State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

June 14, 2016

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

Re: **SOAH Docket No. 582-16-1301; TCEQ Docket No. 2015-0727-PST-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Chapman, Inc.**

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 20 CALENDAR DAYS FROM ISSUANCE OF PFD Any replies to exceptions or briefs must be filed in the same manner no later than 10 CALENDAR DAYS FROM EXCEPTIONS OR BRIEFS DEADLINE.

This matter has been designated **TCEQ Docket No 2015-0727-PST-E; SOAH Docket No. 582-16-1301**. 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,

Sarah Starnes

Sarah Starnes
Administrative Law Judge

Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
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SERVICE LIST

AGENCY: **Environmental Quality, Texas Commission on (TCEQ)**

STYLE/CASE: **CHAPMAN INC**

SOAH DOCKET NUMBER: **582-16-1301**

REFERRING AGENCY CASE: **2015-0727-PST-E**

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ Sarah Starnes

REPRESENTATIVE / ADDRESS	PARTIES
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RYAN RUTLEDGE STAFF ATTORNEY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF LEGAL SERVICES MC-175 P.O. BOX 13087 AUSTIN, TX 78711-3087 (512) 239-3400 (PH) (512) 239-3434 (FAX) Ryan.Rutledge@tceq.texas.gov	TCEQ EXECUTIVE DIRECTOR
ANDREW OLMSTEAD CHAPMAN INC. P.O. BOX 1298 SHERMAN, TX 75091-1298 (903) 815-2733 (PH)	CHAPMAN INC.

SOAH DOCKET NO. 582-16-1301
TCEQ DOCKET NO. 2015-0727-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
	§	**OF**
v.	§	
CHAPMAN, INC., Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Chapman, Inc. (Respondent) violated the Texas Water Code and the Texas Administrative Code by delivering fuel on 144 occasions into an underground storage tank where the operator did not have a valid, current certificate of compliance. The ED requests that the Commission assess an administrative penalty of $14,735 for the violation and order Respondent to take corrective actions. Respondent asserts that a lesser penalty is warranted because the failure to verify its customer's certificate was an unintentional mistake and Respondent has already taken corrective action to ensure that the problem does not recur.

The Administrative Law Judge (ALJ) finds that Respondent committed the alleged violations but, because Respondent has shown good faith efforts to come into compliance, recommends that the Commission assess a penalty of only $13,110. The ALJ also recommends that Respondent should be ordered to take the corrective actions suggested by the ED.

I. PROCEDURAL HISTORY

Notice was not disputed. The attached proposed order contains the required findings of fact and conclusions of law concerning notice.

Prior to the hearing, the ALJ issued Order No. 1 holding that, because Respondent did not provide the ED with financial information to support its claim of an inability to pay a penalty, Respondent waived that issue and was not permitted to introduce evidence about it.[1] Additionally, in Order No. 1 the ALJ granted the ED's motion for sanctions and prevented Respondent from presenting as evidence documents that were responsive to the ED's discovery requests, but that were not provided to the ED.

The hearing was held on April 21, 2016, before ALJ Sarah Starnes in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by attorney Ryan Rutledge. Respondent appeared through its President, Andrew Almstead. The record closed on the date of the hearing.

II. ALLEGED VIOLATION

A. Applicable Law

The Texas Water Code (Code) requires underground or aboveground storage tanks to be registered by the TCEQ, and requires the operator of any underground storage tank (UST) used for storing motor fuels to complete an annual form to obtain a compliance certificate.[2] Pursuant to Code § 26.3467(a), a UST owner or operator is required to provide a common carrier with a copy of its compliance certificate before accepting delivery of any regulated substance into the UST.

In addition to the registration and certification requirements for UST operators, the Code also imposes requirements on those who deliver fuel to USTs. Pursuant to Code § 26.3467(d), a person "may not deliver any regulated substance into an underground storage tank . . . unless the underground storage tank has been issued a valid, current underground storage tank registration

[1] *See* 30 Tex. Admin. Code § 70.8(b).

[2] Tex. Water Code § 26.346.

and certificate of compliance." This requirement is echoed in the TCEQ's rule found at 30 Texas Administrative Code § 334.5(b)(1)(A), which states that "no common carrier . . . shall deposit any regulated substance into a UST system regulated under this chapter unless that owner or operator has a valid, current delivery certificate issued by the agency covering that UST system." When one of these Code provisions has been violated, the Commission is authorized to bring an enforcement action to assess penalties or order corrective measures.[3]

Respondent is an oil and gas distributor in Sherman, Texas, and it is undisputed that Respondent is both a "person" and a "common carrier" as those terms are defined by TCEQ rules, and that the fuel Respondent transports and delivers is a "regulated substance."[4]

B. Evidence of Violation

To establish the violation alleged, the ED offered as evidence several documents and the testimony of Sylvia Muñoz, the Field Operations Team Leader who supervised the inspection that gave rise to this proceeding. Ms. Muñoz explained that, on April 10, 2015, a TCEQ investigator conducted a routine inspection of Shop N Go No. 6 in Sherman, Texas (Shop N Go), one of Respondent's customers, and discovered that the gas station did not have a current delivery certificate as required by TCEQ regulations. Shop N Go corrected this violation immediately by filling out the required form to obtain a current delivery certificate on the same date as the inspection.[5] However, the inspector also found that Shop N Go's records showed Respondent had made numerous fuel deliveries while the delivery certificate was expired. As a result, the ED issued a Notice of Enforcement to Respondent on April 30, 2015.[6]

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[3] Code §§ 7.002, .051.

[4] *See* 30 Tex. Admin. Code § 334.2(21), (76), (91); ED Ex. 10.

[5] ED Ex. 4.

[6] ED Ex. 1 at 0003.

The ED's evidence also included responses to Requests for Admissions in which Respondent stipulated that it is a distributor and transporter of petroleum substances; that it deposited a regulated substance into a UST at Stop N Go each month between April 2014 and April 2015; that Stop N Go's delivery certificate expired on the last day of September 2012; and that Respondent made 144 fuel deliveries to Stop N Go between April 12, 2014 and April 6, 2016, while the certificate was expired.[7] In his testimony at the hearing, Mr. Almstead confirmed that Respondent does not dispute the violation was committed. However, as described below, Respondent contends that the penalty sought by the ED is excessive under the circumstances.

Based on the undisputed evidence, the ALJ finds that the alleged violation occurred. Specifically, the ED has met its burden of proving that Respondent violated Code § 26.3467(d) and 30 Texas Administrative Code § 334.5(b)(1)(A) by delivering fuel into an UST that did not have a valid, current delivery certificate on 144 occasions between April 2014 and April 2015.

III. PROPOSED PENALTY

A. ED's Evidence

Steven Van Landingham, an enforcement coordinator for the TCEQ, testified and presented the ED's proposed penalty. Mr. Van Landingham explained the ED's Penalty Policy and the Penalty Calculation Worksheet used to calculate the proposed penalty in this matter.[8]

Mr. Van Landingham explained that, although 144 deliveries were made during the time period at issue, the ED regards this as only one violation. The base penalty for the violation is $25,000. Mr. Van Landingham determined that the violation was a major violation because 100% of the requirement at issue was not met. This meant that the adjusted base penalty was 5%

[7] ED Ex. 10; *see also* ED Ex. 1 at 0013-14, 0029.

[8] *See* ED Exs. 6, 7.

of the base, or $1,250. Next, the violation was characterized as a monthly violation that resulted in a total of 13 violation events (or one event for each month from April 2014 to April 2015), no matter how many deliveries were made each month. Mr. Van Landingham multiplied the adjusted base penalty by the number of violation events ($1250 x 13) to reach a subtotal penalty of $16,250. That figure was then given a 10% downward adjustment because Respondent was deemed a "high performer" with no prior compliance history.[9] No adjustments were made for good faith efforts to comply or culpability. Mr. Van Landingham enhanced the proposed penalty by $110 to capture the avoided costs of compliance. The total proposed penalty under the Penalty Policy is therefore $14,735.[10]

The ED also seeks corrective action in this matter. As corrective action, the ED seeks to require Respondent to develop and implement training procedures to ensure that deliveries are made only to customers with valid, current delivery certificates.

B. Respondent's Evidence

Mr. Almstead testified that Respondent is a small family company that was started by his grandfather in 1933, and today employs ten people. He agreed that Respondent's failure to verify Stop N Go's delivery certificate was a mistake, but emphasized that it was not an intentional violation. The penalty sought by the ED is "astronomical" to a small business like Respondent, according to Mr. Almstead, and is not necessary to protect the environment.

The Code places the onus on UST operators to maintain their registration and annually renew their delivery certificates, and Mr. Almstead takes issue with the Code and the Commission's regulations to the extent they try to make companies like his responsible for enforcing these regulations against their customers. Mr. Almstead also explained that the law has changed several times over the last decade and has not always required fuel distributors to

[9] ED Ex. 9.

[10] ED Ex. 7.

check a customer's delivery certificate before delivering to a UST, and imposed no penalty for failing to do so until 2012.[11] He said a business like Respondent's must adhere to a multitude of regulations imposed by numerous state and federal agencies. These laws are long and complicated, and they change frequently. Mr. Almstead said even a diligent and well-intentioned business like his can inadvertently violate a requirement like the one at issue in this case, which was changed with little notice.

Mr. Almstead also disputed Mr. Van Landingham's testimony that Respondent had not made any effort to come into compliance since being notified of the violation events. He said it is now his practice to go online at the beginning of every month and check the TCEQ website to ensure that every one of his customers holds a current delivery certificate. If a customer did not have a current and valid certificate, then Mr. Almstead would not permit a delivery. Ms. Almstead explained that no written documentation of this practice was provided to the ED prior to the hearing because he was never instructed or given a deadline to submit anything in writing.[12]

C. Analysis

The ALJ generally agrees that the proposed penalty complies with the applicable law and the Penalty Policy, except that the ALJ disagrees with the ED's and Mr. Van Landingham's assertions that Respondent has not shown good-faith efforts to correct the violations and comply in the future. Mr. Almstead testified convincingly that Respondent's violation was inadvertent

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[11] Mr. Van Landingham explained that the prohibition on making deliveries to USTs lacking a current delivery certificate became an enforcement priority in 2012, when the Code and TCEQ regulations were amended to bring Texas into compliance with federal law. *See* ED Ex. 8.

[12] In cross-examining Mr. Almstead, the ED argued that any such documentation should have been produced in response to the ED's discovery request for "all procedures, training, and/or guidance documents that have been utilized and/or made available to your full-time, part-time, and contract employees and drivers in the performance of their job duties for the time period covering September 2012 through September 2015." In response to that request, Respondent answered "object, irrelevant."[12] The ALJ agrees that the request was overbroad and unduly burdensome, and not reasonably tailored to discover training materials relevant to Respondent's efforts to correct the violation in this case. Therefore, Respondent's objection is sustained, and Respondent's refusal to produce responsive documents did not preclude Mr. Almstead from presenting evidence of compliance efforts at the hearing.

and that, once it learned that fuel distributors now face penalties for delivering fuel without first confirming that their customers hold delivery certificates for their underground storage tanks, Respondent immediately changed its internal procedures to comply with that requirement. Mr. Van Landingham testified that, if there was evidence of compliance efforts, this would be the basis for a 10% penalty reduction. Therefore, the ALJ recommends reducing the proposed penalty by $1,625 (or 10% of the total base penalty of $16,250) to adjust for Respondent's good-faith compliance efforts, for a total proposed penalty of $13,110. The ALJ also recommends that Respondent be required to take the corrective actions proposed by the ED, namely by reducing to writing its procedures for checking customers' delivery certificates prior to delivery, and by providing written certification of those procedures to the ED.

IV. SUMMARY

The ALJ recommends that the Commission adopt the attached proposed order, assessing Respondent a total of $13,110 in penalties for the violation proven in this case and requiring Respondent to take the corrective actions proposed by the ED.

SIGNED June 14, 2016

Sarah Starnes

SARAH STARNES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST CHAPMAN, INC.
TCEQ DOCKET NO. 2015-0727-PST-E
SOAH DOCKET NO. 582-16-1301

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Chapman, Inc. (Respondent). Sarah Starnes, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted an evidentiary hearing on this matter on April 21, 2016, in Austin, Texas, and presented the proposal for decision.

The following are parties to the proceeding: The Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel.

After considering the ALJ's proposal for decision, the Commission adopts the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Respondent is an oil and gas distributor in Sherman, Texas.
2. One of Respondent's customers is Shop N Go No. 6 (Shop N Go), a gas station in Sherman, Texas where fuel is stored in underground storage tanks.

3. On April 10, 2015, a TCEQ investigator conducted a routine inspection of Stop N Go and discovered that the gas station did not have a current delivery certificate as required by TCEQ regulations.

4. Shop N Go's delivery certificate had expired on the last day of September 2012.

5. Shop N Go corrected this violation immediately by filling out the required form to obtain a current delivery certificate on the same date as the inspection.

6. Respondent made 144 fuel deliveries to Stop N Go between April 12, 2014, and April 6, 2016, while the delivery certificate was expired.

7. On April 30, 2015, the ED issued a Notice of Enforcement to Respondent.

8. Promptly after learning of the violation, Respondent implemented new procedures to ensure that fuel deliveries are only made to customers with valid, current delivery certificates for their underground storage tanks.

9. Respondent has made good-faith efforts to correct the violations and comply in the future.

10. On September 21, 2015, the ED issued his EDPRP.

11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective April 1, 2014.

12. The ED recommends the imposition of an administrative penalty in the amount of $14,735, and corrective action to bring Respondent into compliance.

13. The ALJ recommends reducing the proposed penalty by $1,625 to adjust for Respondent's good-faith compliance efforts, for a total proposed penalty of $13,110.

14. On October 13, 2015, Respondent requested a contested case hearing on the allegations in the EDPRP.

15. On November 23, 2015, the case was referred to SOAH for a hearing.

16. On December 4, 2015, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

17. ALJ Sarah Starnes convened the hearing on the merits on April 21, 2016, in SOAH's hearing rooms in Austin, Texas.

18. The ED was represented by staff attorney Ryan Rutledge, and Respondent appeared through its President, Andrew Almstead. The Office of Public Interest Counsel did not appear.

19. The record closed at the end of the hearing on April 21, 2016.

II. CONCLUSIONS OF LAW

1. The Commission may assess an administrative penalty of up to $25,000 a day for each violation against a person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder. Tex. Water Code § 7.051.

2. Respondent is subject to the Commission's enforcement authority. Tex. Water Code § 7.002.

3. Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, and the penalties and the corrective action proposed therein. 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 and corrective action. Tex. Gov't Code §§ 2001.051, .052; Tex. Water Code § 7.058; 1 Tex. Admin. Code § 155.401; 30 Tex. Admin. Code §§ 1.11, 1.12, 39.25, 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. Tex. Gov't Code ch. 2003.

6. The ED has the burden of proof by a preponderance of the evidence in an enforcement proceeding. 30 Tex. Admin. Code § 80.17(c).

7. As shown by the findings of fact, Respondent violated Texas Water Code § 26.3467(d) and 30 Texas Administrative Code § 334.5(b)(1)(A) by delivering fuel into an underground storage tank when the owner or operator did not have a valid, current delivery certificate.

8. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors, including the history and extent of previous violations by the violator; the violator'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.

9. Based on consideration of the above findings of fact and conclusions of law, the factors set out in Texas Water Code § 7.053 and the Commission's Penalty Policy, a total administrative penalty of $13,110 is justified and should be assessed against Respondent, and the Respondent should be required to implement the corrective action set out below.

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. Chapman, Inc. is assessed an administrative penalty in the amount of $13,110 for violation of Texas Water Code § 26.3467(d) and 30 Texas Administrative Code § 334.5(b)(1)(A). 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 in this action. The Commission shall not be constrained in any manner from requiring corrective action 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: Chapman, Inc.; Docket No. 2015-0727-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

2. Within 30 days after the effective date of this Order, Respondent shall develop and implement training procedures for fuel delivery personnel to verify that the owner and operator of a underground storage tank system possesses a valid, current, TCEQ delivery certificate prior to depositing fuel in the underground storage tank system, in accordance with 30 Texas Administrative Code § 334.5.

3. Within 45 days after the effective date of this Order, Respondent shall submit written certification of compliance with Ordering Provision No. 2. The certification shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records, shall be signed by Respondent, and shall include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

Respondent shall submit the written certifications and supporting documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

and

Waste Section Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.

5. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

6. The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.

7. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

Issue Date:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

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