

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 17, 2015

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

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

Dear Mr. Royall:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than July 7, 2015. Any replies to exceptions or briefs must be filed in the same manner no later than July 17, 2015.

This matter has been designated **TCEQ Docket No; SOAH Docket No. 582-15-1630**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/vg
Enclosures
cc: Mailing List

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

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

PROPOSAL FOR DECISION

The Executive Director (ED) asks the Texas Commission on Environmental Quality (Commission or TCEQ) to assess a \$16,243 administrative penalty against the Respondent, Vasan, Inc., d/b/a Mr. D's Convenience Store, for violations of the TCEQ's rules regarding underground storage tanks (USTs). The Administrative Law Judge (ALJ) recommends that the Commission assess an administrative penalty of \$2,000 against Respondent.

I. PROCEDURAL HISTORY AND JURISDICTION

On May 20, 2015, ALJ Kerrie Jo Qualtrough convened the evidentiary hearing at the State Office of Administrative Hearings (SOAH) in Austin, Texas. Staff attorney Jake Marx represented the ED, and Respondent's president, Sivagnana Manickavasagar, represented Respondent *pro se*.

At the hearing, Respondent argued that jurisdiction was in Kendall County and not in Austin, Texas. The ALJ recognized the admission of ED Exhibits A through D for the limited purpose of establishing notice and jurisdiction. The ALJ determined that SOAH had jurisdiction over the proceeding and overruled Respondent's objection to the hearing taking place at SOAH in Austin, Texas.

The evidentiary portion of the May 20, 2015 hearing began with the ED presenting the testimony of Sylvia Janie Munoz, a Field Operations Team Leader with the University of Texas at Arlington (UTA),¹ to testify regarding the April 8, 2014 inspection of Respondent's UST system and the alleged violations that resulted from that inspection. At the conclusion of Ms. Munoz's testimony, Mr. Manickavasagar requested that he be allowed to tell his story so he could return to his convenience store. The ALJ cautioned Mr. Manickavasagar that he would be missing the remainder of the ED's case and would be unable to respond to the evidence. Mr. Manickavasagar chose to present his case out of order, and the ED did not object. Mr. Manickavasagar testified regarding the two alleged violations and left the hearing. The ED then called Ms. Munoz to rebut Respondent's evidence and John Duncan, a TCEQ Enforcement Coordinator, to testify regarding the calculation of the proposed administrative penalty.

II. DISCUSSION

A. Background

Respondent owns and operates three USTs at a convenience store located at 211 S. Main Street in Boerne, Texas. On April 8, 2014, Isaac Foss of UTA conducted an inspection of Respondent's USTs and found two violations. However, the ED did not present Mr. Foss to testify regarding the inspection, and Respondent objected to Ms. Munoz's testimony regarding the violations because she did not personally conduct the inspection or see the violations. Ms. Munoz stated that Mr. Foss is no longer employed by UTA due to a reduction in funding of the contract between UTA and TCEQ. However, Ms. Munoz was Mr. Foss's supervisor and had reviewed the inspection materials. The ALJ determined that Ms. Munoz was an expert witness, overruled Respondent's objection, and allowed Ms. Munoz to testify regarding the April 8, 2014 inspection.

¹ The University of Texas at Arlington inspects UST on behalf of the TCEQ pursuant to contract.

B. Violation No. 1

1. ED's Allegation and Evidence

In his Preliminary Report and Petition (EDPRP), the ED alleged 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).” In relevant part, section 26.3475(d) of the Texas Water Code provides that UST systems must comply with the TCEQ’s corrosion-protection requirements no later than December 22, 1998. Section 334.49(a)(1) of the TCEQ’s rules requires owners of UST systems to comply with the rules to prevent releases from corrosion.² During the hearing, although not pleaded in the EDPRP as a basis for the violations, the ED directed the ALJ to section 334.49(b),³ which sets out the allowable methods of corrosion protection and provides:

- (b) All components of a UST system shall be protected from corrosion *by one or more* of the following methods.
 - (1) The component may be constructed of a noncorrodible material which is compatible with the stored regulated substance(s).
 - (2) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by installing the component in an open area (e.g., manway, sump, vault, pit, etc.) where periodic visual inspection of all parts of the component for the presence of corrosion or released substances is practicable.
 - (3) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by completely enclosing the component in a secondary containment device

² 30 Tex. Admin. Code § 334.49(a)(1).

³ The ED highlighted subsections 334.49(a) and (b) in green in his materials. *See* ED Ref. N at 1.

- (4) Tanks (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 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.
- (5) The component may be coated with a suitable dielectric material, equipped with appropriate dielectric fittings for electrical isolation, and equipped with either [a factory-installed cathodic protection] or [a field-installed cathodic protection system].
- (6) Except for the tanks and the piping system components, other underground components of a UST system (including vent lines, fill risers, spill containment vessels, and tank fittings (e.g., bung hole plugs)) which do not routinely contain regulated substances may be protected from corrosion by thorough coating or wrapping with a suitable dielectric material which is compatible with the stored regulated substance without the need for the use of other corrosion protection methods.
- (7) Corrosion protection in accordance with the requirements of this subchapter is not required if it is determined by a corrosion 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. . . .⁴

Ms. Munoz testified that all components of a UST system located underground must be protected from corrosion. According to Ms. Munoz, corrosion occurs when the metal parts of the UST system corrode and cause leaks. These leaks would occur underground and create a hazard for the quality of groundwater and nearby surface water.

⁴ 30 Tex. Admin. Code § 334.49(b) (emphasis added).

According to Mr. Foss's summary of his investigative findings, "Corrosion Protection was last test[ed] on April 14, 2014 by Innovative Corrosion Control, however the cp test failed."⁵ Ms. Munoz stated that Respondent has composite tanks in his UST system that are coated with fiberglass. According to Ms. Munoz, if the fiberglass coating exceeds 100 mils, the tanks are protected from corrosion.⁶ If the fiberglass coating is less than 100 mils, then the tanks need to have attached anodes, which will corrode instead of the tank. However, Ms. Munoz did not explain whether the fiberglass coating on Respondent's tanks was less than, equal to, or greater than 100 mils.

On April 14, 2014, after Mr. Foss's April 8 inspection, Respondent's consultant, Innovative Corrosion Control, Inc. (ICC), inspected Respondent's UST system.⁷ The tests ICC performed indicated that Respondent's submersible pumps for the three USTs failed the tests for "Structure to Soil Potential Measurements (Galvanic Systems)."⁸ In its report, ICC explained that "[t]he submersible pumps and attached metallic flex connectors at the submersible pumps are in contact with the backfill material."⁹ Ms. Munoz testified that metal UST components should be isolated from backfill material, such as dirt or pea gravel. Corrosion of the metal components can occur if the parts are in contact with backfill.

Shortly after the investigation, ICC submitted to Respondent a proposal to install a "sacrificial anode cathodic protection system" on Respondent's UST system.¹⁰ ICC proposed to install anodes on the USTs and the submersible pumps.¹¹ On July 30, 2014, ICC performed the work to bring the UST system into compliance.¹²

⁵ ED Ex. 5.2 at 7. Although Mr. Foss's inspection occurred on April 8, 2014, the comment date in his summary was June 11, 2014.

⁶ Neither the inspection report nor Ms. Munoz's testimony stated what the term "mil" represents. ED Ex. 5.4 at 17.

⁷ ED Ex. 5.7.

⁸ ED Ex. 5.7 at 43.

⁹ ED. Ex. 5.7 at 39.

¹⁰ ED Ex. 5.8 at 44.

¹¹ ED Ex. 5.8 at 45.

¹² ED Ex. 6.

2. Respondent's Evidence

According to Mr. Manickavasagar, a prior owner installed the USTs in 1985, and the law addressing UST requirements changed in 1993. He purchased the store in April 2004 and did not know that the USTs were noncompliant. Once Mr. Foss informed him at the April 8, 2014 inspection that the USTs did not comply with the corrosion-protection requirements, he contacted ICC to make the necessary repairs. In July 2014, ICC brought Respondent's USTs into compliance.¹³

3. ALJ's Analysis

The ALJ concludes that the ED did not meet his burden of proof on Violation No. 1. In his EDPRP, the ED pleaded that “[d]uring 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)”¹⁴ As evidence of this violation, the ED relied on a test performed on April 14, 2014, six days after the April 8 inspection.¹⁵ 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.

Furthermore, although the ED pleaded that Respondent violated 30 Texas Administrative Code § 334.49(a)(1), he did not plead any specific facts to show the violation; therefore, the EDPRP provides no guidance on what facts the ED contends result in a violation.¹⁶ Given the general nature of the pleading and the text of the rule, the ALJ cannot conclude from this evidentiary record that Respondent failed to comply with the TCEQ's rules.

¹³ ED Ex. 6.

¹⁴ ED Ref. A at 6 (emphasis added).

¹⁵ ED Ex. 5.7.

¹⁶ Compare ED Violation No. 1 (Respondent “[f]ailed to provide corrosion protection for the UST system”) with ED Violation No. 2 (Respondent “failed to provide release detection for the pressurized piping associated with the UST system Specifically, Respondent had not conducted the annual line leak detector and piping tightness test.”). ED Ref. A at 6.

The ED alleged that Respondent violated 30 Texas Administrative Code § 334.49(a)(1), which requires owners of UST systems to “comply with the requirements in this section to ensure that releases due to corrosion are prevented.” Although not mentioned in the EDPRP, the ED directed the ALJ during the hearing to section 334.49(b), which states that “[a]ll components of a UST system . . . shall be protected from corrosion *by one or more of the following methods . . .*”¹⁷ Section 334.49(b) lists seven methods by which a UST system may be protected against corrosion. Therefore, if an owner complies with any one of the seven methods, the owner complies with section 334.49(b). However, Ms. Munoz did not testify that Respondent’s UST system failed to meet all seven of the allowable methods. Nor is it clear from her testimony which of the seven methods apply to Respondent’s system and which do not. Ms. Munoz provided no specificity on which of the seven allowable methods Respondent should have implemented.

In the absence of specificity in the EDPRP and in the ED’s evidence, the ALJ is left to guess which corrosion protection measure the Respondent should have implemented but did not. For example, Mr. Foss’s inspection checklist states that Respondent’s USTs are “[e]lectrically isolated in the form of a composite tank comprised of steel and fiberglass.”¹⁸ Ms. Munoz testified that a composite UST is independently protected if the thickness of the fiberglass coating is greater than 100 mils thick. If the fiberglass coating is less than 100 mils thick, then anodes are required to ensure that the tank is protected from corrosion. Section 334.49(b)(4) discusses corrosion protection for composite tanks. However, Ms. Munoz did not testify regarding the thickness of the fiberglass coating on Respondent’s tanks, possibly because she did not perform the inspection and did not know the thickness of the coating. Therefore, the ALJ cannot determine if the facts demonstrate noncompliance with section 334.49(b)(4), or if that section is even applicable to Respondent’s tanks.

Also, the ED presented evidence that, based on a test that occurred after the inspection, Respondent’s submersible pumps were noncompliant because they came into contact with backfill material.¹⁹ Although Ms. Munoz discussed the placement of anodes on the tanks to prevent

¹⁷ 30 Tex. Admin. Code § 334.49(b) (emphasis added).

¹⁸ ED Ex. 5.4 at 17.

¹⁹ ED Ex. 5.7.

corrosion, it is unclear from her testimony if anodes should have been placed on the submersible pumps as well, and if so, which of the seven methods of corrosion protection in section 334.49(b) sets out that requirement.

In addition, the ALJ concludes that the ED's evidence of Respondent's subsequent actions to remedy the alleged violation is likewise insufficient to prove Violation No. 1. The ED presented evidence of the work Respondent had performed to bring his UST system into compliance after Mr. Foss informed him of the alleged deficiency. On April 16, 2014, only eight days after the April 8 inspection, ICC provided Respondent with a proposal to install anodes on his UST system,²⁰ and ICC completed the work in July 2014.²¹ Under the Texas Rules of Evidence, this information may not be used to establish the violation. Rule 407(a) provides: "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, [or] a defect in a product or its design"²² The use of subsequent remedial measures to prove the violation in this case could discourage future actions to remedy environmental problems.²³ For this reason, the Texas Rules of Evidence makes such evidence inadmissible, in the ALJ's opinion. Respondent acted promptly in response to Mr. Foss's inspection. However, 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.

In summary, the evidence does not prove Violation No. 1. The ED pleaded generally that Respondent violated 30 Texas Administrative Code § 334.49(a). However, the wording of 30 Texas Administrative Code § 334.49(b) allows a UST owner to use *any* one of 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. The ED failed to meet this burden, and the ALJ does not recommend a finding that Respondent committed the alleged Violation No. 1.

²⁰ ED Ex. 5.8.

²¹ ED Ex. 6.

²² Tex. R. Evid. 407(a).

²³ See Peter T. Hoffman, Texas Rules of Evidence Handbook at 308-17 (8th ed. 2009-09).

C. Violation No. 2

1. ED's Allegation and Evidence

In his EDPRP, the ED alleged that Respondent “[f]ailed to provide release detection for the pressurized piping associated with the UST system, in violation of Texas Water Code § 26.3475 and 30 Tex. Admin. Code § 334.50(b)(2). Specifically, Respondent had not conducted the annual line leak detector and piping tightness testing.”²⁴ The relevant portions of section 334.50(b)(2) provide:

- (b) Release detection requirements for all UST systems. Owners and operators of all UST systems shall ensure that release detection equipment or procedures are provided in accordance with the following requirements.

.....

- (2) Release detection for piping. Piping in a UST system shall be monitored in a manner which will detect a release from any portion of the piping system, in accordance with the following requirements.

- (A) Requirements for pressurized piping. UST system piping that conveys regulated substances under pressure shall be in compliance with the following requirements.

- (i) Each separate pressurized line . . . shall be equipped with an automatic line leak detector meeting the following requirements.

.....

- (III) The line leak detector shall be tested *at least once per year* for performance and operational reliability

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

²⁴ ED Ref. A at 6.

- (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.²⁵

Ms. Munoz testified that owners of pressurized UST lines, such as Respondent's, must perform release detection tests. Two tests are at issue in Violation No. 2: a test of the line leak detector and a test of the piping tightness. A line leak detector catches leaks that occur from the lines, and this detector must be tested annually.²⁶ An annual piping tightness test determines if the pressurized lines are containing all of the regulated substances.²⁷

Mr. Foss's inspection checklist indicates that Respondent's UST system was noncompliant with the provisions regarding line testing. The checklist states that "[t]he lines testing was expired on 4/8/14, the day of the inspection. The line testing went 2 weeks over the 1 year requirement.

²⁵ 30 Tex. Admin. Code § 334.50(b)(2)(A)(i)(III), (b)(2)(A)(ii) (emphasis added).

²⁶ 30 Tex. Admin. Code § 334.50(b)(2)(A)(i)(III).

²⁷ 30 Tex. Admin. Code § 334.50(b)(2)(A)(ii)(I).

Owner stated that there was cold weather which delayed testing.”²⁸ Therefore, Ms. Munoz testified that Respondent was noncompliant with the TCEQ’s rules because it did not perform the line leak detector test and the piping tightness test within one year of the last tests, which occurred on March 28, 2013.²⁹

2. Respondent’s Evidence

Mr. Manickavasagar testified that his system has a “Veeder Root” that tests the lines every day, and his lines have passed these tests. Mr. Manickavasagar also conceded that the two tests were not performed within a year of March 28, 2013, the date of the last tests. However, he stated that he had attempted to schedule the tests, but his consultant had a backlog and could not perform the tests on time. Mr. Manickavasagar testified that he told Mr. Foss on April 8, 2014, that he had tried to schedule the test and that his consultant performed the test 17 days late on April 14, 2014.

3. ALJ’s Analysis

In his EDPRP, the ED pleaded that Respondent violated 30 Texas Administrative Code § 334.50(b)(2) by not conducting the “annual line leak detector and piping tightness test.”³⁰ Section 334.50(b)(2)(A)(i)(III) requires that the line leak detector be tested “at least once per year.”³¹ Section 334.50(b)(2)(A)(ii) requires that pressurized lines should be tested for releases in one of three ways, including a piping tightness test conducted “at least once per year.”

At the evidentiary hearing, Respondent stated that the time period should end in December, leading the ALJ to assume that Respondent’s position is that he was required to perform the two tests each calendar year. Respondent performed the tests in 2013 and again in 2014, thereby meeting the requirements of the rules, in his opinion. However, the TCEQ’s rules provide that “in computing

²⁸ ED Ex. 5.4 at 18. The checklist indicates that Vasana Siva was the “owner.” ED Ex. 5.4 at 16. During the hearing, Mr. Manickavasagar testified that he was Vasana Siva. However, the inspection report indicates that “Vasana Siva” and “Sivagnana Manickavasagar” are two separate individuals. See ED Ex. 5.1 at 5.

²⁹ ED Ex. 5.5 at 27, 28.

³⁰ ED Ref. A at 6.

any period of time . . . the period shall begin on the day after the act . . . and shall conclude on the last day of the designated period”³² Therefore, the ALJ concludes that Respondent’s tests were due on or before March 28, 2014, one year after the last test.

For the line leak detector test, Respondent missed the deadline by 17 days. Accordingly, the ALJ recommends that the Commission find that Respondent violated 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III).

However, the ALJ cannot conclude that Respondent violated the rule regarding testing of the pressurized lines. Section 334.50(b)(2)(ii) provides that each pressurized line must be tested or monitored for releases “with *at least one* of the following methods.”³³ Although Respondent did not have the piping tightness test performed “at least once per year,” the rule provides Respondent with two other options for testing or monitoring the pressurized piping.³⁴ The ED presented evidence that Respondent did not perform the piping tightness test within a year under section 334.50(b)(2)(ii)(I), but he did not present evidence that Respondent failed to use one of the other two methods of testing or monitoring the pressurized lines for releases authorized by section 334.50(b)(2)(ii)(II) and (III). Without evidence of the failure to use one of the two remaining alternatives, the ALJ cannot conclude that Respondent violated the TCEQ’s rules regarding the testing of its pressurized lines.

To summarize, the ALJ concludes that the ED met his burden to prove that Respondent violated 30 Texas Administrative Code § 334.50(b)(2)(i)(III) by performing the line leak detector test 17 days late. However, the ALJ finds that the ED did not prove a violation of 30 Texas Administrative Code § 334.50(b)(2)(ii) regarding the testing and monitoring of Respondent’s pressurized lines.

³¹ 30 Tex. Admin. Code § 334.50(b)(2)(A)(i)(III).

³² 30 Tex. Admin. Code § 1.7.

³³ 30 Tex. Admin. Code § 334.50(b)(2)(ii) (emphasis added).

³⁴ 30 Tex. Admin. Code § 334.50(b)(2)(ii)(I), (II), or (III).

D. Administrative Penalty

The ED presented evidence that the calculation of his recommended administrative penalty of \$16,243 complied with Texas Water Code § 7.053 and the TCEQ's 2011 Penalty Policy, effective April 1, 2014.³⁵ Because Mr. Manickavasagar left the evidentiary hearing before the ED presented his evidence on the administrative penalty, the ED's calculation of the penalty is uncontested.

As discussed above, the ALJ concludes that the ED did not prove Violation No. 1 regarding Respondent's alleged failure to provide corrosion protection. Therefore, the ALJ recommends that the Commission not assess the recommended penalty of \$9,066 attributable to Violation No. 1.³⁶

Regarding Violation No. 2, Respondent had already attempted to schedule the line leak detector test before the April 8, 2014 inspection. During that inspection, Respondent informed the inspector, Mr. Foss, that he 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. The tests were performed on April 14, 2014, only 17 days after they were due on March 28. Although technically a violation of 30 Texas Administrative Code § 334.50(b)(2) because the test was not performed within a year, the ALJ concludes that justice may require the reduction of the recommended penalty of \$7,177 associated with Violation No. 2³⁷ under Texas Water Code § 7.053(4). The evidence tends to show that Respondent acted in good faith and did not intentionally violate the TCEQ's rules. Given that Respondent had attempted to schedule the test before the inspection and had the test performed within 17 days after it was due, the ALJ recommends a \$2,000 penalty.

³⁵ ED Ex. 7.

³⁶ ED Ex. 8 at 03.

³⁷ ED Ex. 8 at 5.

D. Summary

To summarize, the ALJ finds that the ED did not meet his burden of proof regarding Violation No. 1 and the provision of corrosion protection for the UST system. The evidence presented during the hearing does not demonstrate that Respondent violated the Commission's rule.

Furthermore, the ALJ concludes that for Violation No. 2, the ED met his burden of proof that Respondent did not have the line leak detector tested annually as required by 30 Texas Administrative Code § 334.50(b)(2)(i)(III). However, the ED did not meet his burden to show that Respondent violated section 334.50(b)(2) by failing to have the pressurized lines tested as required. For the single violation, the ALJ recommends that justice may require the imposition of a \$2,000 administrative penalty.

SIGNED June 17, 2015.



**KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against
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. 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, 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 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, 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 and exhibited good faith in doing so.

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 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 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 30 Texas Administrative Code § 334.50(b)(2) by failing to perform the line leak detector test annually as required by 30 Texas Administrative Code § 334.50(b)(2)(A)(i)(III).

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.
11. A \$2,000 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 for its violation of Texas Water Code § 26.3475(a) and 30 Texas Administrative Code § 334.49(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**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: VASAN INC DBA MR. D'S CONVENIENCE STORE

SOAH DOCKET NUMBER: 582-15-1630

REFERRING AGENCY CASE: 2014-0894-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH

REPRESENTATIVE / ADDRESS

PARTIES

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VASAN, INC.
