET NUMBER: 582-15-1630
REFERRING AGENCY CASE: 2014-0894-PST-E

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