

Bryan W. Shaw, Ph.D., *Chairman*
Toby Baker, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 7, 2015

Via Electronic Filing

The Honorable Kerrie Jo Qualtrough
State Office of Administrative Hearings
300 West 15th Street, Suite 504
P.O. Box 13025
Austin, Texas 78711-3025

Re: Texas Commission on Environmental Quality ("TCEQ") Enforcement Proceeding
against VASAN, INC. d/b/a Mr. D's Convenience Store; TCEQ Docket No. 2014-0894-
PST-E; SOAH Docket No. 582-15-1630

Dear Judge Qualtrough:

Enclosed is a true and correct copy of the "Executive Director's Exceptions to the Proposal for Decision and Proposed Order." The original of this motion was filed with the Chief Clerk of the TCEQ on this day.

Sincerely,

A handwritten signature in black ink, appearing to read "Jake Marx".

Jake Marx
Staff Attorney, Litigation Division

Enclosure

cc: Sivagnanam Manickavasagar, Representative of Respondent
John Duncan, Enforcement Division, TCEQ
Rudy Calderon, Office of Public Interest Counsel, TCEQ
TCEQ Chief Clerk

**SOAH DOCKET NO. 582-15-1630
TCEQ DOCKET NO. 2014-0894-PST-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
v.	§	STATE OFFICE OF
	§	
VASAN, INC. DBA MR. D'S	§	
CONVENIENCE STORE	§	
Respondent	§	ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
PROPOSAL FOR DECISION AND PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE KERRIE JO QUALTROUGH (ALJ)
AND HONORABLE COMMISSIONERS:

The Executive Director (ED), after reviewing the Administrative Law Judge's (ALJ's) Proposal for Decision (PFD) and proposed order (Proposed Order), respectfully files these exceptions for the ALJ's reconsideration and the Commissioners' consideration.

This is an enforcement case against VASAN, INC. d/b/a Mr. D's Convenience Store (Respondent or Vasan) involving two alleged underground storage tank (UST) violations: one for release detection and one for corrosion protection. At the evidentiary hearing in this case, the ED provided evidence that the alleged violations occurred. The ED also provided a recommended penalty of \$16,243 which was calculated in accordance with the TCEQ Penalty Policy (Penalty Policy) as consistently applied, and in consideration of the statutory factors in TEX. WATER CODE § 7.053.

The ED agrees with the ALJ's determination that the release detection violation occurred, and appreciates the ALJ's time and attention to this case. With all due respect to the ALJ, the ED disagrees with the ALJ's remaining determinations. In the ALJ's PFD, the ALJ expressed confusion.¹ The ED understands that the hearing may have been confusing. Due to Respondent representative's unfamiliarity with the hearing process, the ED did not object to his interruptions or his request to veer from the regular procedural order of presentation. However, the ED believes the violations were substantiated by the evidence and that the ED's recommended penalty is appropriate. The ED offers these exceptions and discussion of the issues in an effort to provide clarity such that the ALJ will reconsider the areas of disagreement

¹ Proposal for Decision by the Honorable Kerrie Jo Qualtrough for Docket No. 582-15-5326 (hereinafter "PFD") at 7.

and the Commissioners will issue an order that the two violations occurred and include a penalty of \$16,243.

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I. Summary²

This is an enforcement case against Respondent involving two alleged UST violations: one for release detection and one for corrosion protection. The ED also recommends a penalty of \$16,243. At the hearing, the ED proved both violations and also established that the recommended penalty is the appropriate penalty in this case.

II. The ED proved violation 1—corrosion protection—by overwhelming evidence; moreover, these facts are not in dispute as Respondent admits the violation.

Respondent failed to protect his UST system from corrosion. Respondent's representative admitted to it during testimony. The records, including lack thereof, regarding corrosion protection show that Respondent did not have corrosion protection on three submersible turbine pumps and one petroleum storage tank. Respondent's own consultant found no method of corrosion protection on the submersible pumps. If there is no corrosion protection, then consequently Respondent did not have any of the allowable methods for corrosion protection. This violation occurred as alleged.

The ED alleged this in the Executive Director's preliminary report and petition³ (Petition), stating: "Respondent failed to provide corrosion protection for the UST system, in violation of TEX. WATER CODE § 26.3475(d) and TEX. ADMIN. CODE § 334.49(a)(1)." Corrosion can occur when metal within the UST system comes into contact with corrosive material, such as dirt, gravel, or water, which is referred to as "backfill."⁴ If metal components are not isolated and are in contact with backfill, than corrosion can occur.⁵ Corrosion can lead to leaks and equipment failure.⁶ A UST system involves tanks, piping and other underground components, including pumps, connectors, dispensers, sumps, manways, and risers. Corrosion on any of

² The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [Bates page no.] ([description if necessary]). The reference to page numbers is a reference to the stamped number in the bottom center of each page. Hearing testimony will be referred to as "Test. of" [name] and the audio portion will be referred to as "Audio Recording" [tape number]" at [hour: minute].

³ Executive Director's Preliminary Report and Petition Recommending that the Texas Commission on Environmental Quality Enter an Enforcement Order Assessing the Administrative Penalty Against VASAN, INC. d/b/a Mr. D's Convenience Store," filed on October 6, 2014; ED Ref-A at 5.

⁴ Test. of Janie Munoz, Audio Recording One at 1:14.

⁵ *Id.* Test. of Janie Munoz at 1:14.

⁶ *See* Test. of Janie Munoz, Audio Recording One at 1:15. Ms. Sylvia Janie Munoz testified at the evidentiary hearing on behalf of the ED regarding the investigation of the Facility. Mr. John Duncan testified at the evidentiary hearing on behalf of the ED regarding the penalty. *See* Test. of Janie Munoz at 1:15. *See* Test. of Janie Munoz at 1:15.

these components that contain gasoline can lead to gasoline entering the environment and contaminating soil or groundwater.⁷

The corrosion protection rules require that gas station owners and operators must ensure all components in UST systems are designed, installed, operated, and maintained in a manner that will ensure corrosion protection is continuously provided.⁸ Corrosion protection can be achieved through multiple methods.⁹ These methods include installing noncorrodible tanks or components,¹⁰ placing the tanks or components in an open area away from backfill,¹¹ protecting the tanks or components with a lining or jacket,¹² or installing a cathodic protection system and bonding sacrificial anodes to the tanks or components.¹³ All of the components and tanks within the UST system that contain gasoline must be protected by one of the approved methods.¹⁴

Respondent failed to have corrosion protection on three submersible turbine pumps¹⁵ within the UST system and on at least one tank.¹⁶ Respondent did not comply with the corrosion protection rules of the TCEQ.¹⁷ Thus, the ED alleged that Respondent violated the rule that states, “[o]wners and operators of the underground storage tank (UST) systems (or underground metal UST system components) which are required to be protected from corrosion shall comply with the requirements in this section to ensure that releases due to corrosion are prevented.”¹⁸

An abundance of evidence supports this violation. On the date of the investigation, April 8, 2014, Respondent could not produce records to show the investigator adequate corrosion protection existed even though TCEQ rules require Respondent to maintain specific documentation of corrosion protection to “demonstrate compliance”¹⁹ and make those records “immediately available”²⁰ when requested by TCEQ investigators.²¹ Ultimately Respondent did

⁷ *Id.* Test. of Janie Munoz at 1:15.

⁸ 30 TEX. ADMIN. CODE § 334.49(a)(1) and (a)(2).

⁹ *See* 30 TEX. ADMIN. CODE § 334.49(b).

¹⁰ 30 TEX. ADMIN. CODE § 334.49(b)(1).

¹¹ *Id.* TEX. ADMIN. CODE § 334.49(b)(2).

¹² *Id.* TEX. ADMIN. CODE § 334.49(b)(3).

¹³ *See Id.* TEX. ADMIN. CODE § 334.49(b)(4), (b)(5), (c)(1)(A), and (c)(1)(B)(iii).

¹⁴ *See* TEX. ADMIN. CODE § 334.49(b).

¹⁵ *See* ED 5.6; *see also* ED 5.7; *see also* ED 5.8.

¹⁶ *See* ED -5.7; *see also* ED -5.8 and; *see also* ED -6.

¹⁷ *See* 30 TEX. ADMIN. CODE § 334.49(a) and (b).

¹⁸ 30 TEX. ADMIN. CODE § 334.49(a)(1); *see also* ED Ref-A at, Bates page no. 6 (Executive Director's Preliminary Report and Petition).

¹⁹ *See* 30 TEX. ADMIN. CODE § 334.49(a)(1) and (e)(1).

²⁰ *See* TEX. ADMIN. CODE § 334.10(b)(1)(B).

²¹ *See* ED -5.4 at 22.

provide records and Respondent's own records show that an adequate corrosion protection system was not installed onto components of the UST system until well after the investigation.²² Additionally, one of Respondent's tanks had no corrosion protection until well after the investigation.²³ Since the evidence shows Respondent had no corrosion protection on three submersible turbine pumps, Respondent necessarily failed to provide corrosion protection for the UST system using any of the seven allowable methods in 30 TEX. ADMIN. CODE § 334.49(b) as required by 30 TEX. ADMIN. CODE § 334.49(a).

Respondent did not dispute the corrosion protection violation. Respondent was afforded multiple chances to contest the allegation during the evidentiary hearing, through its answer, and through the discovery process. Respondent never denied the allegation that its gas station located at 211 South Main Street, Boerne, Texas (Facility) lacked corrosion protection, and it even admitted to the violation.

Furthermore, the ED disagrees with the ALJ that the ED must go back and confirm gas station owners and operators have not implemented other methods of corrosion protection after a failure to have corrosion protection has been well documented.

A. There is an abundance of evidence that shows Respondent failed to protect its UST system from corrosion.

No corrosion protection existed on Respondent's submersible turbine pumps, metallic flex, connectors, and various other components in the UST system, and at least one petroleum storage tank at the time of the investigation.²⁴ Respondent admits to it, Respondent failed to have required compliance documentation at the investigation, and Respondent's own corrosion protection records show this. For this reason, the ED alleged Respondent violated 30 TEX. ADMIN. CODE § 334.49(a)(1) for not complying with the corrosion protection requirements.

An abundance of evidence supports this violation. First, on April 8, 2014, Respondent could not produce records to show the TCEQ investigator whether or not adequate corrosion protection existed.²⁵ Second, when Respondent did produce records, it produced a document showing its corrosion protection system failed and did not meet TCEQ standards.²⁶ Third, Respondent sent the TCEQ investigator his plan to provide corrosion protection after the

²² See ED -5.4 at 22 (TCEQ Investigator Isaac Foss requesting verification of corrosion protection by email to be received by April 23, 2014); ED -5.7 at 39; ED -5.8 at 45; and ED -6 at 1.).

²³ See ED -5.8 at 45; see also ED -6 at 1.

²⁴ See ED -5.7 at 39 and 43; see also ED -4 at 17; see also ED -5.8 at 45; and see also ED -6 at 1.

²⁵ See ED -5.4 at 22 (TCEQ Investigator Isaac Foss requesting verification of corrosion protection by email to be received by April 23, 2014).

²⁶ ED -5.7 at 39.

investigation.²⁷ Fourth, Respondent finally installed a corrosion protection system, but well after the violation.²⁸ Fifth, Respondent admitted to the violations. Since Respondent did not have any corrosion protection for the submersible turbine pumps and other various components, it necessarily follows that Respondent did not have corrosion protection for those components using any of the allowable methods. Finally and additionally, one of Respondent's petroleum storage tanks had no corrosion protection as well.

1. TCEQ rules require Respondent to maintain records to “demonstrate compliance” and make them “immediately available” to investigators; Respondent had no records of corrosion protection for various components at the time of the investigation.

Respondent did not have records showing corrosion protection existed on all components of Respondent's UST system on April 8, 2014, when TCEQ's investigation of the Facility occurred.²⁹ A violation was noted during the investigation because Respondent could not produce documentation showing its UST systems were protected from corrosion.³⁰ The rules require, and the ED relies on, gas station owners and operators to show compliance with the rules.³¹

The ED relies on gas station owners and operators for corrosion protection records.³² Furthermore, TCEQ rules require “[o]wners and operators shall maintain records adequate to demonstrate compliance with the corrosion protection requirements. . . .”³³ TCEQ rules further require this compliance documentation to be made “immediately available” to TCEQ inspectors upon request.³⁴ In this case, the investigator asked for the required compliance documentation. Respondent had no corrosion records, and consequently no documentation “demonstrating compliance” as required. Naturally, absent other information, the investigator determined that Respondent's UST system did not have corrosion protection. To this day, despite having numerous opportunities to communicate—starting with the investigator all the way through hearing—Respondent has never claimed that he had corrosion protection and that he just did not keep records of it or that the records had been destroyed. In fact, Respondent has admitted

²⁷ ED -5.8 at 45.

²⁸ ED -6 at 1.

²⁹ See ED -5.4 at Bat 22 (TCEQ Investigator Isaac Foss requesting verification of corrosion protection by email to be received by April 23, 2014 because insufficient records existed at the Facility at the time of the investigation on April 1, 2014).

³⁰ ED -5.4 at 22.

³¹ See 30 TEX. ADMIN. CODE § 334.49(e)(1) and (e)(2).

³² See *id.*

³³ *Id.* § 334.49(e)(2).

³⁴ See *id.* § 334.49(e)(1); see also TEX. ADMIN. CODE § 334.10(b)(1)(B).

to not having corrosion protection and has provided documents to the TCEQ showing no corrosion protection.

As the rule requirements to maintain documents to “demonstrate compliance” reflect, the importance of adequate records cannot be understated. Many components of a UST system are underground and cannot be physically observed during an investigation. Likewise, for example, an investigator cannot observe ongoing monitoring and protection of a system by an on-site investigation. The TCEQ and its contractor can conduct up to 16,000 petroleum storage tank investigations every three years.³⁵ Thus, not only do the rules require that adequate records are kept, the TCEQ also relies on adequate records for very practical purposes. Moreover, in the absence of records, certain corrosion protection methods would be impossible to verify without digging up the UST system.³⁶ In any regard, Respondent did not produce sufficient corrosion protection records at the time of the investigation.³⁷ Nor did Respondent’s representative ever claim that corrosion protection was occurring.

No records were produced by Respondent to show compliance on April 8, 2014, the day of the investigation. The TCEQ investigator called Respondent’s representative on April 1, 2014 to schedule the investigation.³⁸ On April 8, 2014, Respondent could not provide proof of corrosion protection.³⁹ The investigator requested that Respondent verify the existence of corrosion protection by April 23, 2014.⁴⁰ The investigator noted a potential violation on April 8, 2014, of 30 TEX. ADMIN. CODE § 334.49(a)(1), which requires the corrosion protection rules to be followed.⁴¹ Respondent was made aware of this potential violation on the day of the investigation.⁴² Indeed, Respondent could not verify that a corrosion protection system existed on its UST system on April 8, 2014. Furthermore, the ED confirmed the potential corrosion protection violation through Respondent’s own submission of records.

³⁵ Test. of Janie Munoz, Audio Recording One at 00:25.

³⁶ See 30 TEX. ADMIN. CODE § 334.49(b)(1) (Components constructed out of noncorrodible materials do not require additional corrosion protection measures. Without documents showing what noncorrodible materials the components are made of, the ED would have to dig up the UST system to physically inspect each component. Only then could the ED verify whether or not those components are noncorrodible and whether or not additional corrosion protection is needed.).

³⁷ ED -5.4 at 22.

³⁸ ED -5.4 at 19.

³⁹ See ED -5.4 at 22.

⁴⁰ ED -5.4 at 22.

⁴¹ ED -5.4 at 22 (Isaac Foss noting “RR/PV” on the exit interview form given to Respondent which means “Records Request/Potential Violation”).

⁴² ED -5.4 at 22.

2. Respondent's own records document a failing corrosion protection system; Respondent's own consultant's corrosion protection records proves the UST system had no corrosion protection system on various components of the UST system.

Respondent submitted records showing its corrosion protection system was lacking.⁴³ Specifically, Respondent's records stated, "[t]he retail fueling facility, listed above, Mr Ds Convenience Store, does not meet TCEQ regulations specified in TAC Chapter 334, section 334.49 . . . [the] recognized standards for corrosion prevention."⁴⁴ The record further stated, "[t]he readings do not meet recognized criteria for corrosion prevention."⁴⁵ This record is clear and unequivocal and alone establishes the violation. If the Respondent is not meeting any "recognized criteria for corrosion prevention" than necessarily Respondent does not have any of the allowable methods in 30 TEX. ADMIN. CODE § 334.49.

The record Respondent submitted was a failing corrosion protection test.⁴⁶ This test determines the adequacy and operability of the corrosion protection system.⁴⁷ Specifically, the test documented a number of components Respondent failed to isolate from corrosive backfill material.⁴⁸

The test indicated at least three UST system components failed the test.⁴⁹ Specifically, Respondent's test stated, "[t]he submersible pumps and attached metallic flex connectors at the submersible pumps are in contact with the backfill material."⁵⁰ Submersible turbine pumps keep the lines at a gas station under pressure and funnel the fuel from the tank through the lines to where the gas is pumped.⁵¹ Again, if metal components are not isolated and are in contact with backfill, corrosion can occur.⁵²

Every submersible turbine pump at the Facility failed the corrosion protection test.⁵³ The diesel pump failed.⁵⁴ The super unleaded pump failed.⁵⁵ The unleaded pump failed.⁵⁶ This

⁴³ ED -5.7 at 43.

⁴⁴ ED -5.7 at 39.

⁴⁵ ED -5.7 at 39.

⁴⁶ ED -5.7 at 39.

⁴⁷ 30 TEX. ADMIN. CODE § 334.49(c)(4)(C); This test is specifically required for cathodic protection systems. Cathodic protection systems utilize sacrificial anodes or impressed currents to isolate metal components and tanks from corrosive materials such as backfill; specifically, those systems "prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell, normally by means of either the attachment of galvanic anodes or the application of impressed current." (See 30 TEX. ADMIN. CODE § 334.2(16)).

⁴⁸ See generally ED -5.7.

⁴⁹ ED -5.7 at 43.

⁵⁰ ED Ed-5.7 at 39; Test. of Janie Munoz, Audio Recording One at 1:14.

⁵¹ Test. of Janie Munoz, Audio Recording One at 1:13.

⁵² Test. of Janie Munoz, Audio Recording One at 1:14.

⁵³ ED Ed-5.7 at 43.

test was conducted on April 14, 2014.⁵⁷ Thus, based on the documentation provided by Respondent, certain components within the UST system were without corrosion protection at the time of the investigation.

3. The plan to install corrosion protection after the investigation and record of installation also demonstrates Respondent did not have a corrosion protection system at the time of the investigation as alleged.

Another of Respondent's records demonstrates that Respondent had no corrosion protection on UST components as alleged. Respondent did not submit to the TCEQ a plan to fix its failing corrosion protection system until after the investigation.⁵⁸ Respondent chose to install sacrificial anodes on its UST system—including on the submersible turbine pumps—to correct its deficient corrosion protection system.⁵⁹ If bonded to metal components within a UST system, sacrificial anodes will corrode in place of those metal components.⁶⁰ It is illogical to install corrosion protection to components that already have it. Since Respondent was planning to install corrosion protection, it follows that there was not adequate corrosion protection prior to installation.

Respondent's agent, Innovative Corrosion Control, Inc., installed sacrificial anodes on each submersible turbine pump on July 30, 2014, well after the investigation.⁶¹ Respondent's agent would further install sacrificial anodes on the three petroleum storage tanks at the Facility on July 30, 2014.⁶² When accomplished, this plan would establish a cathodic protection system at the Facility for the UST system.⁶³ However, by the time Respondent crafted this plan, it was already in violation of the corrosion protection rules by failing to have adequate protections for all components within its UST system.⁶⁴

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ED Ed-5.7.

⁵⁸ ED -5.8.

⁵⁹ ED -5.8 at 45.

⁶⁰ Test. of Janie Munoz, Audio Recording One at 1:10.

⁶¹ ED -5.8 at 45; Test. of Janie Munoz, Audio Recording One at 1:16.

⁶² ED -5.8 at 45.

⁶³ See 30 TEX. ADMIN. CODE § 334.49(c)(1)(B)(iii).

⁶⁴ See 30 TEX. ADMIN. CODE § 334.49(a) and (b).

4. Respondent did not install the corrosion protection system until months after the investigation.

A third record of Respondent's also establishes the violation. The installation of the corrosion protection system finally occurred, but well after the investigation.⁶⁵ The installation happened on July 30, 2014.⁶⁶ Again, the investigation of the Facility took place on April 8, 2014.⁶⁷ Until the installation occurred, inadequate corrosion protection existed on all three submersible turbine pumps at the Facility.⁶⁸ Thus, at the time of the investigation, Respondent was not in compliance with of the corrosion protection rules.⁶⁹ The violation occurred as alleged.

Everything underground within a UST system must be protected from corrosion, including tanks, lines, submersible turbine pumps, flex connectors, and dispensers.⁷⁰ Gas station owners and operators are responsible for corrosion protection, and are afforded a choice, based on their particular needs, what corrosion protection method to use. Respondent's own admissions proved he didn't have adequate corrosion protection for the UST system. Respondent was responsible here. Respondent violated the corrosion protection rules.

5. Respondent admitted to the violations at the evidentiary hearing.

Respondent did not deny the corrosion protection violations at the evidentiary hearing. During his oral testimony at the evidentiary hearing, Respondent said, "I never deny anything. I did it, maybe a little late. I did it. That's all I can say. But the money problem, I own the money, the money belongs to me."⁷¹ Respondent further testified corrosion protection was installed in July of 2014.⁷² It was also said at the hearing that in July of 2014, the tanks were brought up to the current corrosion protection regulations.⁷³ Respondent did not deny the violations at the hearing, and even admitted to them.

⁶⁵ Compare ED Ed-6 at 2 with ED -5 at 1.

⁶⁶ ED -6 at 1.

⁶⁷ ED -5 at 1.

⁶⁸ See ED -5.7 at 43.

⁶⁹ Test. of Janie Munoz, Audio Recording One at 1:19.

⁷⁰ See generally 30 TEX. ADMIN. CODE § 334.49. See Test. of Janie Munoz at 1:05 to 1:06.

⁷¹ Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:44.

⁷² Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:42.

⁷³ Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:42.

6. Because Respondent had no corrosion protection on the submersible pumps and other various components, Respondent necessarily failed to use any of the seven approved corrosion protection methods.

Respondent failed to protect its submersible turbine pumps from corrosion using any of the available methods under the rules.⁷⁴ The evidence conclusively shows Respondent had no corrosion protection on three submersible pumps and various components, so consequently, Respondent could not have had a method allowed in the rules. For clarification, in this section the ED addresses each of the seven methods of allowable corrosion protection to further demonstrate this point.

There are seven methods available to gas station owners and operators for providing corrosion protection.⁷⁵ The submersible turbine pumps were at risk of corroding until the corrosion protection system was installed on July 30, 2014 (as Respondent's test stated, "[t]he submersible pumps and attached metallic flex connectors at the submersible pumps are in contact with the backfill material)."⁷⁶ The rules that address corrosion protection for components that contain regulated substances⁷⁷, including submersible turbine pumps and metallic flex connectors, are 30 TEX. ADMIN. CODE § 334.49(b)(1), (b)(2), (b)(3), and (b)(5). A respondent is free to implement any one of these methods. In this case, Respondent chose implement the method described in subsection (b)(5) after his failure to provide corrosion protection was documented.

a. Six of the seven options available for corrosion protection do not apply.

Working from the beginning, the ED will show which rules do not apply. First, subsection 334.49(b)(1) addresses components that are constructed out of noncorrodible material and therefore do not need other forms of corrosion protection. Respondent's test stated, "[t]he submersible pumps and attached metallic flex connectors at the submersible

⁷⁴ See generally 30 TEX. ADMIN. CODE § 334.49(b). The purpose of subsection (b) is to provide owners and operators a list of potential methods of corrosion protection. The ED does not know which method an owner or operator chooses to implement without records from the owner or operator. An owner or operator would not find themselves in violation of subsection (b) if no corrosion protection method existed, they would be cited for violating subsection (a)(1).

⁷⁵ See 30 TEX. ADMIN. CODE § 334.49(b)(1) - (b)(7).

⁷⁶ ED -5.7 at 39; Test. of Janie Munoz, Audio Recording One at 1:14; ED 6 at 2; see also ED 6 at-6 at 2.

⁷⁷ See 30 TEX. ADMIN. CODE § 334.49(b)(6), components which do not routinely contain regulated substances may be protected from corrosion through other means. As Ms. Munoz states, "A submersible pump is a-so this particular city had pressurized lines, and the pump is what keeps these lines under pressure and pretty much funnels the fuel from the tank to the lines, through the lines to where it will be pumped as gas."

pumps are in contact with the backfill material.”⁷⁸ If the metal components aren't isolated, if they're in contact with anything then that can cause corrosion.⁷⁹ Metal components are corrodible. Thus, subsection (b)(1) does not apply as it goes to noncorrodible components.

Second, subsection 334.49(b)(2) addresses components that are electrically isolated from the corrosive elements of any surrounding soil, backfill, or groundwater by the placement of those components in an open area where things like backfill cannot come into contact with corrodible components. As Respondent's test showed⁸⁰, and as the ALJ's PFD notes⁸¹, “[t]he submersible pumps and attached metallic flex connectors at the submersible pumps are in contact with the backfill material.” Because Respondent's components are not isolated from backfill, and therefore are not physically isolated, subsection (b)(2) does not apply.

Third, subsection 334.49(b)(3) similarly addresses components that are electrically isolated from corrosive elements by completely enclosing those components in a secondary containment device such as a wall, jacket, or liner. Again, because Respondent's components were in contact with backfill, they could not have been completely enclosed. Thus, subsection (b)(3) does not apply.

Fourth, subsection 334.49(b)(4) applies to petroleum storage tanks only, and thus does not apply.

Fifth, subsection 334.49(b)(6) only applies to components outside of the tanks and piping system components that do not regularly contain regulated substances, such as petroleum. Submersible turbine pumps keep the lines at a gas station under pressure and funnel the fuel from the tank through the lines to where the gas is pumped.⁸² Thus, because submersible turbine pumps are part of the piping system and because they regularly contain gasoline, subsection (b)(6) does not apply.

Sixth, subsection 334.49(b)(7) states that “[c]orrosion protection in accordance with the requirements of this subchapter is not required if it is determined by a corrosion protection specialist that corrosion protection of an underground metal UST system or UST system component is unnecessary because the site is not corrosive enough to cause a release due to corrosion for the operational life of the UST system.” Respondent did not provide any documentation that showed a corrosion protection specialist found its site was not corrosive; in

⁷⁸ See ED 5.7 at 39.

⁷⁹ See Test. of Janie Munoz at 1:15.

⁸⁰ ED -5.7 at 39.

⁸¹ PFD at 5.

⁸² Test. of Janie Munoz, Audio Recording One at 1:13.

fact, Respondent provided documents from a consultant stating the exact opposite—no adequate corrosion protection.⁸³ Thus, this subsection cannot apply.

b. Only one option applies.

Subsection 334.49(b)(5) does apply, however, Respondent did not install this method of corrosion protection until after the violation occurred. This subsection states a component may be coated with a suitable dielectric material, equipped with appropriate dielectric fillings for electrical isolation, and equipped with either: (A) a factory-installed cathodic protection system meeting the requirements of subsection (c)(1) of this section; or (B) a field-installed cathodic protection system meeting the requirements of subsection (c)(2) of this section. Moving to subsection (c)(1), at a minimum, a factory-installed cathodic protection system must include the following components:

- Suitable dielectric external coating or laminate;
- Dielectric isolation bushings, connections, or fittings; and
- Sacrificial anodes which are firmly attached and electrically connected to the protected components and which are positioned and sized to provide complete cathodic protection for all parts of the protected component.

A factory-installed protection system was at issue in this case because Respondent chose to install sacrificial anodes.⁸⁴ Respondent installed sacrificial anodes onto each submersible turbine pump and on all three petroleum storage tanks on July 30, 2014, well after the investigation.⁸⁵ This shows that Respondent eventually chose to rely on a factory-installed cathodic protection system with sacrificial anodes to provide corrosion protection. Respondent made this choice after he had failed to provide corrosion protection to the entire UST system.

A number of different methods can be used in conjunction with each other to provide corrosion protection for all the components and tanks within a UST system. After the investigation, Respondent ultimately chose a cathodic protection system as its corrosion protection method. What Respondent records show is that prior to this installation, its UST system was not protected from corrosion.

⁸³ ED 5.7 at 39.

⁸⁴ See ED -5.8 at 45; see also ED -6 at 1.

⁸⁵ See ED -5 at 1; see also ED -6 at 1.

7. Respondent's petroleum storage tank was not protected from corrosion.

The focus of the corrosion protection violation is on the three submersible pumps. But in addition to having inadequate corrosion protection on the pumps, Respondent also failed to have adequate corrosion protection on at least one tank at the Facility. The tanks at the Facility are classified as *composite*, a combination of steel and fiberglass.⁸⁶ Tanks are required to have a 100 mils⁸⁷ thick fiberglass coating to be protected from corrosion.⁸⁸ If the mils are under 100 mils, the fiberglass alone does not adequately protect the tanks and sacrificial anodes must be attached to them for additional protections.⁸⁹ As Ms. Munoz testified at hearing, however, it is difficult to tell how much fiberglass coats the steel.⁹⁰ Thus, the TCEQ relies on Respondent's records.⁹¹ Respondent's record showed it had a tank with less than 100 mils of protection.⁹²

Respondent submitted documents showing one petroleum storage tank did not have 100 mils of protection. This record showed at least one tank was coated with only 60 mils fiberglass coating.⁹³ Specifically, the record states the "SINGLE WALL STEEL UNDERGROUND STORAGE TANKS WERE COATED WITH 60 MILS FIBERGLASS COATING. . . ." ⁹⁴ This record is from July 12, 1985.⁹⁵ The additional protections needed to compensate for the deficient 60 mils were not installed until July 30, 2014 (sacrificial anodes were installed).⁹⁶ At the time of the investigation, insufficient corrosion protection existed for at least one of Respondent's tanks evidenced by Respondent's UST installation record dated July 12, 1985.⁹⁷

Per the regulations, rule 30 TEX. ADMIN. CODE § 334.49(b)(4) states, "[t]anks (only) may be factory-constructed either as a steel/fiberglass-reinforced plastic composite tank, or as a steel tank with a bonded fiberglass-reinforced plastic external cladding or laminate, or as a steel tank with a bonded fiberglass reinforced polyurethane coating, as a steel tank with a bonded

⁸⁶ ED -5.4 at 17.

⁸⁷ "Mil" is defined as " a unit of length equal to 1/1000 inch used especially in measuring thickness (as of plastic films). *Mil Definition*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/mil> (last visited July 7, 2015).

⁸⁸ Test. of Janie Munoz at 1:10; 30 TEX. ADMIN. CODE § 334.45(b)(1)(D)(i); Test. of Janie Munoz, Audio Recording One at 1:10)).

⁸⁹ Test. of Janie Munoz, Audio Recording One at 1:10.

⁹⁰ Test. of Janie Munoz, Audio Recording One at 1:09 to 1:10; *see also* ED -5.4 at, Bates page 17.

⁹¹ *See* 30 TEX. ADMIN. CODE § 334.49(e)(1).

⁹² ED -6 at 5.

⁹³ *Id.* ED-6 at 5.

⁹⁴ *Id.* ED-6 at 5. (emphasis—large and small capital letters—in original).. Although the record alludes to multiple tanks being coated with 60 mils fiberglass, the quantity on an attached invoice lists only one 10,000 gallon tank.

⁹⁵ *Id.*

⁹⁶ *See* ED -5.8 at 45; *see also* ED -6 at 1.

⁹⁷ *See* ED -6 at 5.

polyurethane external coating, or as a steel tank completely contained within a nonmetallic external tank jacket in accordance with the requirements in §334.45(b)(1)(D), (E), or (F) of this title, as applicable.”

Going to that referenced rule, 30 TEX. ADMIN. CODE § 334.45(b)(1)(D)(i), it states in pertinent part, “[t]he tank may be factory-constructed either as a steel/fiberglass-reinforced plastic composite tank, or as a steel tank with a bonded fiberglass-reinforced plastic external cladding or as a steel tank with a bonded fiberglass reinforced polyurethane coating. Any tank constructed under this method is not required to be equipped with a cathodic protection system, provided that the tank meets the following requirements:

- (i) The tank shall be equipped with a factory-applied external fiberglass-reinforced plastic or fiberglass reinforced polyurethane cladding or laminate which has a total dry film **thickness of 100 mils minimum** and 125 mils nominal. . . .” (emphasis added).

If the tank does not meet the fiberglass 100 mils standard, than the installation of a cathodic protection system must occur.⁹⁸ Rule 30 TEX. ADMIN. CODE §334.49(b)(5) identifies how a cathodic system must be installed. That rule states a tank or component may be coated with a suitable dielectric material, equipped with appropriate dielectric fillings for electrical isolation, and equipped with either: (A) a factory-installed cathodic protection system; or (B) a field-installed cathodic protection system. At a minimum, a factory-installed cathodic protection system must include the following components:

- Suitable dielectric external coating or laminate;
- Dielectric isolation bushings, connections, or fittings; and
- Sacrificial anodes which are firmly attached and electrically connected to the protected components and which are positioned and sized to provide complete cathodic protection for all parts of the protected component.⁹⁹

A factory-installed protection system was at issue in this case—because Respondent chose to install sacrificial anodes.¹⁰⁰ Respondent installed the sacrificial anodes onto all three tanks on July 30, 2014, well after the investigation.¹⁰¹ While this likely shows that all three tanks were without corrosion protection until the installation of those sacrificial anodes, it clearly

⁹⁸ See 30 TEX. ADMIN. CODE § 334.45(b)(1)(D)(i).

⁹⁹ 30 TEX. ADMIN. CODE § 334.49(b)(5) and (c)(1).

¹⁰⁰ See ED -5.8 at 45; see also ED -6 at 1.

¹⁰¹ See ED -5 at 1; see also ED -6 at 1; see ED -6 (Record stating “SINGLE WALL STEEL UNDERGROUND STORAGE **TANKS** WERE COATED WITH 60 MILS FIBERGLASS COATING. . . .”(emphasis—bold— added)).

establishes that Respondent had insufficient corrosion protection on at least one tank. This tank, coated with 60 mils of fiberglass, required additional protection. Respondent violated the corrosion protection rules.

B. In addition to the overwhelming evidence, the facts are not in dispute; Respondent further admits to the violation in its answer and deemed admissions.

Respondent did not dispute the corrosion protection violation. It was afforded multiple chances to contest the allegation through its answer filed in this case (Answer) and through the discovery process. Respondent never denied the allegation that its Facility lacked corrosion protection.

1. Respondent admitted in the Answer that it did not meet the corrosion protection standards.

In Respondent's Answer¹⁰², the point going directly to corrosion protection was: "[t]his year, the clean earth division of Innovative Corrosion Control Inc said 'do not meet the standard' and I have upgraded to the current standard."¹⁰³ Respondent concedes it was not in compliance with the corrosion protection rules, although corrective action has since occurred. In short, Respondent admitted the corrosion protection violation in Respondent's Answer.

The admissions in Respondent's Answer should be given weight. Typically, assertions of fact in a party's live pleading are regarded as a judicial admission.¹⁰⁴ A judicial admission is conclusive against the party making it, relieves the opposing party of the burden of proving the admitted fact and bars the admitting party from disputing the fact.¹⁰⁵ Even testimonial declarations are not as conclusive as judicial admissions in pleadings.¹⁰⁶ Moreover, Respondent's representative did not contradict the admission in Respondent's answer; he confirmed it by admitting the violation.

The ED recognizes Respondent is pro se. The ED is not asking that he not be required to put on evidence of the allegations. The ED has provided an abundance of evidence that Respondent's corrosion protection was deficient. The ED is asking that the admission in the Answer be given some weight.

¹⁰² See ED Ref. A at 17-18: Re: VASAN, INC. d/b/a Mr. D's Convenience Store; RN101765295 (Respondent's Answer).

¹⁰³ ED Ref-A at 19, Respondent's Answer dated October 27, 2014.

¹⁰⁴ See, e.g., *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001).

¹⁰⁵ *Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980).

¹⁰⁶ See *Hennigan v. I.P. Pet. Co.*, 858 S.W.2d 371, 372 (Tex. 1993).

2. Respondent's deemed admissions further document the violation.

Furthermore, Respondents deemed admissions—which warrant some weight—show that it failed to have corrosion protection:

- Respondent's deemed admission: at the time of the April 8, 2014 investigation, the Facility failed to have corrosion protection for the UST system.¹⁰⁷
- Respondent's deemed admission: at the time of the April 8, 2014, the Facility failed to have corrosion protection for the submersible turbine pumps for the diesel, unleaded, and super unleaded USTs.¹⁰⁸
- Respondent's deemed admission: the required corrosion protection was installed on the USTs at the Facility on July 30, 2014.¹⁰⁹
- Respondent's deemed admission: the required corrosion protection was installed after the April 8, 2014 TCEQ Investigation at the Facility.¹¹⁰
- Respondent's deemed admission: the diesel, unleaded, and super unleaded USTs did not have corrosion protection on April 8, 2014.¹¹¹

Respondent failed to respond to the ED's discovery requests. The ED filed a motion to compel Respondent's responses.¹¹² The ALJ granted the ED's motion, ordering that "Respondent must respond to the ED's February 18, 2015 discovery requests by **May 4, 2014.**"¹¹³ Respondent again failed to respond to the ED's discovery requests. Therefore, the ED filed a motion for sanctions requesting in-part that his Request for Admission be deemed admitted. The ALJ granted the ED's motion and deemed the Requests for Admissions admitted.¹¹⁴

¹⁰⁷ ED Ref-C at 7, Request for Admission No. 11

¹⁰⁸ ED Ref-C at 7-8, Request for Admission Nos. 12-14.

¹⁰⁹ ED Ref-C at 8, Request for Admission No. 18.

¹¹⁰ ED Ref-C at 8, Request for Admission No. 19.

¹¹¹ ED Ref-C at 8, Request for Admission Nos. 20-22.

¹¹² See ED Ref-E.

¹¹³ ED Ref-F at no. 2 (emphasis in original).

¹¹⁴ ED Ref-I-2. In Order No. 4, the ALJ acknowledged that the ED's Requests for Admission were deemed admitted, but urged the ED to meet his burden of proof on each violation independently of the deemed admissions, through the production of evidence. See *id* at 1 (citing *Marino v. King*, 355 S.W. 3d 629 (Tex. 2011); *Lucas v. Clark*, 347 S.W. 3d 800 (Tex. App. – Austin 2011, pet. denied). Unlike the offending parties in *Marino* and *Lucas*, the ED is not attempting to rely on the deemed admissions to conclusively prove the violations instead of offering evidence at a hearing on the merits. Instead, in this case, the ED offered evidence to prove the two alleged violations in this case and that the recommended penalty was properly calculated and is appropriate for the violations in this case. Moreover, Respondent did not ask that the deemed admissions be withdrawn and did not offer any good cause for its total failure to respond to the ED's discovery requests. Most significantly, Respondent admitted to the violations in its pleadings and at the evidentiary hearing. For all of these reasons, the ED respectfully requests the ALJ to give the deemed admissions some consideration.

Respondent could have denied the allegations in the ED's Requests for Admission against it if it had participated in the discovery process, however, it did not.

The deemed admission in this case should be given some weight. Generally, deemed admissions are admissible against the party to whom the requests for admissions were addressed¹¹⁵—in this case Respondent. A request for admission, once deemed, is a judicial admission and the matter admitted is “conclusively established”.¹¹⁶ Moreover, there is no evidence that contradicts the deemed admissions; Respondent admits the violation. If the trier of fact returns findings that contradict a judicial admission, the admission must be accepted as controlling.¹¹⁷ Since the PFD's recommendation to find no corrosion violation has been established is inconsistent with these “conclusively established” admissions, the ED requests that the admissions control and that there be a determination that the violation occurred as alleged.

The ED recognizes Respondent is pro se. The ED is not asking that he not be required to put on evidence of the allegations. The ED has provided an abundance of evidence that Respondent's corrosion protection was deficient. The ED is asking that the deemed admissions be given some weight, and not none.

C. Respondent chose its method of corrosion protection after the violation occurred; the ED does not have to prove which specific methods Respondent did or did not implement, only that Respondent failed to provide corrosion protection, and disagrees with the ALJ.

The corrosion protection violation was initially established at the time of the investigation. Respondent could not provide records at that time. The corrosion protection violation was confirmed once Respondent sent in records in response to the Exit Interview Form signed April 8, 2014.¹¹⁸ The ED should not have to go back to the Facility to reconfirm that Respondent failed to provide corrosion protection. In many ways, this would be an impossible task. As stated above, the ED relies on records from regulated entities to verify that certain protection systems are in place; the ED cannot be expected to dig up UST systems whenever gas stations owners and operators fail to keep adequate records to verify whether or not all the

¹¹⁵ Tex. R. Civ. P. 198.3; see, e.g., *Thalman v. Martin*, 635 S.W.2d 411, 414 (Tex. 1982).

¹¹⁶ Tex. R. Civ. P. 198.3; see, e.g., *Beutel v. Dallas Cty. Flood Control Dist.*, 916 S.W.2d 685, 694 (Tex. App.—Waco 1996, writ denied 1989).

¹¹⁷ See, e.g., *Beutel*, 916 S.W.2d at 685.

¹¹⁸ ED-5.4, Bates Page no. 22.

components in a UST system are made out of noncorrodible materials and thus need no further protection.¹¹⁹

The ALJ stated that “the wording of 30 Texas Administrative Code § 334.49(b) allows a UST owner to use *any* of the seven corrosion-protection methods. Therefore, the ED needed to present evidence of how Respondent failed to comply with each method, or show which of the seven methods were not applicable to Respondent’s UST system.”¹²⁰ With all due respect, the ALJ’s contention is misplaced. Respondent’s test indicated the UST system was not protected from corrosion. Respondent then installed a system that will protect its UST from corrosion. Respondent’s failing corrosion protection test and eventual repair of his corrosion protection system show that it failed to have any of the seven corrosion protection methods at the time of the investigation.

After its test failed, Respondent chose to install sacrificial anodes, however, it could have chosen a different method. It could have chosen to replace all the *failing* components with components made out of noncorrodible materials.¹²¹ It could have chosen to dig up the components and re-place them in an open area within the ground such as a manway or sump.¹²² Or, it could have chosen to isolate the components by using walls, jackets, or liners.¹²³ There are many devices underground at a gas station. These devices include: tanks, submersible pump manways, tank monitor manways, submersible turbine pumps, pipes, and metallic flex connectors. Respondent was not required to implement any specific combination of these methods to protect its UST system. Respondent was required though to have adequate corrosion protection on the entire UST system.

Respondent eventually complied with 30 TEXAS ADMINISTRATIVE CODE § 334.49(b), which requires, “[a]ll components of an UST system which are designed to convey, contain, or store regulated substances shall be protected from corrosion by one or more of the following methods.” However, it complied after the investigation. The owner or operator of a gas station can choose how to provide corrosion protection based on a number of methods allowed by the rules. It is not that Respondent failed to install a specific method of corrosion protection, but that its records indicated it needed to implement one of the methods so that its components were protected from corrosion. Owners and operators can choose the appropriate method of

¹¹⁹ See 30 TEX. ADMIN. CODE § 334.49(b)(1) (components made out of noncorrodible materials require no additional corrosion protection facilities).

¹²⁰ PFD at 8-9.

¹²¹ See 30 TEX. ADMIN. CODE § 334.49(b)(1).

¹²² See *id.* 30 TEX. ADMIN. CODE § 334.49(b)(2).

¹²³ See *id.* 30 TEX. ADMIN. CODE § 334.49(b)(3).

corrosion protection for each component as they see fit. It may have been that Respondent chose to install sacrificial anodes on the UST system because it was the least expensive option to provide corrosion protection, however, in the end, this was done after the investigation.

Respondent in this case failed to provide adequate corrosion protection through any combination of the available methods. Therefore, Respondent violated 30 TEX. ADMIN. CODE 334.49(a)(1) because he did not comply with the requirements of the corrosion protection rules.

D. The ALJ misapplied the subsequent remedial measures rule and improperly disregarded ED 6—which was admitted when the record was open and is a significant piece of relevant evidence—after the record closed.

With all due respect to the ALJ, the ED believes the ALJ misapplied the subsequent remedial measures rule and was incorrect to not consider, after the record closed, an exhibit she had admitted without objection during the hearing. This exhibit is part of the record as well as significant and relevant; it should be considered when evaluating the evidence.

Texas law, as well as federal law, is clear that the scope of exclusion in the subsequent remedial measures evidence rule is limited to a very narrow set of circumstances. First it only applies in tort cases involving personal injuries due to an accident. This is not a tort case and there is no bodily harm. Evidence is only excluded if two criteria are met: (1) safety precaution measures are taken after an accident involving personal injury and (2) mental state, such as culpability or negligence, is a relevant issue in the case.¹²⁴ The purpose of the rule is safety; it is designed to protect and not discourage people from implementing safety measures they learn as a result of the accident.¹²⁵ It is based on the idea that “the rule rejects the notion that ‘because

¹²⁴ See Tex. R. Evid. 407, stating that subsequent measures are not admissible to prove: negligence; culpable conduct; a defect in product or its design; or a need for warning or instruction. See, e.g., *Dudley v. Tex. Dep't. of Highways and Public Transp.*, 716 S.W.2d 628, 629–30 (Tex. App.—Corpus Christi 1986, no writ.); (finding that evidence that a sign was replaced at the site of an accident by the defendant would not be admissible under Rule 407 to show that defendant had knowledge of an alleged defect of the sign.); *Howard v. Faberge, Inc.*, 679 S.W.2d 644, 646–47, (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (noting that evidence of a warning label was properly excludable as evidence of subsequent repairs, but “it should have been admitted if it constituted relevant evidence of something other than negligence or culpability”).

¹²⁵ See *Marathon Corp. v. Pitzner ex rel. Pitzner*, 55 S.W.3d 114, 143–44 (Tex. App.—Corpus Christi 2001), rev'd other grounds, *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003) (“The purpose of this rule is to exclude such evidence so as not to discourage parties from taking safety measures.”); *Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 207 (Tex. App.—Texarkana 2000); *E.V.R. II Associates, Ltd. V. Brundige*, 813 S.W.2 552, 556 (Tex. App.—Dallas 1991) (“The rule is one of policy and good sense to avoid discouraging safety measures.”).

the world gets wiser as it gets older, therefore it was foolish before.”¹²⁶ As one Texas court stated, consistent with many—if not all¹²⁷—cases discussing this issue:

Generally, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. Tex. R. Evid. 407(a). The purpose of this rule is to exclude such evidence so as not to discourage parties from taking safety measures However, evidence of subsequent remedial measures is admissible when offered for another purpose, such as proving ownership, control or feasibility of precautionary measures, if controverted, or impeachment.¹²⁸

In discussing the purpose behind the rule, the Texas Supreme Court stated:

By following this long-standing rule, the courts hope to avoid discouraging the implementation of safety measures after accidents which make the need for such measures clear.¹²⁹

In discussing the scope of this rule, one Texas court states (consistent with many cases):

The guiding rule pertinent here is Texas Rule of Evidence 407, which states that subsequent remedial measures are inadmissible to prove negligence or culpable conduct. . . . However, **it does not demand exclusion if the evidence is offered for another purpose**, such as to prove, among other things, control.¹³⁰

Thus, the scope of this rule has to do with safety conditions and precautionary measures, not requirements mandated by law, such as corrosion protection at gas stations. The ALJ's attempt to expand this rule well beyond its intended scope should be rejected.

Moreover, to—after the close of evidence and all opportunity to offer evidence is gone—refuse to consider a significant relevant piece of evidence that was admitted without objection during the hearing is also unprecedented, contrary to procedural rules and unfairly disadvantages the ED.

¹²⁶ Fed. R. Evid. R. 407. Subsequent Remedial Measures; Advisory Committee Notes (citation omitted), (quoting Baron Bramwell from *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S; 261, 263 (1869)).

¹²⁷ The ED has not been able to find one instance in which TRE 407 was expanded to apply to situations beyond the explicit situation contained in the rule.

¹²⁸ *Marathon Corp.*, 55 S.W.3d at 143-44 (citing, *Huckaby*, 20 S.W.3d at 207). See also, *Exon Corp. v. Roberts*, 724 S.W.2d 863, at 869 (Tex. App. — Texarkana 1987) (0) (0) (0) (stating that rule 407 prohibits the use of subsequent remedial measures to prove negligence, but is admissible for other purposes, such as control); *Cohen v. Landry's Inc.*, 442 S.W.3d 818, at 825 (Tex. App —Houston [14th Dist.] 2014, pet. denied) (“evidence of subsequent remedial measures, although inadmissible as to negligence, is admissible to prove control when that issue is controverted”); *Beavers on Behalf of Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669, 676-677 (Tex. App. — Amarillo 1991, writ denied); *Lee Lewis Construction, Inc. v. Harrison*, 64 S.W.3d 1, *12-14 (Tex. App— Amarillo 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001).

¹²⁹ *Brookshire Bros. v. Lewis*, 911 S.W.2d 791, 796 (Tex. App. — Tyler 1995, writ denied).

¹³⁰ *Id.*, citing *Exxon Corp*, 724 S.W.2d at 869 (Emphasis added); See also, *City of Amarillo v. Reid*, 510 S.W.2d 624, 630 (Tex. App.—Amarillo 1974, writ ref'd n.r.e.).

1. The subsequent remedial measures rule of evidence in no way applies in this case; the law, not only in Texas but also federal law, speaks with one voice and that voice is clear that it only applies in situations in which (1) safety precaution measures are taken after an accident involving personal injury and (2) mental state, such as culpability or negligence, is a relevant issue in the case.

The ALJ refused to consider ED 6 claiming incorrectly that ED 6 should be excluded from evidence in accordance with the subsequent remedial measures rule¹³¹ (TRE 407) stating:

For this reason, the Texas Rules of Evidence makes such evidence inadmissible, in the ALJ's opinion . . . Rule 407(a) dictates that Respondent's efforts to bring his system into compliance should not be used as an evidentiary basis to prove the violation.¹³²

Yet, the subsequent remedial measures rule is inapplicable in this case. State law and federal law¹³³ are clear that the rule only applies when two criteria are met: (1) case involves bodily harm due to an accident and there are subsequent learned safety measures implemented, and (2) a party is offering the evidence to prove that the alleged tortfeasor is guilty of a particular state of mind, such as culpability.¹³⁴ The purpose is to promote the evolution of safety measures by protecting knowledge learned and implemented as a result of an accident involving personal injury. Neither of the two criteria required for exclusion are met in this case and there is no purpose served by excluding ED 6.

According to the plain language of the rule, evidence is only excluded (1) when specific circumstances exist and (2) when offered for only specified purposes; the rule expressly states evidence is admissible when offered for other purposes.¹³⁵ TRE 407, by its plain language¹³⁶, does not apply or justify exclusion of ED 6. By its terms, it only excludes evidence (1) in a very particular situation and even then, (2) only when the evidence is offered for certain purposes.¹³⁷

¹³¹ Tex. R. Evid. 407.

¹³² PFD at 8.

¹³³ See Fed. R. Evid. 407. See also, *Beavers*, 821 S.W.2d at 676-677, stating, "Rule 407 is identical to Federal Rule of Evidence 407. Rule 407(a) carries forward a longstanding Texas policy that prospective defendants should not be discouraged from making subsequent safety improvements for fear that such improvements will be admissible against them as evidence of their liability."

¹³⁴ See Tex. R. Evid. 407(a); *Marathon Corp.*, 55 S.W.3d at 143-44; *Dudley*, 716 S.W.2d 628, 629-30.

¹³⁵ Tex. R. Evid. 407.

¹³⁶ In construing a rule or statute, courts consider the plain language used in the provision being construed. See, e.g., *Liberty Mut. Ins. Co. v. Griesing*, 150 S.W.3d 640, 644 (Tex. App.—Austin 2004, no pet.).

¹³⁷ Tex. R. Evid. 407(a); see, e.g., Other purposes include ownership, control, or the feasibility of precautionary measures, if those issues are disputed. Tex. R. Evid. 407(a). See *Cohen*, 442 S.W.3d at 825 ("evidence of subsequent remedial measures, although inadmissible as to negligence, is admissible to prove control when that issue is controverted"); *Huckaby*, 20 S.W. 3d at 207, (finding that rule 407 was not implicated because the subsequent remedial measures were not offered to prove negligence or culpable conduct of the defendant).

The rule also expressly states that when the requisite situation exists, if the evidence is offered for a purpose not specified, it is admissible.¹³⁸ This case involves neither the requisite situation nor was ED 6 offered for any of the specified purposes. TRE 407 is inapplicable and ED 6 is properly admitted and a part of the record in this case.

a. The only circumstance in which TRE 407 excludes evidence is in a tort case involving bodily harm due to an accident; this situation does not exist in this case.

TRE 407 only applies when a case involves bodily harm due to an accident and there are subsequent learned safety measures implemented after that accident.¹³⁹ TRE 407 states:

(a) Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

(b) Notification of Defect. A manufacturer's written notification to a purchaser of a defect in one of its products is admissible against the manufacturer to prove the defect.¹⁴⁰

It only applies in one situation, “when measures are taken that would have made an earlier injury or harm less likely to occur.”¹⁴¹ It applies when there are safety measures implemented after an accident.¹⁴² There is no tort, accident, safety measures or bodily harm in this case.

The ALJ suggests that Respondent’s actions to come into compliance are the subsequent remedial measures. As such, presumably the ALJ considers the requisite preceding “accident”

¹³⁸ Tex. R. Evid. 407(a).

¹³⁹ See, e.g., *Hathcock v. Hankook Tire America Corp.*, 330 S.W. 733, 743-44 (Tex. App. Texarkana 2000); *Brookshire Bros.*, 911 S.W.2d at 795-96 (Tex. App. Tyler 1995); *Christus Health Southeast Texas v. Wilson*, 305 S.W.3d 392, 401-02 (Tex. App. 2010).

¹⁴⁰ Tex. R. Evid. 407 (b) (emphasis—underlining only— added).

¹⁴¹ Tex. R. Evid. 407(a).

¹⁴² See, e.g., *Hathcock v. Hankook Tire America Corp.*, 330 S.W. 733, 743-44 (Tex. App. — Texarkana 2000);, no pet.); *Brookshire Bros.*, 911 S.W.2d at 795-96; *Christus Health Southeast Texas v. Wilson*, 305 S.W.3d 392, 401-02 (Tex. App. — Eastland 2010, no. pet.).

causing bodily injury to be the investigation. Yet an investigation does not cause bodily harm. There is no accident or bodily harm in this case. The rule is not applicable.

Because Rule 407 requires exclusion when a particular situation exists—bodily harm and subsequent safety measures—and that situation does not exist in this case, it provides no basis to exclude or otherwise disregard ED 6.

b. Even if the required situation existed, which it does not, TRE 407 requires the exclusion of evidence only when the evidence is offered for to prove that the alleged tortfeasor is guilty of a particular state of mind, such as culpability; Respondent's mental state is not an issue in this case.

TRE 407 only applies in a tort case in which a Plaintiff is trying to prove that the alleged tortfeasor is guilty of a particular state of mind, such as culpability. TRE 407(a) states:

(a) Subsequent Remedial Measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.¹⁴³

Even if you have the requisite bodily harm followed by subsequent remedial measures, TRE 407 applies to evidence offered to prove an alleged tortfeasor's mental state, such as culpability.¹⁴⁴

All of these involve a particular state of mind. Respondent's state of mind is not an issue in this case. The ED does not have to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction.

The ED did not offer ED 6 to prove negligence, culpable conduct, a defect in a product or its design, or a need for a warning or instruction. The ED offered ED 6 to show that Respondent achieved compliance with the rule after the investigation, and was thus not in compliance from the investigation date until the date of compliance, consistent with the allegation. The rule

¹⁴³ Tex. R. of Evid. 407(a) (emphasis—underlining only----- added).

¹⁴⁴ Tex. R. of Evid. 407(a); see e.g., *Huckaby*, 20 S.W. 3d at 207 (finding that rule 407 was not implicated because the subsequent remedial measures were not offered to prove negligence or culpable conduct of the defendant). See, e.g., *Dudley*, 716 S.W.2d at 629–30 (finding that evidence that a sign was replaced at the site of an accident by the defendant would not be admissible under Rule 407 to show that defendant had knowledge of an alleged defect of the sign.) *Howard*, 679 S.W.2d at 646–47, (noting that evidence of a warning label was properly excludable as evidence of subsequent repairs, but, "it should have been admitted if it constituted relevant evidence of something other than negligence or culpability").

expressly states “[b]ut the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.”¹⁴⁵ As such, evidence offered for a purpose not listed, is not excluded under TRE 407. Because the ED did not offer the exhibit for one of the purposes listed in TRE 407, the rule is not applicable in this case.¹⁴⁶

If the case is about bodily harm caused by an accident, TRE 407 requires exclusion of evidence offered to show a tortfeasor’s culpable state of mind. Even if the case were about bodily harm caused by an accident, evidence offered for a different purpose should not be excluded based on Rule 407. Since ED 6 was not offered to prove any of the mental states identified in TRE 407, TRE provides no basis to exclude or otherwise fail to consider ED 6.

The comments to TRE 407¹⁴⁷, Texas case law¹⁴⁸, as well as federal law (TRE 407 mirrors the federal rule of evidence)¹⁴⁹ are consistent, the application of TRE 407 is confined to the context of the language of the rule. The scope and intent of this rule is limited as the Advisory Committee Notes to the identical Federal Rule of Evidence 407ule when stating:

Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct.¹⁵⁰

The Notes and Comments to TRE 407 also clarify that TRE 407 does not apply to situations outside the explicit contexts stated by the rule, stating:

. . . if [evidence is] offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.¹⁵¹

The purpose of the rule is to encourage the implementation of safety measures;¹⁵² that purpose is not served in this case and in fact, limiting the scope of evidence the ED has available could be detrimental to the ED’s ability to enforce TCEQ rules and statutes. TRE 407 has no application to this case. And even if it did apply in this case, which it does not, retro-application

¹⁴⁵ Tex. R. Evid. 407(a).

¹⁴⁷ Tex. R. Evid. 407, Notes and Comments, Comment to 2015 Restyling.

¹⁴⁸ See, e. g., *Hathcock*, 330 S.W. at 743-44; *Brookshire Bros., Inc. v. Lewis*, 911 S.W.2d at 795-96; *Christus Health*, 305 S.W.3d at 401-02.

¹⁴⁹ Fed. R. of Evid. 407. The Proposed Rules Advisory Committee Notes of 1972, state, “The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault”; describes the situation as “injury by mere accident”; and discusses the purpose as “in furtherance of added safety”; see.” See also, *In re Air Crash Disaster*, 86 F.3d 498, 528-30 (6th Cir. 1996) and *Patrick v. South Central Bell Tel. Co.*, 641 F.2d. 1192, 1195 (6th Cir. 1980) for application of the Federal Rule...

¹⁵⁰ Fed. R. of Evid. 407. The Proposed Rules Advisory Committee Notes of 1972.

¹⁵¹ Tex. R. of Evid. 407, Notes and Comments, Comment to 2015 Restyling.

¹⁵² See *Marathon Corp.*, 55 S.W.3d at 143-44 (“The purpose of this rule is to exclude such evidence so as not to discourage parties from taking safety measures.”); *Huckaby*, 20 S.W.3d at 207; *E.V.R. II Associates*, 813 S.W.2 at 556 (“The rule is one of policy and good sense to avoid discouraging safety measures.”).

of such a novel interpretation of TRE 407 by disregarding an admitted significant piece of evidence after a party has closed his evidence and has no opportunity to bolster the remaining evidence or introduce additional evidence is highly detrimental to that party.

For all these reasons, disregarding ED 6 is unwarranted.

2. ED 6 was admitted without objection at the hearing and should be available for consideration; it is contrary to the procedural rules and fairness to, after the record closes, withdraw a significant and relevant admitted piece of evidence for which there was no objection.

ED 6 was admitted without objection at the hearing and should be available for consideration. It was admitted and is part of the record in this case. . At the hearing, ED 6 was admitted: when the ED offered ED-6 into the record, Respondent did not object and the ALJ admitted it.¹⁵³

ED 6 is relevant and significant. It conclusively establishes by itself that Respondent did not have corrosion protection on the submersible turbine pumps during the timeframe of the alleged violation. Because it was admitted and is currently part of the record, it is improper to treat it as if it does not exist.

It is contrary to the rules of evidence and the rules of procedure to treat evidence as if it were never admitted. It would be very detrimental to a party who, in accordance with the rules of procedure¹⁵⁴ and rules of evidence¹⁵⁵, offered a piece of evidence and it was admitted only to have the judge decide to exclude or disregard it after that party has closed its case and has no further opportunity to present evidence. A party presents a piece of evidence toward establishing an element of his case. When a party's evidence is excluded during the proceeding, the party has the opportunity to offer other evidence on that issue, bolster the remaining evidence, or otherwise establish the case element the excluded evidence was offered to prove. However, if a piece of admitted evidence is allowed to be excluded or disregarded after that party rests his case and has no more opportunity to offer other evidence of otherwise bolster his case, that is a severe disadvantage to that party.

Further, if a party has a piece of evidence admitted that conclusively establishes an element of that party's case, that party might conclude that it has established that element and focus on the remaining elements of its case. If a judge is able to exclude or disregard that piece

¹⁵³ Test. of Janie Munoz, Audio Recording TwoTwoOneTwo at 31311:1831.

¹⁵⁴ See generally, Tex. R. Civ. P.

¹⁵⁵ See generally, Tex. R. Evid.

evidence after the evidentiary portion of the case is closed, a judge might conclude that—as to the remaining evidence—there is no evidence or confusing evidence as to the element that the disregarded piece of evidence conclusively established. If a judge is allowed to exclude evidence after the close of evidence, that is a game changer; it is not consistent with well-established procedural and evidentiary rules. As stated in *American Jurisprudence (Second Edition)*:

It is an abuse of discretion for a trial court to reverse its ruling on the admission of exhibits after the close of the trial, when the party relying on those exhibits has no opportunity to further the necessary supporting data.¹⁵⁶

ED 6 was admitted without objection and is in the record. It is significant and relevant; it conclusively establishes the alleged corrosion protection violation. It should be considered. Notably, even if ED 6 is not considered, there are two other of Respondent's documents which are evidence in this case that establish the corrosion protection violation—ED-5.7¹⁵⁷ and ED-5.8¹⁵⁸. These documents alone show that Respondent had no corrosion protection on the submersible pump and consequently none of the seven allowable methods. It logically follows that if a party must have one of seven available options and the evidence shows that the party had none, then necessarily the party did not have one of the seven. Hence it is unnecessary to go through each option to conclude the party has none of the seven. ED 6 is relevant, and is part of this record. It must be considered when considering whether the corrosion protection violation occurred.

E. The ED's Petition is immaterial in regards to whether there is sufficient evidence to prove this corrosion protection violation because the Petition is about fair notice to Respondent and that is not an issue in this case.

The clarity of the ED's Petition does not go towards whether the ED met the burden of proof. The only issue that would go to is whether Respondent has reasonable notice of the allegations as required in the Administrative Procedures Act (APA).¹⁵⁹ Nowhere in the PFD did the ALJ discuss or claim that Respondent did not have the requisite notice; that is because the Petition does provide the requisite notice. Respondent has never complained about any confusion regarding the allegations in the Petition, and in fact admits the violations.¹⁶⁰ The language of a petition does not address whether a party has provided sufficient evidence to

¹⁵⁶ 75 Am. Jur. 2d Trial § 252 (quoting *Automatic Control Products Corp. v. Tel-Tech, Inc.*, 780 P.2d 1258 (Utah 1989)).

¹⁵⁷ ED- 5.7.

¹⁵⁸ ED - 5.8.

¹⁵⁹ See TEX. GOV'T CODE ANN. CH. 2001. (West 2014).

¹⁶⁰ Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:42.

prove an element of its case. Thus, the ED's Petition is immaterial, after establishing notice, as to whether he met his burden of proof.

1. The sole purpose of the Petition is to give Respondent notice, and that is not an issue, as reflected by a lack of discussion in the ALJ's PFD.

The ED's Petition exists because the APA requires reasonable notice to Respondent of the allegations.¹⁶¹ That is its sole purpose. Nowhere in the PFD does the ALJ reference notice to Respondent or any deficiency of notice to Respondent. The Petition does not go towards whether the ED met the burden of proof.

The APA requires a notice of hearing to provide reasonable notice.¹⁶² The Petition is the notice of hearing in this case and the purpose of it is to comply with the APA; nothing more, nothing less. Section 2001.051 and 2001.052 of the Texas Government Code are the applicable notice provisions in the APA.¹⁶³ Section 2001.051 requires that each party be given "reasonable notice" of any hearing.¹⁶⁴ The notice of hearing must include: (1) a statement of the time, place and nature of the hearing; (2) a statement of the legal authority and jurisdiction under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short, plain statement of the matters asserted.¹⁶⁵ Administrative Law Judge Howard Seitzman succinctly states the APA pleading standard in a prior Proposal For Decision as follows:

The APA requirement is akin to the "fair-notice" standard for pleading in the Texas courts.¹⁶⁶ In a trial court, the standard for pleading "looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant."¹⁶⁷ In a contested case proceeding, a party is entitled to an opportunity to respond and to present evidence and argument on each issue involved in the case.¹⁶⁸ A plaintiff, in this case the ED, is not required to describe the evidence in detail.^{169 170}

¹⁶¹ *Id.* § 2001.051

¹⁶² *Id.*

¹⁶³ *See id.* §§ 2001.051 and 2001.052.

¹⁶⁴ *Id.* § 2001.051.

¹⁶⁵ *Id.*; *see also*, *Garza v. Texas Alcoholic Beverage Comm'n*, 138 S.W.3d 609, 618 (Tex. App.—Houston [14th Dist.] 2004, *no pet.*).

¹⁶⁶ Tex. R. Civ. P. 45(b) and 47(a); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000).

¹⁶⁷ *Horizon*, 34 S.W.3d at 896.

¹⁶⁸ TEX. GOV'T CODE ANN. § 2001.051; *Madden v. Tex. Bd. Of Chiropractic Examiners*, 663 S.W.2d 622, 626 (Tex. App.—Austin, 1983, writ ref'd n.r.e.)

¹⁶⁹ *Paramount Pipe & Supply v. Muhr*, 749 S.W.2d 491, 494-495 (Tex. 1988); *Garza*, 138 S.W.3d at 618-619.

¹⁷⁰ *Proposal for Decision in the Matter of an Enforcement Action Against Micro Dirt Inc. dba Texas Organic Recovery*; SOAH Docket No. 582-10-1754; TCEQ Docket No. 2009-0096-MSW-E at 11.

Nowhere does the ALJ accuse the ED of any deficiency of notice; because there is none. The Petition gives "fair notice" to Respondent. That is the relevance of the Petition to this case. It is not to be used to determine whether the ED met its evidentiary burden.

2. The ED disagrees with the ALJ's characterization of the ED's Petition.

Even though the ED is of the opinion that the Petition does not go toward whether the burden of proof is met, the ED will address the ALJ's comments to it. The ED respectfully disagrees with the ALJ's statements.

- a. 30 TEX. ADMIN. CODE § 334.49(a) is an appropriate citation for the violation; the ED disagrees with the ALJ's claim that the ED's Petition is deficient in specificity such that it impacts whether there was sufficient evidence of a violation of 30 TEX. ADMIN. CODE § 334.49(a) (i.e. a corrosion protection violation).**

The ED disagrees with the ALJ's contention that 30 TEX. ADMIN. CODE § 334.49(a) is not a sufficient citation for the corrosion protection violation. In the Petition, the ED alleges that Respondent violated 30 TEX. ADMIN. CODE § 334.49(a) by failing to have corrosion protection.¹⁷¹ The ED has been using this citation consistently for years.

Section 334.49(a) states:

(a) General requirements.

(1) **Owners and operators** of underground storage tank (UST) systems (or underground metal UST system components) which are required to be protected from corrosion **shall comply with the requirements in this section** to ensure that releases due to corrosion are prevented.

(2) All corrosion protection systems shall be designed, installed, operated, and maintained in a manner that will ensure that corrosion protection will be continuously provided to all underground metal components of the UST system.¹⁷²

Section 334.49(a) requires owners and operators to have corrosion protection on every component of the UST system, and comply with all requirements in section 334.49. The ED proved Respondent violated a requirement in section 334.49, namely that Respondent was not utilizing one of the corrosion protection methods in section 334.49(b). Because section 334.49(a) requires Respondent to comply with all of section 334.49, and Respondent was not in compliance with section 334.49(b), the ED proved the violation alleged in the Petition. As discussed above in section II, the ED proved that Respondent did not have a method of

¹⁷¹ Ref A. at 6, paragraph 9.a.

¹⁷² 30 TEX. ADMIN. CODE § 334.49(a)(2011).

corrosion protection found in section 334.49(b), which is a requirement in section 334.49, through at least the following:

- Respondent admits in his answer he did not have any method,¹⁷³
- Respondent's records show that he had no method (and consequently none of the seven)¹⁷⁴
- Respondent had none of the records that TCEQ rules require that owners and operators must have "immediately" available to "demonstrate compliance"; in fact the only records provided showed lack of corrosion protection;¹⁷⁵ and
- Respondent is deemed to have admitted the corrosion protection violation due to his failure to comply with any discovery despite repeated opportunities.

Since 30 TEX. ADMIN. CODE § 334.49(a) requires compliance with all of 30 TEX. ADMIN. CODE §334.49 and the ED proved Respondent was utilizing no method of corrosion on submersible turbine pumps, and since Respondent had no method of corrosion protection, it certainly did not have one of the methods in 30 TEX. ADMIN. CODE § 334.49(b), the ED established the very violation alleged in the Petition. There is no deficiency in the Petition in citing only to 30 TEX. ADMIN. CODE § 334.49(a)(1).

b. The ED disagrees with the ALJ's suggestion that the ED's reliance on evidence collected after the date of an onsite investigation is improper, confusing or is anyway relevant to whether the ED proved the corrosion protection violation.

The ALJ discusses made the following statement regarding the Petition:

During an investigation conducted on April 8, 2014, a UT Arlington PST Program investigator (TCEQ contractor) documented that Respondent . . . [f]ailed to provide corrosion protection for the UST system, in violation of TEX. WATER CODE § 26.3475(d) and 30 TEX. ADMIN. CODE § 334.49(a)(1); . . .¹⁷⁶

The ALJ states that because a piece of evidence was obtained days after the investigation date, the ED could not have used that piece of evidence to have "documented" the violation on the investigation date of April 8, 2014. The ED is permitted to utilize evidence obtained after the investigation date. That has always been the case and is for example, supported by the fact that TCEQ rules provide for discovery.¹⁷⁷ SOAH routinely allows the ED to conduct discovery in TCEQ cases and offer evidence obtained after the investigation date. Also TCEQ rules allow the

¹⁷³ Ref. A. at 18.

¹⁷⁴ See ED-5.6; see also, ED-5.7; see also, ED-5.8.

¹⁷⁵ See ED 5.4 at 22.

¹⁷⁶ Ref. A. at 6, paragraph 9.

¹⁷⁷ See 30 TEX. ADMIN. CODE § 80.127 (Evidence in Contested Case Hearings).

ED to amend its case to add violations discovered after the investigation.¹⁷⁸ These statements in the Petition follow a form the ED has used for years without complaint, despite numerous SOAH proceedings for TCEQ enforcement cases. The ALJ may disagree with the wording in the Petition, but that should not determine whether the ED proved the violation alleged. The ED frequently utilizes evidence obtained after the date the violation is first documented; this has been the practice for years of the ED at SOAH for years.

At the on-site portion of the investigation, which was April 8, 2014, the investigator requested corrosion protection records which TCEQ rules require owners/operators maintain to “demonstrate compliance”¹⁷⁹ and which must be “immediately available”¹⁸⁰ when requested during an investigation. On April 8, 2014, Respondent had no documents as required. That alone would support the violation and past cases have relied on nothing more than that.¹⁸¹ Many components of UST systems are underground and unobservable; also, for example, the rules require daily release detection monitoring and there are not enough TCEQ investigators to physically observe daily release detection. Sometimes the absence of records required to “demonstrate compliance”¹⁸² is all there is to rely on. In this case, not atypically, Respondent sent documents to the investigator a few days after the investigation. That is not unusual. While the ALJ might not like the wording used in the Petition, this wording has no impact on whether the ED met his burden of proof.

As discussed above, the ED is not required to list all evidence and present his entire case in the Petition; the Petition is required to give “fair notice”. The ED is able to obtain evidence after the investigation date and does not have to revise the Petition each time he obtains an additional piece of evidence. The ED’s Petition gives fair notice.

In the PFD the ALJ states:

Therefore, the inspector could not have documented a violation based on a test that was conducted six days later, and the evidence fails to support the violation alleged in the EDPRP.¹⁸³

¹⁷⁸ 30 TEX. ADMIN. CODE § 80.115(a) (2011) (“...in an enforcement proceeding, no party except the executive director may seek to amend or add to the violations alleged in the petition that initiated the case”).

¹⁷⁹ 30 TEX. ADMIN. CODE § 334.49(e)(2) (2011).

¹⁸⁰ 30 TEX. ADMIN. CODE § 334.10(b) (2011).

¹⁸¹ See, e.g., *Proposal for Decision in the Matter of an Enforcement Action Against Accel Quick Stop, Inc. dba Libby Food Store*, SOAH Docket 582-12-3504; TCEQ Docket No. 2011-0882-PST-E at 4-5, 8 (concluding that the lack of release detection records established the ED’s alleged violation); *Proposal for Decision in the Matter of an Enforcement Action Against Joseph Endari dba Endari’s Exxon*, SOAH Docket 582-04-0757; TCEQ Docket No. 2002-0893-PST-E at 5, 7 (finding that evidence of Respondent’s failure to produce release detection records to the investigator was sufficient to establish ED’s alleged violation).

¹⁸² 30 TEX. ADMIN. CODE § 334.49(e)(2) (2011).

¹⁸³ PFD at 6.

The logic of this statement not clear. It does not follow that because the ED's Petition states he documented the violation during an investigation date of April 8, 2014, and a piece of admitted evidence is one that the ED obtained a few days after that investigation, that leads to the conclusion that the ED did not meet his burden of proof.

III. The ED agrees with the ALJ that the release detection violation was established by the evidence showing that Respondent failed to annually test its line leak detectors; however the ED disagrees with the ALJ that Respondent's failure to test its pressurized lines was not established as well, even though it is immaterial since all agree that the release detection violation was established.

Release detection is a way to determine if a UST system is leaking. PST owners and operators are required to monitor tanks and piping for releases in accordance with the Commission's release detection rules.¹⁸⁴ Piping in a UST system must be monitored in a way that will detect a release from any portion of the piping system.¹⁸⁵ The rules provide different monitoring requirements for piping systems which convey regulated substances under pressure ("pressurized piping system") and for piping systems which convey regulated substances under either suction or by gravity flow.¹⁸⁶ The release detection violation in this case relates to the release detection requirements for pressurized piping.¹⁸⁷

In the Petition, the ED alleges that Respondent "[f]ailed to provide release detection for the pressurized piping associated with the UST system, in violation of TEX. WATER CODE § 26.3475(a) and 30 TEX. ADMIN. CODE § 334.50(b)(2). Specifically, Respondent had not conducted the annual line leak detector and piping tightness test."¹⁸⁸ The ED would like to clarify that this allegation is actually a combination of two instances of Respondent's violation of the Commission's release detection rules for piping. The ED consolidated these two related violations into one allegation¹⁸⁹ but two separate instances of violation of the Commission's release detection rules support the allegation. The first instance of a release detection violation was Respondent's failure to test the Facility's line leak detectors on an annual basis as required

¹⁸⁴ 30 TEX. ADMIN. CODE § 334.50(b)(1) (2011) (relating to release detection for tanks) and), (b)(2) (relating to release detection for piping).

¹⁸⁵ *Id.* 30 TEX. ADMIN. CODE § 334.50(b)(2).

¹⁸⁶ *Compare* 30 TEX. ADMIN. CODE § 334.50(b)(2)(A) (relating to release detection for pressurized piping)), *with* 30 TEX. ADMIN. CODE § 334.50(b)(2)(B) (relating to release detection for suction piping).

¹⁸⁷ *See* ED. Ref. A at 06.

¹⁸⁸ ED Ref. A at 6.

¹⁸⁹ Since the ED treated these two violations as a single violation, the Respondent received a benefit in the penalty calculation. *See infra* Section IV.

by the rule. The second instance of the release detection violation was Respondent's failure to test or monitor its pressurized lines as provided by the rule.

The ALJ agreed that the ED proved that Respondent failed to test the Facility's line leak detector annually as required by the rule. The ALJ concluded that the ED did not prove that Respondent failed to test or monitor its pressurized piping system as required by the rule. Even though the occurrence of this second instance of violation is immaterial to the release detection violation because the ED proved the release detection violation through the first instance of violation, the ED disagrees with the ALJ's conclusion. The evidence establishes that Respondent failed to test or monitor its pressurized piping system as required by the rule. Therefore, the ED proved the release detection violation through evidence showing that Respondent failed in two instances to comply with the release detection rule.

A. ED established the release detection violation in this case through evidence that Respondent did not annually test its line leak detectors.

The ED agrees with the ALJ's conclusion that Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(III) by failing to test the Facility's line leak detector at least once per year. One part of the ED's alleged release detection violation is about monitoring the line leak detector. A line leak detector is a device used to monitor the piping in a UST system for catastrophic releases.¹⁹⁰ Each pressurized line in a UST system is required to be equipped with an automatic line leak detector.¹⁹¹ Each line leak detector must be tested "at least once per year for performance and operational reliability"¹⁹²

In this case, Respondent had its line leak detectors tested on March 28, 2013.¹⁹³ Respondent had its line leak detectors tested again on April 14, 2014.¹⁹⁴ The rule requires each line leak detector to be tested at least once per year.¹⁹⁵ Respondent did not comply with the rule because more than one year passed between its tests of its line leak detectors.

¹⁹⁰ See 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(I) and (II); Test. of Janie Munoz, at Audio Recording Two at 0:06.

¹⁹¹ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i).

¹⁹² *Id.* § 334.50(b)(2)(A)(i)(III).

¹⁹³ ED Ex. 5.5 at 28.

¹⁹⁴ ED Ex. 5.6 at 31. Respondent clearly violated the annual testing requirement of § 334.50(b)(2)(A)(i)(III) by failing to have its line leak detector tested on an annual basis (as it failed to do for at least the past four years, see ED Ref. A at 18 (stating that line tests were conducted on March 23, 2011, March 27, 2012, March 29, 2013, and April 14, 2014, *i.e.*, in excess of a year for each of the preceding four years), and previous to UTA's January 2011 onsite investigation, since 2004, see ED Ref. A at 21). The timeliness of Respondent's actions to address the noncompliance at issue in this case were considered by the ED in calculating the recommended penalty for the release detection violation, as described in more detail in Section IV *infra*.

¹⁹⁵ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(III).

Accordingly, the ED agrees with the ALJ's recommendation that the Commission find that Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(i)(III). Therefore the release detection violation alleged by the ED in paragraph 9.b. of the Petition has been established.

B. Even though it is immaterial since the violation is established through the failure to meet line leak detector requirements, the ED established failure to meet piping release detection requirements as well.

The ED alleged a violation of the Commission's release detection rule in this case and relied on two instances of violations, combining them, to support one allegation. Specifically, the ED alleged that Respondent failed to conduct its annual line leak detector and piping tightness test. As discussed in Section III, Part A, above, the ED proved Respondent violated the Commission's release detection rule by failing to annually test its line leak detectors. By proving this first instance of violation, the ED has met his burden of proof on the single release detection violation alleged by the ED in this enforcement case. As discussed further in Section IV, the ED consolidated both instances of violation of the release detection rule into one single violation event for purposes of calculating a penalty—the lowest penalty for this violation. Thus, before even considering the second instance of Respondent's failure to comply with the release detection rule, the ED has proved the release detection violation and has established the facts necessary to justify his recommended penalty under the Penalty Policy.

Accordingly, finding that Respondent failed to test or monitor its pressurized lines in accordance with the release detection rule is immaterial to the ED's allegation and penalty recommendation in this case. However, the record evidence, testimony, and Respondent's own admissions show that the ED also established that Respondent failed to monitor its pressurized lines as required by the Commission's release detection rule. The ED proved the second instance of a release detection violation in this case.

The release detection rule requires that pressurized lines must be monitored for releases in one of three ways.¹⁹⁶ By rule, PST owners and operators are required to maintain documentation to demonstrate compliance with the piping release detection requirements.¹⁹⁷ The TCEQ uses these records to determine which of the three methods of release detection is being utilized for the pressurized lines and whether the owner or operator is in compliance with the Commission's release detection rule. In this case, the only records relating to its pressurized

¹⁹⁶ See *id.* § 334.50(b)(2)(A)(ii)(I)–(III).

¹⁹⁷ See *id.* § 334.50(e)(2).

pipng system Respondent provided to the inspector were records showing (1) it utilized one particular method of release dection for its pressurized lines and (2) it was not complying with that method's annual testing requirement. These records, considered with the absence of any othe record indicating that Respondent was monitoring its pressurized lines in another, approved manner, establish the second instance of Respondent's violation of the Commission's release detection rule.

Pressurized lines must be monitored for releases in the manner established by 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(ii). This rule provides three methods by which owners and operators can test or monitor each pressurized line:

(ii) In addition to the required line leak detector prescribed in clause (i) of this subparagraph, each pressurized line shall also be tested or monitored for releases in accordance with at least one of the following methods.

(I) The piping may be tested at least once per year by means of a piping tightness test conducted in accordance with a code or standard of practice developed by a nationally recognized association or independent testing laboratory. Any such piping tightness test shall be capable of detecting any release from the piping system of 0.1 gallons per hour when the piping pressure is at 150% of normal operating pressure.

(II) Except as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in subsection (d)(5) - (10) of this section.

(III) The piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by means of an electronic leak monitoring system capable of detecting any release from the piping system of 0.2 gallons per hour at normal operating pressure.¹⁹⁸

A PST owner or operator must conduct at least one of these three methods in order to comply this rule. The first option – the piping tightness test – is required annually.¹⁹⁹ The second two options – utilizing a monthly release detection method²⁰⁰ or utilizing a specified

¹⁹⁸ *Id.* § 334.50(b)(2)(A)(ii)(I)–(III).

¹⁹⁹ *Id.* § 334.50(b)(2)(A)(ii)(I).

²⁰⁰ *Id.* § 334.50(b)(2)(A)(ii)(II).

electronic leak monitoring system²⁰¹ -- are both required at least once every month, not to exceed 35 days between each monitoring.²⁰²

TCEQ rules require that PST owners and operators maintain and provide records to demonstrate compliance with the Commission's release detection rules. PST owners and operators are required to "maintain records adequate to demonstrate compliance with the release detection requirements" ²⁰³ Specifically, "[r]ecords of the results of all manual and/or automatic methods of sampling, testing, or monitoring for releases (including tank tightness tests) shall be maintained for at least five years after the sampling, testing, or monitoring is conducted."²⁰⁴ With limited exceptions, these records must be maintained in a secure location on the premises of the UST facility and "must be immediately available for inspection upon request" ²⁰⁵

In this case, Respondent provided records that established a violation of the pressurized piping release detection requirements. During the inspection in this case, when asked to provide records demonstrating compliance with release detection requirements, Respondent provided the investigator with records from the 2013 testing of the line leak detector and pressurized piping system²⁰⁶ and automatic tank gauging and inventory control records.²⁰⁷ The automatic tank gauging and inventory control records relate to the release detection requirements for tanks, not for the piping system.²⁰⁸ By producing this set of records upon request from the investigator, Respondent demonstrated two things. First, Respondent demonstrated that it was not conducting monthly monitoring of its pressurized lines as allowed by the rule. Second, Respondent demonstrated that it elected to utilize the annual piping tightness test as its method of release detection for the pressurized piping system.

Respondent provided no records to indicate it was monitoring its pressurized lines for releases through monthly monitoring, as allowed under the release detection rule. At hearing,

²⁰¹ *Id.* § 334.50(b)(2)(A)(ii)(III).

²⁰² *Id.* § 334.50(b)(2)(A)(ii)(II)-(III).

²⁰³ *Id.* § 334.50(e)(2).

²⁰⁴ *Id.* § 334.50(e)(2)(C).

²⁰⁵ *See id.* § 334.10(b)(1)(B) and 334.50(e)(1).

²⁰⁶ *See* ED Ex. 5.5 at 26. These records were faxed to UTA after Mr. Foss called Respondent to schedule the April 8, 2014 on-site investigation. *See* ED Ex. 5.4 at 19 (stating in "Communication History" that Respondent's representative was contacted by telephone on April 1, 2014 to schedule the investigation).

²⁰⁷ *See* ED Ex. 5.4 at 18 (stating in the "Investigator Notes" section under column 4 (regarding release detection for tanks) that inventory control ("IC") records were provided for the months of September 2013 through March 2014 and that monthly automatic tank gauging records were provided for the months of May 2013 through April 2014).

²⁰⁸ The ED did not allege a violation of the release detection requirements for tanks in this case. *See* ED Ref. A at 06. The automatic tank gauging and inventory control records are discussed in this Part in order to clarify that Respondent was not utilizing a monthly monitoring method for its pressurized lines.

Respondent appeared to argue for the first time that it tests its pressurized lines through its automatic tank gauging equipment (referred to as a “Veeder Root,” which is a brand of such equipment).²⁰⁹ Respondent did not provide any records demonstrating that its automatic tank gauging equipment was monitoring its pressurized lines. Automatic tank gauging is not an acceptable form of release detection for pressurized lines under § 334.50(b)(2)(A)(ii)(II).²¹⁰ However, the ED presented rebuttal testimony from Ms. Munoz that some automatic tank gauging equipment can also test pressurized lines if an electronic line leak detector is installed.²¹¹ Ms. Munoz testified that Respondent does not utilize an electronic line leak detector and in fact has an mechanical line leak detector.²¹² Therefore, Respondent’s automatic tank gauging equipment is not capable of testing its pressurized lines. Respondent’s lack of records of monthly monitoring of pressurized piping systems indicate that it was not utilizing either of the permissible methods of release detection which require monthly monitoring.

This conclusion is also supported by the investigation report which notes that Respondent provided no records that the pressurized lines were being monitored monthly.²¹³ Respondent’s representative also testified that it utilized the annual piping tightness test as its method of testing its pressurized lines.²¹⁴ This admission is further evidence that Respondent did not utilize either of the monthly monitoring methods allowed by the rule.

The evidence demonstrates Respondent chose to utilize an annual piping tightness test as its method of testing its pressurized piping system. The piping tightness test must be conducted at least once per year.²¹⁵ In this case, Respondent had its piping tightness test conducted on March 28, 2013.²¹⁶ Respondent had its piping tightness conducted again on April

²⁰⁹ Mr. Manickavasagar contradicted himself when explaining what the Facility’s Veeder Root system is capable of testing. *See* Test. of Sivagnanam Manickavasagar at Audio Recording Two at 0:26 – 0:29 (stating that Facility’s Veeder Root machine tests its lines). *But see* Test. of Sivagnanam Manickavasagar at Audio Recording Two at 0:36 (stating that the Facility’s Veeder Root machine is capable of testing the tanks but is not capable of testing the lines).

²¹⁰ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(ii)(II) provides that “[e]xcept as provided in subsection (d)(9) of this section, the piping may be monitored for releases at least once every month (not to exceed 35 days between each monitoring) by using one or more of the release detection methods prescribed in *subsection (d)(5) - (10)* of this section.” (emphasis added). Automatic tank gauging and inventory control is a method of release detection described in subsection (d)(4) of § 334.50. Subsection (d)(4) is not listed as an acceptable method of monthly monitoring for pressurized piping systems.

²¹¹ Test. of Janie Munoz at Audio Recording Two at 0:50 – 0:52.

²¹² *Id.*; *see also* ED Ex. 5.4 at 18 (indicating that only a mechanical line leak detector was present at the Facility, rather than an electronic line leak detector).

²¹³ *See* ED Ex. 5.4 at 18 (indicating in the “Investigator Notes” section that Respondent provided no records that the pressurized lines were being monitored monthly by leaving the box for “Monthly Monitoring” unchecked).

²¹⁴ Test. of Sivagnanam Manickavasagar at Audio Recording Two at 0:37 – 0:38 (indicating that Respondent elected to test the pressurized lines on an annual basis).

²¹⁵ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(ii)(III).

²¹⁶ ED Ex. 5.4 at 18; ED Ex. 5.5 at 27.

14, 2014.²¹⁷ The rule requires a piping tightness test on each pressurized line once a year.²¹⁸ Respondent did not comply with the rule because more than one year passed between its piping tightness tests.

In conclusion, the ED established that Respondent violated the Commission's release detection rule by showing two separate instances of noncompliance with the release detection requirements for piping. The ALJ agreed that the ED proved that Respondent failed to test its line leak detectors in compliance with the rule, thus the release detection violation is established. Furthermore, the ED proved that Respondent failed to test or monitor its pressurized lines through one of the three methods provided by the rule. Specifically, Respondent demonstrated that it failed to conduct a piping tightness test at least once per year as provided in the rule and failed to provide any records to indicate it was monitoring its pressurized lines monthly, which could satisfy the rule requirement. Therefore, even though the pressurized line violation is immaterial to finding Respondent violated the release detection rule, the ED established through evidence that Respondent failed to comply with the release detection requirements for pressurized lines.

C. The ED respectfully disagrees with ALJ's conclusion that there is insufficient evidence of Respondent's failure to test or monitor its pressurized lines; the evidence establishes that Respondent did not test its pressurized lines as required by the release detection rule.

As discussed in Section III, Parts A and B above, the evidence establishes Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(2) by failing to conduct an annual line leak detector test and annual piping tightness test. The ALJ correctly concluded that Respondent violated the release detection requirements for line leak detector detectors. However, the ALJ concluded that the evidence did not support a conclusion that Respondent failed to comply with the release detection requirements for pressurized lines. The ED respectfully disagrees with the ALJ's conclusion that the ED did not prove a violation of the release detection requirements for pressurized lines. First, the evidence is that Respondent provided records demonstrating a violation of the release detection requirements for pressurized lines. These records establish that Respondent elected to conduct annual testing of its pressurized lines. Second, PST owners and operators are required by rule to maintain records adequate to determine compliance with release detection monitoring requirements. Respondent produced no records to the investigator

²¹⁷ ED 5.6 at 30.

²¹⁸ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(ii)(I).

or to the ED through the discovery process to suggest that it was monitoring its pressurized lines on a monthly basis as allowed by the release detection rule. Therefore, Respondent's own records establish a violation of the release detection rule for pressurized lines.

The ALJ agreed that Respondent did not have a pressurized piping tightness test conducted at least once a year as provided by the release detection rule. However, the ALJ stated that she could not conclude that Respondent violated the release detection rule relating to pressurized lines because the ED did not present evidence that Respondent failed to use the monthly monitoring options for its pressurized lines. The ED disagrees with the ALJ's conclusion that the evidence in the record does not establish that Respondent failed to monitor its pressurized lines monthly as allowed by the release detection rule for pressurized lines.

As discussed in Section III, Part B, above, the Commission's release detection rule requires that pressurized lines must be tested or monitored for releases by at least one of three methods.²¹⁹ The first option—the piping tightness test—is required annually.²²⁰ The second two options – utilizing a monthly release detection method²²¹ or utilizing a specified electronic leak monitoring system²²² – are both required at least once every month, not to exceed 35 days between each monitoring.²²³ The ED established that Respondent did not comply with this rule requirement.

The evidence clearly establishes that Respondent elected to test its pressurized lines by conducting an annual piping tightness test.²²⁴ As the ALJ recognized, Respondent failed to conduct a piping tightness test at least once per year as the rule provides.

Furthermore, Respondent did not provide any records to the investigator to indicate that it was conducting monthly monitoring of its pressurized lines, as allowed by the rule. PST owners and operators are required to maintain records adequate to demonstrate compliance with release detection monitoring.²²⁵ Because UST systems are underground, the TCEQ's rules acknowledge the importance of record-keeping to determine compliance with PST regulations. Records are the tool by which PST owners and operators must demonstrate compliance and that

²¹⁹ 30 TEX. ADMIN. CODE § 334.50(b)(2)(A)(ii).

²²⁰ *Id.* § 334.50(b)(2)(A)(ii)(I).

²²¹ *Id.* § 334.50(b)(2)(A)(ii)(III).

²²² *Id.* § 334.50(b)(2)(A)(ii)(III).

²²³ *Id.* § 334.50(b)(2)(A)(ii)(II)-(III).

²²⁴ See ED - 5.4 at 18 (indicating that Respondent elected to use piping tightness test instead of monthly monitoring as its release detection method for pressurized lines); Test. of Sivagnanam Manickavasagar, at Audio Recording Two at 0:37 – 0:38 (indicating that Respondent elected to test the pressurized lines on an annual basis); see also Respondent's Answer in ED Ref. A. at 16 wherein Mr. Manickavasagar states that "I am now doing the line test every year."

²²⁵ 30 TEX. ADMIN. CODE § 334.50(e)(2).

is why the TCEQ's rules require release detection records to be maintained and produced immediately for inspection upon request. If records are not provided, then the TCEQ cannot determine whether a rule requirement has been met.

Here, Respondent provided no records to indicate it was conducting monthly monitoring of its pressurized lines as allowed by the release detection rule for pressurized lines. Instead, Respondent provided records to the investigator demonstrating that it elected to utilize the annual piping tightness test as its method of release detection for the pressurized lines. Respondent demonstrated its Facility was out of compliance by producing the piping tightness test records that it did and because of its failure to produce records demonstrating one of the other approved methods of release detection for pressurized lines. At the hearing, no evidence was presented that any method of release detection for the pressurized lines was in place at the time of the investigation. If a PST owner or operator fails to create and maintain records of its release detection method and this failure cannot be used to demonstrate a violation of the release detection rule, then the TCEQ's regulatory duties would be stifled and a noncompliant PST owner or operator would be immune from enforcement. That is not the intent of the rules as demonstrated by the fact that the rules require records to demonstrate compliance and that records must be immediately made available to the investigator. The ED must be able to ensure compliance by utilizing and relying upon this system of documentation.

In conclusion, the ED respectfully disagrees with the ALJ's conclusion that a violation of the release detection requirements for pressurized lines was not established. The evidence establishes that Respondent elected to use the annual piping tightness test as its method of release detection for its pressurized lines and that it failed to comply with the rule's "once per year" testing frequency. Respondent's admissions also establish that it elected to use the annual piping tightness test as method of release detection for the pressurized lines. Respondent provided no records to the investigator, to the ED through discovery, or at hearing to indicate it was complying with either of the monthly monitoring methods allowed by the release detection rule. Since PST owners and operators are required to maintain records to demonstrate compliance with the release detection rules, and Respondent did not provide records demonstrating compliance with the release detection rule relating to pressurized lines, it failed to comply with the Commission's release detection rule. The ED respectfully disagrees with the ALJ's conclusion that the ED did not prove this second instance of Respondent's violation of the release detection rule.

IV. The ED's recommended penalty is appropriate for this case; it is consistent with the Penalty Policy and further adjustment for other factors is inappropriate and unwarranted.

The ED's recommended penalty is appropriate in this case and is in accordance with the TCEQ Penalty Policy. This is a typical routine enforcement case; no downward adjustment to the penalty as "Other Factors" is warranted. Ignoring the Penalty Policy for routine enforcement cases could lead to arbitrary penalties and inefficient enforcement.

A. The ED's recommended penalty amount is appropriate because it conforms to the Penalty Policy and was calculated considering all factors in this case.

The ED's recommended penalty amount for this case conforms to the approved Penalty Policy by considering this case's relevant factors in ways prescribed by the Penalty Policy, but it is also one of the lowest, if not the lowest, possible amount allowed by the Penalty Policy. The evidence demonstrates at least six instances of violation,²²⁶ yet the ED's recommended penalty contains only two violation events.²²⁷ For all the reasons described in this section, the ED's recommended penalty appropriately reflects the gravity of Respondent's violations, Respondent's history of noncompliance with environmental laws and rules, Respondent's actions demonstrating its good faith, and other factors that justice requires be considered. Furthermore, the ED's recommended penalty is the lowest amount possible under the Penalty Policy, and could have been approximately six times as much.²²⁸

1. The recommended Violation Base Penalty for each violation was calculated considering each violations' harm, Respondent's size, and number of violation events.

The Penalty Policy directs the ED to recommend a penalty that is appropriate for the type of violation(s) that occurred. In doing so, the Penalty Policy instructs the ED to consider factors such as the statutorily set maximum amount that can be assessed for the violation, the type of harm resulting from the violation, and the duration that the violation continued to occur. The Penalty Policy also instructs the ED to consider the propriety of his recommended penalty amount "based upon the size of the respondent's site, or its potential volume of pollutants, or

²²⁶ There are at least four instances of a violation of corrosion protection requirements because at least four UST system components lacked corrosion protection--three submersible pumps and one tank, as discussed above. There are two instances of violation of the release detection requirements—one instance regarding the leak line detector and one regarding the pressurized piping.

²²⁷ See ED-5.8 at 3 and 5.

²²⁸ See *infra* Parts IV.A.1.a. and IV.A.1.b. (describing how the ED assessed both the minimal number of violation events and consolidated two violations into one, both resulting in substantial reductions to the Total Base Penalty for the violations in this case).

both.”²²⁹ After factoring in all of these considerations, the ED arrives at “Violation Base Penalties,” which are added together to result in a “Total Base Penalty.” Further adjustments to the Total Base Penalty may be warranted by other contextual factors,²³⁰ but the Total Base Penalty is a component of the ED’s eventual recommended penalty that is meant to reflect factors relevant to the violations specifically.

The ED’s determination of an appropriate penalty for a violation begins with considering the maximum amount that can be assessed under state law. Under the Texas Water Code, the Commission has the authority to assess up to \$25,000 for every day that a UST law or rule is violated.²³¹ The ED thereafter reduces his recommended violation base penalties to consider other factors, but his starting point for each violation’s penalty calculation is what is allowed under statute.

The first such factor the Penalty Policy directs the ED to consider is what type of harm results from the violation committed. The Penalty Policy states that “violations will be broken down into two categories—those that harm or have the potential to harm the environment, and/or human health[,] and those that are related to documentation.”²³² For the former, the violation “will be evaluated to determine whether there has been a release and will be categorized as either an actual release or a potential release.”²³³ In this way, the ED ensures his recommended penalty will be appropriate for violations whose harm is from an actual release of contaminants into the environment, and for violations whose harm is from just the created potential for such a release. Whether actual or potential, the degree of the violation’s harm is then assessed through a specific procedure based on distinctions between “major,” “moderate,” or “minor.”²³⁴ For a violation creating a potential release of contaminants into the environment, the Penalty Policy considers it to cause a major harm if “[h]uman health or the environment will

²²⁹ ED 7 at 09.

²³⁰ See *infra* Parts IV.A.2–IV.A.6 (elaborating on how the Penalty Policy instructs the ED to recommend a penalty appropriate for a respondent’s circumstances and actions, as opposed to just the nature of the violation(s) it committed).

²³¹ See ED Ref. P at 02022 (listing the maximum penalty amounts that the Commission can assess for violations of specific chapters of different statutory codes or the rules promulgated therefrom, and going on to say that “[t]he amount of the penalty for all other violations within the jurisdiction of the commission to enforce may not exceed \$25,000 a day for each violation”).

²³² ED 7 at 11–12.

²³³ *Id.* at 12 (also instructing the ED to here utilize an “Environmental, Property and Human-Health Matrix,” as opposed to a “Programmatic Penalty Matrix”).

²³⁴ See *id.* at 12–16 (directing the ED to consider the degree of harm a particular pollutant would cause to the environment or human health upon the release of that pollutant).

our could be exposed to pollutants that would exceed levels that are protective of human health or environmental receptors. . . .”²³⁵

If the ED determines that a respondent’s violation posed a potential, major harm, how that affects the ED’s penalty determination for that violation depends on whether Respondent’s activities qualify it to be a “major source” or a “minor source.” This is because the degree of harm posed by a violation is affected by the size of a respondent’s regulated facility or the volume of pollutants involved in its operations. The Penalty Policy provides specific criteria that must be met for a respondent’s facility to be considered a major source.²³⁶ Those criteria are specific to the type of activity occurring at the facility, and for UST facilities, a facility is a major source if its throughput of regulated substances is 50,000 gallons or greater per month.²³⁷ If a respondent’s facility is a major source, the Penalty Policy considers a UST violation causing a potential, major harm to warrant a reduction to 30% of the maximum allowed under statute.²³⁸ If, however, Respondent’s facility is a minor source, the same violation would warrant a reduction to 15% of the maximum allowed under statute.²³⁹ Respondent in this case is a major source because its monthly throughput of regulated substances through its UST system is approximately 60,000 gallons per month.²⁴⁰

In the present case, the ED applied the Penalty Policy and classified all Respondent’s violations here as violations with potential, major harms. They are all potential because Respondent’s violations are not documented to have caused any actual release of regulated substances from its USTs but instead because they create a risk of that happening.²⁴¹ They all result in major harms because the release of a UST system’s regulated substances into the environment could exceed protective levels by leaking onto the ground’s surface a fuel that is both ignitable and harmful to wildlife, groundwater, and surface water if it runs into any nearby creek.²⁴² Furthermore, the ED assessed the penalties for these violations by appropriately considering Respondent’s facility to be a major source. With all these factors in mind, the ED

²³⁵ *Id.* at 14.

²³⁶ ED 7 at 09–11.

²³⁷ *See id.* at 10 (identifying “Petroleum Storage Tank” as the relevant program area).

²³⁸ *See id.* at 16 (organizing Penalty Policy instruction into “Table 6: Environmental, Property and Human-Health Matrix”).

²³⁹ *Id.*

²⁴⁰ *See* ED 5 at 02 (“Throughput for this retail convenience facility is approximately 60,000 gallons per month.”); Test. of John Duncan, Audio Recording Two at 0:59, 1:04 (stating Respondent’s facility is a “major source”).

²⁴¹ *See supra* Parts II and III (describing the purpose of the corrosion protection and release detection requirements insofar as the harm they are meant to prevent, and that the failure of fulfilling these requirements creates a risk that regulated substances can leak into the environment).

²⁴² *See* Test. of John Duncan, Audio Recording Two at 0:59, 1:04 (describing this harm as existing for any actual or potential release of such a regulated substance into the environment).

reduced his recommended penalty for each violation to be 30% of the maximum allowed by statute for each violation.

Under the Penalty Policy's instruction, the ED also ensures a violation's penalty amount is appropriate by considering how long it was documented to occur. The Penalty Policy refers to a violation's duration through determining a number of "violation events," which are determined to have intervals appropriate to the circumstances of the violation.²⁴³ Depending on the violation, the ED might determine violation events to be (1) discrete instances or (2) intervals of time meant to account for a violation that continues to occur for a period.²⁴⁴ To guide the ED in determining how to divide a continuing violation into temporal intervals, the Penalty Policy directs the ED to consider the violation's impact.²⁴⁵ Violations causing potential, major harms, as construed by the Penalty Policy, call for their violation events to occur as frequently as every month.²⁴⁶ The ED's recommended penalty reflects that he determined Respondent's violation events differently for each violation, as described below.

a. The recommended Violation Base Penalty for Violation 1 (corrosion protection) is in accordance with the Penalty Policy; it is also a low penalty for this violation since it is treated as only one event.

One of Respondent's violations here is for its failure to provide corrosion protection for its UST system. On April 8, 2014, an investigator documented that Respondent did not have sufficient corrosion protection for its UST system, and the ED recognizes that Respondent installed and tested the sufficiency of its needed corrosion protection system on August 4, 2014.²⁴⁷ Respondent's failure to have its needed corrosion protection system is a continuing violation with a potential, major harm, which results in the ED being able to assess two violation events to account for the two months of the documented continuing violation. Instead, the ED assessed a single violation event, at a quarterly interval, beginning on April 8, 2014, and ending on June 24, 2014, when the ED calculated what penalty would be

²⁴³ See ED 7 at 17 (granting the ED a degree of discretion by requiring he assess violation events depending on the "number of times the violation is observed, the specific requirement violated, the duration of the violation, and other information about the case").

²⁴⁴ ED 7 at 17.

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 18 (describing these violation events to be construed "[u]p to monthly," meaning that they could be construed with less frequently occurring intervals but not more).

²⁴⁷ See *supra* Part II (describing the TCEQ's discovery of Respondent's lack of a corrosion protection system, and the TCEQ's receipt of documentation for Respondent's action to correct its violation).

appropriate for this violation.²⁴⁸ This both accords with the Penalty Policy and benefits Respondent by assessing the minimum number of violation events possible. Documentation and discretion exists for the ED to have instead assessed more violation events, by both construing violation events as monthly instead of quarterly, and extending the duration of Respondent's noncompliance. Instead of a single violation event, the ED could have found as many as four. Doing so would have quadrupled Respondent's penalty for this violation.

When considering the statutory maximum for this violation, that Respondent's facility is a "major site," the type of potential harm resulting from this violation, and the number of violation events, the ED's recommended Violation Base Penalty for these violations is \$7,500. This is the minimum amount for these violations, and as just described, could have instead been as much as \$30,000 and still consistent with the approved Penalty Policy.

b. The recommended Violation Base Penalty for Violation 2 (release detection) is in accordance with the Penalty Policy; it is also a low penalty for this violation since it is treated as only one event.

Respondent's other violations here were for its failure to provide release detection for its UST system's pressurized piping. Specifically, Respondent had failed to timely conduct its needed annual line leak detector test and annual piping tightness test. On April 8, 2014, an investigator documented that Respondent had failed to conduct these tests within the preceding year, and the ED recognizes that Respondent had these tests subsequently done on April 14, 2014.²⁴⁹ For the purposes of determining violation events, the Penalty Policy describes violations like these to be discrete events.²⁵⁰

The ED recommended the minimum penalty amount for these violations by assessing Respondent's two failures to conduct these two tests as one single violation event. Even though these are two different tests independently required under UST rules, and each one would alone be an actionable violation, the ED combined them to treat them as one violation for the purposes of their penalty calculation. In this way, the ED's recommended penalty amount is the least it can be under the Penalty Policy—the ED also had the discretion to ask for penalty

²⁴⁸ See ED 8 at 03033 ("One quarterly event is recommended based on documentation of the violation during the April 8, 2014 investigation to the June 24, 2014 screening.").

²⁴⁹ See *supra* Part III (describing Respondent's obligation to conduct these release detection tests on its UST system's associated piping and the investigator's discovery of when Respondent had last conducted these tests).

²⁵⁰ See ED 7 at 17 ("[Discrete violations] involve practices or actions that do not occur continuously. If they recur, they do so in individual instances that is separate in time.")

amounts for each release detection violation, which would have effectively doubled the penalty amount here.

When considering the statutory maximum for this violation, that Respondent's facility is a "major site," the type of potential harm resulting from this violation, and the number of violation events, the ED's recommended Violation Base Penalty for these violations is \$7,500. This is the minimum amount for these violations, and as just described, could have instead been \$15,000 and still consistent with the approved Penalty Policy.

2. The ED's recommended penalty was enhanced to account for Respondent's compliance history.

As directed by the Penalty Policy, the ED here considered Respondent's history of having failed to comply with UST laws and rules, and the ED adjusted his recommended penalty accordingly. The Penalty Policy directs the ED to consider any history of a respondent's noncompliance as manifested through a number of components, such as documented notices of violation, or final enforcement orders.²⁵¹

In the present case, Respondent has a history of noncompliance with PST laws and rules, so the ED enhanced Respondent's penalty. In accordance with the Penalty Policy,²⁵² the ED enhanced Respondent's penalty by 20% because Respondent resolved a previous enforcement case through an agreed final enforcement order containing a denial of liability.²⁵³ Respondent's history of noncompliance is especially relevant to the case here, because as reflected in the prior enforcement order, Respondent's noncompliance was with its obligations to conduct annual tightness tests for its UST system's associated piping.²⁵⁴ The ED has before alleged Respondent violated 30 TEX. ADMIN. CODE § 334.50(b)(2), and the ED here proved Respondent violated it again.²⁵⁵

3. The ED's recommended penalty was neither enhanced nor reduced to account for any bad faith or culpability.

Following the Penalty Policy, the ED did not enhance his recommended penalty because of any bad faith on Respondent's part. According to the Penalty Policy, such an enhancement

²⁵¹ ED 7 at 20–21 (identifying different components that warrant adjusting a penalty amount, either positively or negatively, and specifying the degree to which the penalty should be adjusted to account for each such component in a respondent's history with the TCEQ).

²⁵² See ED 7 at 20 (directing the ED to enhance a respondent's penalty for each such final enforcement order).

²⁵³ ED Ref. K.

²⁵⁴ See *id.* at 02 (specifying that Respondent was documented on January 25, 2011, to have committed this prior violation of UST laws and rules at issue in this case).

²⁵⁵ See ED Ref. A. at 21.

for culpability is appropriate if a respondent “could have reasonably anticipated and avoided” its violations.²⁵⁶ The Penalty Policy does elsewhere recommend enhancements for similar justifications, and “culpability” penalty enhancements are only appropriate when not captured otherwise.²⁵⁷

In the present case, the ED did not recommend enhancing his recommended penalty because of any bad faith or culpability by Respondent.²⁵⁸ The penalty amount does not reflect an allegation that Respondent intentionally violated environmental state laws or rules, except that the penalty amount does account for a prior enforcement order resolving a prior instance of a violation at issue here.

4. The ED’s recommended penalty was reduced to account for Respondent’s “Good Faith Efforts to Comply.”

Pursuant to the Penalty Policy’s guidance, the ED here considered whether Respondent’s actions demonstrated any “good faith,” and lowered the recommended penalty amount because of the dates on which Respondent returned to compliance. The Texas Water Code requires penalty amounts to be calculated considering any actions demonstrating a respondent’s “good faith,”²⁵⁹ and the Penalty Policy elaborates on how to consider any such actions by looking at their quality and timing.²⁶⁰ Regarding the quality of actions that a respondent takes to completely return a violation to compliance, a respondent’s action is “ordinary” if it “correct[s] the violations as expected under the rules,” or it is “extraordinary” if it corrects the violations and “goes beyond what would be expected under the rules.”²⁶¹ For the timing of a respondent’s corrective actions, an action is timely if it was completed either (1) before the ED’s issuance of a Notice of Violation (“NOV”) or Notice of Enforcement (“NOE”), or (2) before the ED’s initial settlement offer or filing of a petition.²⁶² A respondent’s ordinary corrective actions warrant reducing the penalty by 25% if completed before the ED’s issuance of an NOV or NOE, or by 10%

²⁵⁶ See ED 7 at 22 (indicating the ED more commonly enhances a penalty due to culpability when a licensed individual commits a violation, because licensing demands knowledge of compliance requirements, and the Penalty Policy might otherwise not capture violations occurring at different locations but committed by the same individual).

²⁵⁷ See *id.* (noting that because “other forms of culpability, such as NOV’s and orders, are included in compliance history, these will not be considered for culpability determination”).

²⁵⁸ ED 8 at 01 (concluding “Respondent does not meet the culpability criteria”).

²⁵⁹ See ED Ref. P at 01 (obligating penalties to be calculated considering any objective “good faith” of a Respondent, as demonstrated through “actions taken by the alleged violator to rectify the cause of the violation. . .”).

²⁶⁰ See ED 7 at 22–23 (defining “quality” as “the degree to which the respondent took action” and “timeliness” as “the point when the respondent completed actions to correct the violations”).

²⁶¹ ED 777*Id.* at 23.

²⁶² *Id.*

if completed thereafter but before the ED's issuance of an initial settlement agreement or filing of his petition.²⁶³

In the present case, the ED followed the Penalty Policy's instructions and granted a 25% penalty reduction to the Violation Base Penalty for one of Respondent's two violations. First, the ED established that: as of April 8, 2014, Respondent had failed to provide corrosion protection for its USTs; the ED issued an NOE on June 18, 2014 and offered a settlement agreement on July 3, 2014; and Respondent installed a corrosion protection system on July 30, 2014.²⁶⁴ According to the Penalty Policy's guidance, Respondent's correction of this violation does not demonstrate "good faith" sufficient to reduce the penalty because Respondent installed its corrosion protection system a nearly month after the ED had offered a settlement agreement.

Second, the ED established that on April 8, 2014, Respondent had failed to conduct required release detection testing on the piping associated with its UST system, *i.e.*, an annual line leak test and a piping tightness test.²⁶⁵ The ED also established that Respondent conducted its needed line leak test and piping tightness test on April 14, 2014, before the ED issued its NOE on June 18, 2014.²⁶⁶ Conducting these tests was sufficient to bring Respondent back into compliance for this pair of release detection violations, and are exactly the types of tests identified in the TCEQ's release detection rules.²⁶⁷ In accordance with the Penalty Policy, the ED reduced these violations' base penalty by 25% because Respondent satisfied these release detection requirements, via methods expected under the rules, before the ED issued an NOE.

5. The ED's recommended penalty was neither enhanced nor reduced to account for any delayed costs.

The ED's recommended penalty does not include an enhancement to account for any benefit received by Respondent for having delayed incurring its costs of compliance, and this is in accordance with the Penalty Policy. In certain scenarios, the Penalty Policy instructs the ED to enhance his recommended penalty to account for money a respondent saves by delaying

²⁶³ *Id.*

²⁶⁴ *See supra* Part II.

²⁶⁵ *See supra* Part III.

²⁶⁶ *See id.*

²⁶⁷ *See* Test. of Janie Munoz, Audio Recording Two at 0:09, 0:18 (identifying the tests Respondent conducted as exactly those required under the release detection rules).

expenses necessary to comply with environmental laws and rules.²⁶⁸ Even though a respondent incurs such an expense eventually, the delay itself can afford a benefit to a respondent in the form of any interest earned on the money that should have been spent earlier. This is contrasted by the benefit a respondent receives through avoided costs of compliance, which are those that a respondent avoids altogether and would never be incurred at all.²⁶⁹

In the present case, the ED did not adjust his recommended penalty amount to account for any economic benefit Respondent received by delaying a cost of compliance.²⁷⁰ The ED proved Respondent had failed to provide corrosion protection for its UST system but that Respondent installed the needed corrosion protection.²⁷¹ By delaying the expense of installing this, the ED does not argue Respondent's economic benefit rose to the level that the Penalty Policy directs it be accounted for in the penalty.²⁷² The ED also proved Respondent had failed to conduct required release detection tests on its UST system's associated piping but that Respondent eventually had this corrected.²⁷³ Respondent did receive an economic benefit by pushing back when it conducted these tests, but because Respondent is under a continuous obligation to have these tests done annually, Respondent entirely avoided a portion of these tests' cost.²⁷⁴

6. The ED's recommended penalty was enhanced to account for "Other Factors as Justice May Require," in accordance with the Penalty Policy.

The ED also adhered to the Penalty Policy when he determined this case presented no factors, other than avoided costs, for which "justice may require" adjusting his recommended penalty amount. The Texas Water Code requires the Commission to "consider any other matters that justice may require" when imposing a penalty,²⁷⁵ and the approved Penalty Policy describes

²⁶⁸ See ED 7 at 23–25 (outlining common scenarios that justify a penalty enhancement to account for economic benefit a delayed cost, and setting a floor value below which such an economic benefit would not affect the recommended penalty amount).

²⁶⁹ The Penalty Policy directs such avoided costs to justify an enhancement due to an "other factor as justice may require." *Infra* Part IV.A.6.

²⁷⁰ See ED 8 at 01 (showing no enhancement for this to the case's Total Base Penalty).

²⁷¹ See *supra* at Part II.

²⁷² See ED 8 at 04 (calculating Respondent's economic benefit here to be \$121, making it an irrelevant factor according to the Penalty Policy).

²⁷³ See *supra* at Part III.

²⁷⁴ *Infra* notes 284 and 285, and accompanying text.

²⁷⁵ See ED Ref. P (listing many different things that must be considered when determining a penalty amount, and then stating more broadly that any other factors should also be considered if justice requires them).

more specifically when that may be appropriate.²⁷⁶ Specifically, the Penalty Policy describes appropriate circumstances as when a respondent saved money by avoiding costs of compliance, when a respondent itself voluntarily notifies the TCEQ of a violation, when a respondent is penalized because the compliance history of its facility is negatively affected by violations by a previous owner, and when a respondent intentionally violates environmental law or rule.²⁷⁷

Though the Penalty Policy does explain the ED “may recommend adjustment of the penalty amount, case by case, upon a consideration of factors unique to the situation,”²⁷⁸ what qualifies as an “other factor” to be considered here must exclude contextual factors considered elsewhere in the Penalty Policy. As explained above, the Penalty Policy elsewhere directs the ED to consistently consider a violation’s duration and harm,²⁷⁹ and a respondent’s compliance history,²⁸⁰ culpability,²⁸¹ good faith efforts to comply,²⁸² and benefit from delaying compliance costs.²⁸³ To not limit “other factors as justice may require,” excluding these factors would result in them affecting a penalty amount to degrees not contemplated by the approved Penalty Policy.

In the present case, the ED applied the Penalty Policy and determined that the only contextual factor that should be addressed as an “other factor as justice may require” is Respondent’s avoided cost for having failed to conduct leak detector and tightness tests for its UST system’s associated piping.²⁸⁴ By not conducting these tests on time, Respondent saved an estimated \$118 by failing to ensure its UST system’s associated piping was sufficiently tested during this time period.²⁸⁵ Instead, Respondent conducted these tests after they were due,

²⁷⁶ See ED 7 at 25–26 (describing upward or downward adjustments for “other factors” as possibly appropriate when a respondent itself notifies the TCEQ of the violation, when a respondent is penalized for its facility’s poor compliance history classification that had resulted from violations by the facility’s previous owner, and when a respondent’s violations were intentional).

²⁷⁷ *Id.*

²⁷⁸ ED 777*Id.* at 25.

²⁷⁹ See *supra* Part IV.A.1. (describing how the ED’s recommended penalty was not only determined consistently with the Penalty Policy but is also the least amount the ED could possibly determine when considering the size of Respondent’s facility and the duration of each violation in this case).

²⁸⁰ See *supra* Part IV.A.2. (explaining that the Penalty Policy requires a penalty be enhanced if a respondent, as here, has a documented history of not complying with environmental laws and rules).

²⁸¹ See *supra* Part IV.A.3. (stating the Penalty Policy may direct the ED to enhance a penalty amount when documentation shows a respondent should have known about its environmental obligation yet committed a violation when it nevertheless failed to fulfill it).

²⁸² See *supra* Part IV.A.4. (describing when and to what extent a respondent may be eligible for a penalty reduction on account of completely returning to compliance).

²⁸³ See *supra* Part IV.A.5. (identifying how and when a penalty should be enhanced to account for a respondent’s saving money by delaying but eventually spending money to be in compliance with environmental laws and rules).

²⁸⁴ See Test. of John Duncan, Audio Recording Two at 1:08 (explaining that Respondent was estimated to have saved \$118 during this period for not conducting these tests when due, a number determined from an estimate used consistently across similar enforcement cases).

²⁸⁵ *Id.*

resulting in Respondent's next deadline to conduct these tests being pushed back further. Were Respondent's avoided cost not accounted for here, Respondent would never have to incur it.

B. The ALJ's recommended penalty amount unnecessarily reduces the penalty when the ED acted fairly; Respondent's actions did not warrant additional reductions; and Respondent admitted to the violations and has been consistently late in complying with the regulations.

The ED respectfully disagrees with the ALJ's recommended reduction of the payable penalty in this case. The ED applied the Penalty Policy consistently and fairly in this case. This is a typical enforcement case and does not warrant deviating from the Commission approved Penalty Policy. Respondent's actions are not atypical and do not warrant any reductions beyond what has already been afforded. Furthermore, Respondent admitted to the violations and did not object to the payable penalty calculation.

1. The ALJ's recommended penalty amount deviates from the Penalty Policy, but this enforcement case's circumstances are typical and no deviation is warranted.

The ED respectfully disagrees with the ALJ's recommended penalty in her Proposal for Decision, as the ED applied the Penalty Policy in a normal, consistent way. This is a standard case. The uniformity and the consistency that the Penalty Policy creates allows the TCEQ to regulate in a fair and consistent manner across the entire regulated community. Nothing in this case necessitates straying away from that policy.

The ALJ recommends adjusting the ED's recommended penalty for Respondent's release detection violations because "justice may require" doing so.²⁸⁶ Namely, the ALJ found persuasive that Respondent had attempted (but failed) to comply with release detection requirements, and that Respondent returned to compliance with the requirements after 17 days.²⁸⁷ Respondent received a good faith reduction in accordance with the Penalty Policy for these efforts.²⁸⁸ Any additional reductions are unwarranted.

The Penalty Policy directs TCEQ staff to make downward adjustments to penalties if, for example, a respondent has (1) self-reported violations where no self-reporting is required under

²⁸⁶ See PFD at 15 ("[T]he ALJ concludes that justice may require the reduction of the recommended penalty of \$7,177 associated with Violation No. 2 under Texas Water Code § 7.053(4)" (footnote omitted)).

²⁸⁷ *Id.*

²⁸⁸ ED 8 at 5.

the law, or (2) purchased a noncompliant facility and the resulting penalties do not reflect efforts of the new owner.²⁸⁹ Neither of those situations happened here. Respondent did not self-report these violations.²⁹⁰ Respondent is not a new owner—it purchased the Facility in 2004.²⁹¹ While the Commission is free to adjust the penalty for “Other Factors That Justice May Require,” the ED respectfully suggests that no such factors exist in this case and the ED respectfully disagrees with the ALJ.

2. The ALJ's recommended penalty resulted from Respondent's inconsistent and legally irrelevant basis for violation; Respondent is responsible for the violation.

The ED respectfully disagrees with the ALJ's conclusion that Respondent should be afforded more reduction for good faith beyond the reduction set forth in the Penalty Policy. The ALJ reduced the penalty because, as stated in the PFD, Respondent, “had attempted to schedule the tests, but the company that performs his testing had a backlog and could not perform the tests in a timely manner” and it “acted in good faith and did not intentionally violate the TCEQ's rules.”²⁹² At the time of the investigation though, Respondent said it was cold weather that delayed the testing.²⁹³ The reasons provided by Respondent are inconsistent. Moreover, it is not atypical for respondents to provide unsubstantiated (or even substantiated) reasons for non-compliance. Subjective reductions to penalties based on a respondent's reasoning could lead to arbitrary penalties. While one person may think a particular reason warrants a particular reduction, another person may think differently—leading to inconsistent penalties. The Penalty Policy is designed to prevent this. The Penalty Policy works.

Respondent's reasoning further lacks merit because its track record shows it has been late every year with its tests since 2012.²⁹⁴ Respondent was not just late in 2014, but has been late every year since beginning to test at the Facility. In that regard, Respondent bought the gas station in 2004,²⁹⁵ but did not conduct any testing from April of 2004 to March of 2011.²⁹⁶ Respondent has repeatedly not complied with the annual testing requirement and failed to test

²⁸⁹ ED 7 at 25-26 (2014 Penalty Policy).

²⁹⁰ See ED 5.

²⁹¹ Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:35.

²⁹² PFD at 15.

²⁹³ ED 5.4 at 16.

²⁹⁴ ED Ref. A at 18 (detailing, in Respondent's answer, that tests had been conducted on 3/23/2011, 3/27/2012, 3/29/2013, and 4/14/2014).

²⁹⁵ Test. of Sivignanam Manickavasagar, Audio Recording Two at 0:35.

²⁹⁶ ED Ref. A at 21 (Respondent's Answer with attached 2011 UTA Investigation Report) (“The facility did not have release detection for the piping/line. Line leak testing has not been conducted since April 2004.”).

at all for a number of years, thus the ED respectfully disagrees that Respondent warrants reductions beyond what the Penalty Policy calls for.²⁹⁷

To the extent Respondent alludes that it has been learning the regulations along the way,²⁹⁸ Respondent is responsible for knowing and complying with the regulations when Respondent first chooses to engage in a regulated business; ignorance is no defense. An enforcement case in 2011 for similar violations should have put Respondent on notice about the release detection regulations.²⁹⁹ Respondent, furthermore, took UST Facility operator training in 2012.³⁰⁰ Then Respondent continued to violate the rule. Additional “good faith” reduction beyond what the Penalty Policy provides is unwarranted. One of Respondent’s claims is that he did not know what the requirements were. Yet as stated by an ALJ in another case, “Respondent’s lack of knowledge is not a defense to this enforcement action against it.”³⁰¹ Thus, there should be no reduction of the payable penalty.

3. The ALJ’s recommended penalty amount differs from the ED’s despite Respondent admitting to the violations and despite Respondent’s failure to object to the ED’s testimony justifying his recommended penalty.

Respondent left the evidentiary hearing prior to the ED’s testimony regarding the calculation of the penalty, never objecting to penalty calculation, and admitted to the violations—three facts that further illustrate why the penalty should not be reduced. As the ALJ stated in the PFD, “Because Mr. Manickavasagar left the evidentiary hearing before the ED

²⁹⁷ As stated above, Respondent received a good faith reduction of \$1,875 dollars for achieving compliance regarding the line and piping testing before the Notice of Enforcement letter was sent out, in accordance with the TCEQ’s Penalty Policy that it applies consistently across the entire regulated community.

²⁹⁸ Test. of Sivagnanam Manickavasagar Audio Recording Two at 2 (Respondent described at the hearing that a prior TCEQ investigator told him about many of the requirements during a 2011 investigation, and Respondent then stated, “So, these-these are the things we learn . . . We learn from the people. . . . It’s not like I went to school for running a convenience store.” The ED disagrees with Respondent that gas station owners and operators can wait and learn the regulatory requirements of the petroleum storage tank programs of the state as time goes on. Rather, before beginning to sell volatile, regulated substances, such as gasoline, owners and operators should be familiar with all of the rules administered under the law. Additionally, owners and operators are required to undergo UST Facility Operator training. Respondent received such training in 2012). See 30 TEX. ADMIN. CODE §§ 334.602(b)(1)(B) and (b)(2)(B), and 334.603(a).

²⁹⁹ See ED Ref. A at 21 (noting, in UTA 2011 Investigation Report, Respondent’s “[f]ailure to provide proper release detection for the piping associated with UST system.”)

³⁰⁰ ED 3 at 7 (Certificate of Completion awarded to Sivagnanam Manickavasagar for completing TPCA Class A and B UST Facility Operator Training Course).

³⁰¹ PFD for *TCEQ v. Brushy Landing, LLC*, SOAH DOCKET NO. 582-13-5790, at 4.

presented his evidence on the administrative penalty, the ED's calculation of the penalty is uncontested."³⁰²

Despite Respondent admitting to the violations at the hearing,³⁰³ the ALJ recommended reducing the penalty to \$2,000. Directly before leaving the hearing prior to the ED's testimony regarding the penalty, Respondent said, "I never denied anything. I did it. Might be a little late, I did it. That's all I can say. But the money problem; I own the money. The money belongs to me. It doesn't belong to somebody sitting on a desk." Respondent then left the hearing.

To reiterate, Respondent admitted to both the line testing violation and the corrosion protection violation at the hearing. Respondent and the ALJ had an exchange that pointed to the line testing occurring in April of 2014 and the installation of corrosion protection in July of 2014.³⁰⁴ The ALJ asked if the tanks were brought up to the current regulations in July of 2014; Respondent said "exactly."³⁰⁵ The ALJ then asked if the line test was done in July of 2014; Respondent said no, the line test was done in April and the corrosion protection was done in July.³⁰⁶ Thus, there should be no reduction of the payable penalty.

4. Respondent seems dismissive regarding enforcement of these violations, is not accepting of any consequences to the violations, and has repeated the same violations for years; a further reduction of the penalty beyond what the Penalty Policy allows is not warranted under these circumstances.

Throughout this case, Respondent has been uncooperative. He refused to comply with discovery despite being compelled and ordered by the ALJ to do so,³⁰⁷ on several occasions he interrupted the testimony of the ED's witness,³⁰⁸ he left the evidentiary hearing prior to the ED's testimony regarding the calculation of the penalty,³⁰⁹ has expressed dismissiveness and frustration at the ED's efforts to enforce laws and rules, such as when he stated: "So give me my five minutes and I am out of here . . . Give me my five minutes-I am out of here."³¹⁰

³⁰² PFD at 15.

³⁰³ Test. of Sivignanam Manickavasagar, audio recording Audio Recording Two at 0:42-0:44.

³⁰⁴ See Test. of Sivignanam Manickavasagar, audio recording Audio Recording Two at 0:42-0:44.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ See ED Ref. F.

³⁰⁸ See generally, Audio Recordings One and Two.

³⁰⁹ *Id.*

³¹⁰ Test. of Sivagnanam Manickavasagar, Audio Recording Two at 0:13.

There is never any discussion from Respondent about stopping his chronic untimely compliance, only of frustration that the ED would enforce the laws and rules. No further reduction beyond what the Penalty Policy allows is warranted.

5. Respondent's deemed admissions further support the ED's recommended penalty.

Respondents deemed admissions—which warrant some weight—support the ED's recommended penalty:

- Respondent's deemed admission: the penalty of eighteen thousand one hundred twenty-nine dollars (\$18,129.00) recommended by the Executive Director is reasonable given the alleged violations in this enforcement matter and considering the factors set forth in TEX. WATER CODE § 7.053.³¹¹
- Respondent's deemed admission: the penalty of eighteen thousand one hundred twenty-nine dollars (\$18,129.00) recommended by the Executive Director is necessary given the alleged violations in this enforcement matter and considering the factors set forth in TEX. WATER CODE § 7.053.³¹²
- Respondent's deemed admission: the administrative penalty was calculated in accordance with the April 1, 2014 TCEQ Penalty Policy.³¹³
- Respondent's deemed admission: the April 1, 2014 Penalty Policy incorporates the factors in TEX. WATER CODE § 7.053 into the penalty calculation.³¹⁴
- Respondent's deemed admission: [it] can afford to pay the full amount (\$18,129.00) of the administrative penalty.³¹⁵
- Respondent's deemed admission: the total base penalty was properly enhanced to account for the March 18, 2012 TCEQ Agreed Order Docket No. 2011-1272-PST-E.³¹⁶

Respondent failed to respond to the ED's discovery requests. The ED filed a motion to compel Respondent's responses.³¹⁷ The ALJ granted the ED's motion, ordering that "Respondent must respond to the ED's February 18, 2015 discovery requests by **May 4, 2014**."³¹⁸ Respondent again failed to respond to the ED's discovery requests. Therefore, the ED filed a motion for

³¹¹ ED Ref. C at 11, (Request for Admission No. 53).

³¹² Ref-C at 11, *Id.* (Request for Admission No. 54).

³¹³ Ref-C at 11 (Request for Admission No. 55).

³¹⁴ Ref-C at 11 (Request for Admission No. 56.).

³¹⁵ Ref-C at 11 (Request for Admission No. 57).

³¹⁶ Ref-C at 11 (Request for Admission No. 58).

³¹⁷ See ED Ref. -E.

³¹⁸ ED Ref. F at 2 (emphasis in original).

sanctions requesting in-part that his Requests for Admission be deemed admitted. The ALJ granted the ED's motion and deemed the Requests for Admissions admitted.³¹⁹

The deemed admission in this case should be given some weight. Generally, deemed admissions are admissible against the party to whom the requests for admissions were addressed³²⁰—in this case Respondent. A request for admission, once deemed, is a judicial admission and the matter admitted is “conclusively established.”³²¹ Moreover, there is no evidence that contradicts the deemed admissions; Respondent admits the appropriateness of the penalty. If the trier of fact returns findings that contradict a judicial admission, the admission must be accepted as controlling.³²²

The ED recognizes Respondent is pro se. The ED is not asking that he not be required to put on evidence of the appropriate penalty. The ED has provided evidence in support of the penalty—evidence that Respondent did not dispute, or even bother to hear. The ED is asking that the deemed admissions be given some weight, and not none.

Because this is a routine and typical enforcement case, Respondent did not object to the penalty, admitted to both violations, and has a track record of repeated violations,³²³ the administrative penalty in this case should not be reduced.

V. The ED's exceptions to specific provisions in the ALJ's Proposed Order.

The ED submits the following exceptions to the language in the Proposed Order. As Attachment A, the ED provides a red-lined version of the proposed order reflecting the proposed order including the ED's exceptions.

A. REVISION TO CAPTION AND INTRODUCTORY PARAGRAPH.

According to the Texas Secretary of State website, Respondent's name is spelled in all capitalized letters as VASAN, INC.³²⁴ The ED respectfully recommends that references to Respondent's name be changed in the caption and introductory paragraph of the Proposed Order so that Respondent's name is spelled in all capital letters as VASAN, INC. d/b/a Mr. D's Convenience Store.

³¹⁹ ED Ref. I at 2; .

³²⁰ Tex. Rules of Civ. P. 198.3; *see, e.g., Thalman v. Martin*, 635 S.W.2d 411, 414 (Tex. 1982).

³²¹ Tex. Rules of Civ. P. 198.3; *see, e.g., Beutel*, 916 S.W.2d 685 at 694; *Marshall*, 767 S.W.2d at 700.

³²² *See, e.g., Beutel*, 916 S.W.2d at 694.

³²³ ED 9.

³²⁴ ED. 4.

B. REVISION OF PROPOSED FINDING OF FACT NO. 3.

The ED respectfully recommends that this Finding of Fact be revised as follows:

Respondent received notice of the inspection on April 8~~1~~, 2014.

The evidence in the record establishes Respondent was provided with notice of the inspection by telephone on April 1, 2014.³²⁵

C. REVISION OF PROPOSED FINDING OF FACT NO. 6.

The ED respectfully recommends that this Finding of Fact be revised as follows:

~~In his EDPRP, t~~The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$16,243 against Respondent.

The ED makes this recommendation to clarify that the Petition recommended a higher penalty than was sought at hearing.³²⁶ As discussed in Section IV above, the ED recognized Respondent's good faith efforts to bring its system back into compliance with the release detection rules and made a commensurate reduction in the penalty as instructed by the Penalty Policy. This lower penalty was not plead in the Petition in the event a default proceeding was necessary; it is the ED's policy that if Respondent failed to respond to the Petition or failed to appear at SOAH after requesting a hearing, the ED would have pursued the higher penalty plead in the Petition by not including a good faith reduction.

D. REVISION OF PROPOSED FINDING OF FACT NO. 10.

The ED respectfully recommends that this Finding of Fact be revised as follows to correct a minor typographical error:

On December 18, ~~2015~~, 2014, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for January 15, 2015, to Respondent at 211 South Main Street, Boerne, Texas 78006.

This recommended change is supported by the record.³²⁷

E. REVISION OF PROPOSED FINDING OF FACT NO. 13.

The ED respectfully recommends that this Finding of Fact be revised as follows:

On March 28, 2013, Respondent had the lines of its UST system tested. ~~Respondent attempted to schedule the annual line leak detector and~~

³²⁵ ED 5.4 at 16 (listing notification date of April 1, 2014, via telephone), 19 (indicating in "Communication History" that Respondent was contacted by investigator via telephone on April 1, 2014 to schedule investigation).

³²⁶ Compare ED Ref. A at 7 with ED 8 at 1.

³²⁷ ED Ref. A at 47.

~~pipng tightness tests prior to the April 8, 2014 inspection, but the consultant was backlogged and could not perform the tests on time.~~

As discussed in Section III, Respondent failed to comply with the Commission's release detection rule through two discrete instances. The ED respectfully recommends that the language regarding Respondent's attempts to schedule the required testing on time be deleted because Respondent's excuses for its noncompliance are legally irrelevant. As discussed in Section IV, Respondent's excuses should not be considered as a factual basis for a penalty mitigation because it has a history of noncompliance with the Commission's release detection rules which justifies an enhancement, rather than a reduction, to the penalty

F. REVISION OF PROPOSED FINDING OF FACT NO. 16.

The ED respectfully recommends that this Finding of Fact be revised as follows:

Respondent promptly brought the USTs into compliance with ~~state law~~ release detection requirements and exhibited good faith in doing so.

As discussed in Part IV, the ED recognized Respondent's efforts to bring its UST system back into compliance with the release detection rules by reducing the recommended penalty as instructed by the Penalty Policy. Under the Penalty Policy, a reduction for good faith effort to comply is appropriate for the release detection violation because of the quality and timing of Respondent's efforts to bring the system back into compliance. However, under the Penalty Policy, Respondent is not entitled to a good faith effort to comply reduction for the corrosion protection violation because Respondent installed its corrosion protection system nearly a month after the ED had offered a settlement agreement; the Penalty Policy provides no good faith reduction if compliance is achieved after an initial settlement agreement is offered.

G. ADDITION OF FINDING OF FACT NO. 17.

The ED respectfully recommends that Finding of Fact No. 17 be added as follows:

At the time of the investigation on April 8, 2014, there was inadequate corrosion protection system on three submersible turbine pumps and various related components and at least one UST at the Facility.

As discussed in Part II, the Respondent's own records demonstrate that its UST system was not compliant with the Commission's corrosion protection rule because its submersible turbine pumps, various related components, and at least one UST were not protected against corrosion.

H. ADDITION OF FINDING OF FACT NO. 18.

The ED respectfully recommends that Finding of Fact No. 18 be added as follows:

Respondent installed corrosion protection on its UST system on July 30, 2014.

This recommendation has support in the record.³²⁸

I. REVISION OF PROPOSED CONCLUSION OF LAW NO. 7.

The ED respectfully recommends that this Conclusion of Law be revised as follows:

~~The ED failed to meet met his burden of proof to establish that~~ Based on the above findings of fact, Respondent violated Texas Water Code § 26.3475(d) and 30 Texas Administrative Code § 334.49(a)(1) regarding corrosion protection of Respondent's UST system.

As discussed in Section II, the ED proved that Respondent failed to protect its UST system against corrosion.

J. REVISION OF PROPOSED CONCLUSION OF LAW NO. 8.

The ED respectfully recommends that this Conclusion of Law be revised as follows:

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 and by failing to conduct the piping tightness test annually as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III).

As discussed in Section III, Parts B and C, the ED proved that Respondent failed to test or monitor is pressurized lines in accordance with the Commission's release detection rule.

K. REVISION OF PROPOSED CONCLUSION OF LAW NO. 9.

The ED respectfully recommends that this Conclusion of Law be revised as follows:

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 (d) and 30 Texas Administrative Code §§ 334.49(a)(1) and 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).~~

As discussed in Section II, the ED proved that Respondent failed to protect its UST system against corrosion in accordance with the Commission's corrosion protection rule. As discussed

³²⁸ ED. 6.

in Section III, the ED proved that Respondent failed to test is pressurized piping in accordance with the Commission's release detection rule. As discussed in Section IV, the ED proved that the recommended penalty for the violations was calculated consistently with the Texas Water Code and the Commission's Penalty Policy.

L. DELETION OF PROPOSED CONCLUSION OF LAW NO. 10.

The ED respectfully recommends that of this Conclusion of Law be deleted. As discussed in Section III, the ED established that Respondent failed to comply with the Commission's release detection requirements for pressurized lines.

M. REVISION OF PROPOSED CONCLUSION OF LAW NO. 11.

The ED respectfully recommends that this Conclusion of Law be revised as follows and renumbered to account for the recommended deletion of proposed Conclusion of Law No. 10: A ~~\$2,000~~ \$16,243 administrative penalty should be assessed against Respondent.

As discussed in Section IV, the ED proved that the recommended penalty was calculated consistently with the Texas Water Code and the Commission's Penalty Policy.

N. REVISION OF PROPOSED ORDERING PROVISION NO. 1.

The ED respectfully recommends that this Ordering Provision be revised as follows:

Respondent is assessed an administrative penalty in the amount of ~~\$2,000~~ \$16,243 for its violation of Texas Water Code § 26.3475(a) and (d) and 30 Texas Administrative Code §§ 334.49(a)(1) and 334.50(b)(2). ~~(b)(2)(A)(i)(III).~~

As discussed in Sections II and III, the ED proved Respondent violated the Texas Water Code and the Commission's rules relating to corrosion protection and release detection. As discussed in Section IV, the ED proved that the recommended penalty was calculated consistently with the Texas Water Code and the Commission's Penalty Policy.

VI. Conclusion

For these reasons and based on the evidence in the record, the ED respectfully requests the ALJ reconsider and the Commission issue an order determining the two alleged violations occurred, recommending a penalty of \$16,243, by adopting the ED's exceptions.

Respectfully submitted,

Texas Commission on Environmental Quality

Richard A. Hyde, P.E.
Executive Director

Caroline M. Sweeney, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division



Jake Marx, Staff Attorney
State Bar of Texas No. 24087989

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CERTIFICATE OF SERVICE

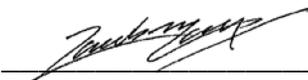
I hereby certify that on July 7, 2015, the foregoing original document and seven (7) copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas; the document was electronically filed with the Chief Clerk as well.

I further certify that on this day the foregoing document was served as indicated:

The Honorable Administrative Law Judge Kerrie Jo Qualtrough
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649
512-322-2061
Via Electronic Filing

Sivagnanam Manickavasagar, Director
VASAN, INC. d/b/a Mr. D's Convenience Store
211 South Main Street
Boerne, Texas 78006
Via First Class Mail and Certified Mail Art. No. 7013 3020 0001 1906 1082

Rudy Calderon
Office of Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087
Email: rudy.calderon@tceq.texas.gov
Via Electronic Mail



Jake Marx

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
VASAN, INC. ~~Vasan, Inc.~~ d/b/a Mr. D's Convenience Store
TCEQ Docket No. 2014-0894-PST-E
SOAH Docket No. 582-15-1630**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED) Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against VASAN, INC. ~~Vasan, Inc.~~ d/b/a Mr. D's Convenience Store (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

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 three underground storage tanks (USTs) and a convenience store with retail sales of gasoline located at 211 South Main Street, Boerne, Kendall County, Texas (the "Facility"). The USTs at the Facility are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission. Respondent's USTs contain a regulated petroleum substance as defined in the rules of the Commission.
2. A University of Texas at Arlington petroleum storage tank investigator conducted an investigation of Respondent's UST system on April 8, 2014, and documented alleged violations of UST rules.
3. Respondent received notice of the inspection on April 8~~1~~, 2014.

4. In his EDPRP, the ED alleged that Respondent failed to provide corrosion protection in violation of Texas Water Code § 26.3475(d) and 30 Texas Administrative Code § 334.49(a)(1).
5. In his EDPRP, the ED alleged that Respondent failed to provide release detection for the pressurized piping associated with the UST system in violation of Texas Water Code § 26.3475(a) and 30 Texas Administrative Code § 334.50(b)(2). The ED pleaded that Respondent had not conducted the annual line leak detector and piping tightness tests.
6. ~~In his EDPRP,~~ The ED ~~recommended~~ recommends that the Commission enter an enforcement order assessing a total administrative penalty of \$16,243 against Respondent.
7. On October 6, 2014, the ED mailed the EDPRP to Respondent at 211 South Main Street, Boerne, Texas 78006.
8. On October 27, 2014, Respondent filed an answer to the EDPRP and requested a hearing.
9. On December 9, 2014, the ED referred this matter to SOAH for a contested case hearing.
10. On December 18, ~~2015~~2014, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for January 15, 2015, to Respondent at 211 South Main Street, Boerne, Texas 78006.
11. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice, and attached EDPRP, being deemed as true, and the relief sought in the notice possibly being granted by default.
12. On May 20, 2015, Kerrie Jo Qualtrough convened the evidentiary hearing in Austin, Texas, at SOAH. Attorney Jake Marx represented the ED, and Sivagnana Manickavasagar represented Respondent.
13. On March 28, 2013, Respondent had the lines of its UST system tested. ~~Respondent attempted to schedule the annual line leak detector and piping tightness tests prior to the April 8, 2014 inspection, but the consultant was backlogged and could not perform the tests on time.~~
14. On April 14, 2014, Respondent's consultant performed the testing, 17 days after the March 28, 2014 deadline.
15. Respondent did not intentionally violate state law regulating UST systems.
16. Respondent promptly brought the USTs into compliance with ~~state law~~ release detection requirements and exhibited good faith in doing so.

17. At the time of the investigation on April 8, 2014, there was inadequate corrosion protection system on three submersible turbine pumps and various related components and at least one UST at the Facility.

16.18. Respondent installed corrosion protection on its UST system on July 30, 2014.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority. Tex. Water Code § 7.002.
2. The Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or who violates a Commission administrative rule, order, or permit. Tex. Water Code § 7.051.
3. Respondent was properly notified of the EDPRP, the opportunity to request a hearing on the alleged violations, and the proposed administrative penalties. Tex. Water Code § 7.055; 30 Tex. Admin. Code §§ 1.11, 70.104.
4. Respondent was properly notified of the hearing on the alleged violations and the proposed penalties. Tex. Gov't Code §§ 2001.051, .052; Tex. Water Code § 7.058; 1 Tex. Admin. Code § 155.27; 30 Tex. Admin. Code §§ 1.11, .12, 39.25, 70.104, 80.6.
5. 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 chapter 2003.
6. The ED's recommended penalty considered the factors required by Texas Water Code § 7.053, including the alleged violation's 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 Respondent; Respondent'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.
7. ~~The ED failed to meet his burden of proof to establish that~~ Based on the above findings of fact, Respondent violated Texas Water Code § 26.3475(d) and 30 Texas Administrative Code § 334.49(a)(1) regarding corrosion protection of Respondent's UST system.
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 and by failing to conduct the piping tightness test annually as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III).
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 (d) and 30 Texas Administrative Code §§ 334.49(a)(1) and 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).~~

~~10. The ED failed to meet his burden of proof to establish that Respondent violated 30 Texas Administrative Code § 334.50(b)(2)(ii) regarding the testing of Respondent's pressurized lines.~~

~~10.~~ A ~~\$2,000~~ \$16,243 administrative penalty should be assessed against Respondent.

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. Respondent is assessed an administrative penalty in the amount of ~~\$2,000~~ \$16,243 for its violation of Texas Water Code § 26.3475(a) and (d) and 30 Texas Administrative Code §§ 334.49 (a)(1) and 334.50(b)(2) ~~(A)(i)(III)~~.
2. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. 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: Vasan, Inc. d/b/a Mr. D's Convenience Store; TCEQ Docket No. 2014-0894-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 ED 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 ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
4. 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.
5. The effective date of this Order is the date the Order is final, as provided by Texas Government Code § 2001.144 and 30 Texas Administrative Code § 80.273.
6. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

7. 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., P.E., Chairman
For the Commission**