

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

November 6, 2014

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

Re: **SOAH Docket No. 582-13-5326; TCEQ Docket No. 2012-1799-AIR-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Citgo Refining and Chemicals Company, L.P.**

Dear Ms. Idsal:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 26, 2014. Any replies to exceptions or briefs must be filed in the same manner no later than December 8, 2014.

This matter has been designated **TCEQ Docket No. 2012-1799-AIR-E; SOAH Docket No. 582-13-5326**. 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 that reads "Rebecca S. Smith".

Rebecca S. Smith  
Administrative Law Judge

RSS/Ls  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** CITGO REFINING AND CHEMICALS COMPANY L.P.  
**SOAH DOCKET NUMBER:** 582-13-5326  
**REFERRING AGENCY CASE:** 2012-1799-AIR-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ REBECCA SMITH**

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**REPRESENTATIVE / ADDRESS**

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CITGO REFINING AND CHEMICALS COMPANY, LP

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**SOAH DOCKET NO. 582-13-5326  
TCEQ DOCKET NO. 2012-1799-AIR-E**

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

v.

**CITGO REFINING AND CHEMICALS  
COMPANY, L.P.,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that CITGO Refining and Chemicals Company, L.P. (CITGO) violated the Texas Water Code, the Texas Health and Safety Code, and the Texas Administrative Code when it failed to prevent the emission of volatile organic compounds, benzene, toluene, xylene, and ethyl benzene from a cooling tower at its petroleum refinery. The ED also alleges that CITGO failed to timely report these emissions. The ED requests that the Commission assess an administrative penalty of \$9,775 for these violations. CITGO does not disagree that the emissions occurred, but argues that its failure to prevent these emissions was not a violation, that it complied with the reporting requirements, that it should be exempt from this enforcement action, and that the penalty should be reduced.

The Administrative Law Judge (ALJ) finds that CITGO committed the alleged violations and that the proposed penalty and corrective action are just and in accordance with applicable law and the Penalty Policy. The ALJ recommends that the Commission assess the penalty recommended by the ED and order the requested corrective action.

## II. PROCEDURAL HISTORY AND JURISDICTION

Notice and jurisdiction were not disputed. The attached proposed order contains the required findings of fact and conclusions of law concerning those matters.

The hearing convened on May 14, 2014, before ALJ Rebecca S. Smith in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by attorney Jennifer Cook. CITGO was represented by attorney Paul Seals. The record closed when the parties filed reply briefs on September 10, 2014.

## III. ALLEGED VIOLATIONS

In support of its allegations, the ED presented the testimony of three witnesses and introduced twenty exhibits. CITGO presented the testimony of its manager of environmental affairs and introduced seven exhibits.

### A. The Incident

CITGO owns and operates a petroleum refinery located at 1801 Nueces Bay Boulevard in Corpus Christi, Texas (the Plant). Part of the Plant is a permitted cooling tower called Cooling Tower Number 10, which removes heat and recycles cooling water to and from heat exchangers at the Plant. If a heat exchanger leaks materials into the cooling water, it can result in emissions of those materials from the cooling towers.

Just such an emission occurred in late June 2011. A routine total organic compound test on June 28, 2011, showed high results. CITGO then conducted what is called an El Paso Stripper (EPS) test on Cooling Tower 10. At 5:30 p.m. on June 28, 2011, CITGO obtained the EPS test results, which indicated that the volatile organic compound (VOC) concentration of the

water returning to Cooling Tower 10 was 25.56 parts per million by weight (ppmw), well above where it should be.

On June 30, 2011, at 8:52 a.m., CITGO submitted an initial report of an emissions event to the TCEQ. This report indicated that the emissions event was discovered on June 28, 2011, at 5:30 p.m.<sup>1</sup> On the face of the report, more than 24 hours had passed between the discovery and the report. The initial report estimated that 850 pounds of benzene, 850 pounds of hydrocarbons, and 850 pounds of toluene had been emitted.<sup>2</sup> The final report, submitted eleven days later, provided emissions amount of 824.17 pounds of benzene, 899.42 pounds of hydrocarbons, 666.75 pounds of toluene, 3.95 pounds of ethyl benzene, and 10.05 pounds of xylene.<sup>3</sup>

CITGO blocked the leaking heat exchanger on June 29, 2011, before it submitted the initial report to the TCEQ. The particular heat exchanger was the glycol knockout cooler, which is used in shutting down the Plant. CITGO later repaired it. There are no allegations that this repair was improperly performed or that there are current problems with the Plant. This Proposal for Decision will refer to the increased VOC concentration and resulting emissions as the Incident.

## **B. The Permit**

CITGO holds an air permit (Permit) issued by the TCEQ. Permit Special Condition No. 4 addresses VOC concentrations in cooling water:

The [VOCs] associated with cooling tower water shall be monitored monthly for VOC leakage from heat exchangers with an approved air stripping method. All sampling and testing methods shall be subject to approval of the [TCEQ] Executive Director prior to their implementation . . . .

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<sup>1</sup> ED Ex. 4.

<sup>2</sup> *Id.*

<sup>3</sup> ED Ex. 5.

The minimum detection level of the overall testing system shall be no greater than 0.15 [ppmw] VOC (concentration [of] VOC in water entering the cooling tower). . . . Cooling water VOC concentrations above 0.15 ppmw indicate faulty equipment.

The appropriate equipment shall be maintained so as to minimize fugitive VOC emissions from the cooling tower. Faulty equipment shall be repaired at the earliest opportunity but no later than the next scheduled shutdown of the process unit in which the leak occurs.

**Emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw.** The VOC concentrations above 5 ppmw are not subject to extensions for delay of repair under this permit condition. The results of the monitoring and maintenance efforts shall be recorded, and such records shall be maintained for a period of two years. The records shall be made available at the request of TCEQ personnel.<sup>4</sup>

The Permit also contains a Maximum Allowable Emission Rates Table (MAERT).<sup>5</sup> This table provides specific emissions limits for the Plant. It includes amounts for fugitive VOC emissions from Cooling Tower 10, but notes in a footnote that these amounts “are an estimate only and should not be considered as a maximum allowable emission rate.”

In addition to the Permit, CITGO also holds a federal operating permit (Federal Permit) for the Plant.<sup>6</sup> Special Condition 31 of the Federal Permit requires CITGO to “comply with the requirements of New Source Review authorizations issued or claimed by the permit holder for the permitted area, including permits . . . .”<sup>7</sup> It is undisputed that the Permit is a New Source Review Authorization. Special Condition 2.F of the Federal Permit requires CITGO to comply with 30 Texas Administrative Code § 101.201, which addresses emissions event reporting and recordkeeping.<sup>8</sup>

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<sup>4</sup> ED Ex. 2 at 9 (emphasis added).

<sup>5</sup> *Id.* at 27-31.

<sup>6</sup> ED Ex. 1 at 1588-93.

<sup>7</sup> *Id.* at 1593.

<sup>8</sup> *Id.* at 1591.

**C. Unauthorized Emissions**

The ED contends that CITGO violated Special Condition No. 4 of the Permit when the VOC concentration in the cooling water reached 25.56 ppmw. The ED alleges that by violating the Permit, CITGO also violated 30 Texas Administrative Code § 116.115(c), which requires permit holders to comply with all special conditions contained in a permit.

The ED further alleges that by violating the Permit, CITGO violated the Federal Permit, which required compliance with the Permit. Under the Commission's rules, a permit holder is required to comply with all terms and conditions in a federal operating permit, and failure to comply with those terms and conditions is grounds for an enforcement action.<sup>9</sup>

Finally, the ED alleges that by violating these rules, CITGO also violated a section of the Health and Safety Code that provides, "[a] person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of this chapter or of any commission rule or order."<sup>10</sup>

CITGO argues that it did not violate this statute, the rules, or its permits because Special Condition No. 4 is not an emission limit, but rather is an "operating condition or action level that prescribes repair obligations on CITGO as well as the requirement to initiate shutdown procedures."<sup>11</sup> It argues that so long as it complied with the work practices in Special Condition No. 4 and immediately shut down the cooling tower to begin repairs, the emissions cannot be unauthorized emissions, regardless of the level of VOC concentration. It argues that there are no limits on fugitive emissions from Cooling Tower 10 because the MAERT chart states in a

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<sup>9</sup> 30 Tex. Admin. Code § 122.143(4).

<sup>10</sup> Tex. Health & Safety Code § 382.085(b).

<sup>11</sup> CITGO's Closing Brief at 12.

footnote that the emissions listed for Cooling Tower 10 “are an estimate only and should not be considered a maximum allowable emission rate.”<sup>12</sup>

CITGO’s argument, however, ignores the language of Special Condition No. 4, which states that emissions from the cooling tower are not authorized if the VOC concentration of the water returning to the cooling tower exceeds 5 ppmw. CITGO correctly notes that much of Special Condition No. 4 deals with how and when to repair leaks. But that does not mean that CITGO can read out the language stating when emissions are not authorized. Nor does the limit’s placement in a special condition, rather than in the MAERT, change it from a limit into something else.

This is confirmed by the testimony from two of the ED’s witnesses, Jeff Grief and Joseph Janecka, both of whom testified that Special Condition No. 4 contained an emission limit. It also is confirmed by CITGO’s own air emission reporting procedure, which defines an air emissions event requiring reporting as including “[VOCs] in a Cooling Tower which exceed[] the upper limit for that specific Tower.”<sup>13</sup>

The ALJ finds that Special Condition No. 4 contains an air emission limit and that the ED established that CITGO exceeded that limit, thereby violating the Permit, the Federal Permit, and the statute and rules cited above.

#### **D. Failure to Timely Report**

The ED’s second allegation is that CITGO failed to report an emissions event within 24 hours of discovery. This is based on a regulation that states:

- (a) The following requirements for reportable emissions events apply.

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<sup>12</sup> ED Ex. 2 at 31.

<sup>13</sup> ED Ex. 10 at 2.

- (1) As soon as practicable, but not later than 24 hours after the discovery of an emissions event, the owner or operator of a regulated entity shall:
  - (A) determine if the event is a reportable emissions event; and
  - (B) notify the commission office for the region in which the regulated entity is located, and all appropriate local air pollution control agencies with jurisdiction, if the emissions event is reportable.<sup>14</sup>

The ED asserts that CITGO violated this rule by waiting more than 24 hours after it obtained the EPS test results of 25.56 ppmw to file an initial report with the Commission. CITGO argues both that there was no emissions event and, alternatively, that it complied with the 24-hour reporting requirement.

### **1. Emissions Event**

CITGO argues that the 24-hour reporting requirement only applies to emissions events and that the Incident does not satisfy the definition of “emissions event,” even though it reported it as such. An “emissions event” is defined as “[a]ny upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that results in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.”<sup>15</sup> An “upset event” is “[a]n unplanned and unavoidable breakdown or excursion of a process or operation that results in unauthorized emissions.”<sup>16</sup>

CITGO argues that the Incident was not an emissions event because it did not result in unauthorized emissions. It argues that the ED errs by “equat[ing] ‘not authorized emissions’ with ‘unauthorized emissions’ for the purposes of defining an emissions event.”<sup>17</sup> It further argues that the emissions from Cooling Tower 10 when the VOC concentration exceeded

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<sup>14</sup> 30 Tex. Admin. Code § 101.201(a)(1).

<sup>15</sup> 30 Tex. Admin. Code § 101.1(28).

<sup>16</sup> 30 Tex. Admin. Code § 101.1(110).

<sup>17</sup> CITGO’s Closing Brief at 13.

5 ppmw “do not constitute unauthorized emissions even though they are not authorized.”<sup>18</sup> Although the basis for this argument is a little unclear, the ALJ believes it to be that because nothing authorizes an amount of fugitive emissions, there is no way for emissions to exceed that amount and become unauthorized.<sup>19</sup>

The ALJ declines to distinguish between “not authorized” and “unauthorized.” Based on the Permit’s language, once the VOC concentration of the water returning to the cooling tower exceeded 5 ppmw, emissions from that cooling tower were not authorized. Such emissions occurred and were, accordingly, unauthorized. The Incident was an emissions event that was required to be reported to the TCEQ.

## 2. Timeliness

CITGO also argues that, if it is determined that the Incident was an emissions event, the 24-hour reporting clock began running when it discovered the source of the leak was its glycol knockout cooler that could no longer serve its functional purpose, not when it obtained the EPS test results. CITGO argues that its position “is supported by 2002 emissions event rulemaking and agency protocols regarding fugitive emission sources.”<sup>20</sup> Specifically, it relied on the following comment and response:

**Comment:** Sierra-Houston questioned if fugitive emissions are included in the § 101.1(26) definition of emissions event.

**Response:** Unauthorized emissions may result from fugitive emissions from a piece of equipment or component. For example, a complete failure of a component such that the component can no longer serve its functional purpose would generally be considered an emissions event.<sup>21</sup>

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<sup>18</sup> CITGO’s Closing Brief at 14.

<sup>19</sup> CITGO also relies on a proposed rule from 2002 that the TCEQ declined to adopt. This rule would have included a definition of “authorized emission.”

<sup>20</sup> CITGO’s Closing Brief at 14.

<sup>21</sup> 27 Tex. Reg. 8499, 8512 (April 26, 2002).

Additionally, CITGO relies on the TCEQ's Emissions Events Regional Investigation Protocol,<sup>22</sup> which discusses the applicability of a functional purpose test. Specifically, CITGO quotes at length a section entitled "Fugitive Component Failures Resulting in an Emission Event."<sup>23</sup> This section begins by noting that fugitive components can be part of emissions events:

Emissions from a fugitive component that are considered "leaks" are authorized under conditions of a permit or rules for leak detection and repair (LDAR). Emissions from a fugitive component not considered a leak under LDAR permit conditions or rules may be considered upset emissions and subject to the emissions event rules under 30 TAC Chapter 101.

It is the responsibility of the owner or operator of the facility to identify an emission from a fugitive component as an authorized emission (or repairable leak) or an emission event and respond to the detection of those emissions accordingly. In general terms, as found in the preamble and response to comments for the Chapter 101 rulemaking documents, an emission event may be the appropriate identification when the emission is a result of a failure that renders the component in a condition where it "can no longer serve its functional purpose."

This section of the protocol continues with a discussion of functional purpose review and how it is conducted.

The ED argues in response that the failure of a component such that it no longer serves its functional purpose is only one kind of an emissions event, not a definitional requirement. The ED also argues that CITGO knew that Cooling Tower 10 was no longer serving its functional purpose once it got the EPS test results back and that it did not need to wait to find out which heat exchanger was leaking.

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<sup>22</sup> Resp. Ex. 1.

<sup>23</sup> Resp. Ex. 1 at 25-26.

The ALJ agrees with the ED. Once CITGO received the EPS test results—test results showing that emissions from Cooling Tower 10 were not authorized—there was an emissions event as defined by the rule. There was, in other words, an “upset event or unscheduled maintenance, startup, or shutdown activity, from a common cause that result[ed] in unauthorized emissions of air contaminants from one or more emissions points at a regulated entity.”<sup>24</sup> Comments and protocols relating to one kind of emissions event do not alter this clear language. Additionally, the ALJ agrees with the ED that CITGO knew that there was a significant breakdown and knew that there were unauthorized emissions once it had the EPS test results. That point marked the beginning of the 24-hour reporting requirement, which the ALJ finds CITGO violated.

#### IV. CITGO’S AFFIRMATIVE DEFENSES

##### A. Affirmative Defense for Reporting

Alternatively, CITGO argues that it is entitled to an affirmative defense available to parties who report a non-excessive emissions event to the TCEQ.<sup>25</sup> Under this affirmative defense, an owner or operator must prove, among other things, that it complied with the emissions event reporting and recordkeeping requirements. As discussed above, one of those requirements is that the emissions event be reported to the TCEQ within 24 hours of its discovery. The ED disagrees that CITGO meets the criteria for this defense because it did not report the event within 24 hours.

CITGO argues that its untimeliness should not prevent its use of the affirmative defense. It bases this argument on the language of the rule setting out the defense, specifically that the affirmative defense applies even “when there are minor omissions or inaccuracies that do not

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<sup>24</sup> 30 Tex. Admin. Code § 101.1(28).

<sup>25</sup> 30 Tex. Admin. Code § 101.222(b).

impair the commission's ability to review the event according to this rule, unless the owner or operator knowingly or intentionally falsified the information in the report."<sup>26</sup> CITGO argues, based largely on rule-making comments, that untimeliness is just such a minor omission or inaccuracy. It contends that a delay does not impair the Commission's ability to review the Incident.

The ED disagrees and cites to other comments from rulemaking that distinguish omissions and inaccuracies from timeliness. The ED argues that these comments show that minor omissions and inaccuracies are forgiven as a result of the haste necessary to meet the reporting deadline. The ED also notes that the Commission declined to extend the reporting deadline from 24 hours to one working day, thereby showing the significance of a quick report.<sup>27</sup>

The ALJ agrees with the ED. Filing a late report is not a minor omission or inaccuracy. To find otherwise is to stretch the rule's language past its meaning. Additionally, CITGO's cited comments are so vague as not to be helpful to its position. CITGO failed to timely file its emissions event report and therefore failed to establish its entitlement to the affirmative defense for reporting.

## **B. Voluntary Leak Detection Program**

CITGO also argues that it is immune from this enforcement action because it has a voluntary supplemental VOC leak detection program. It argues that because it voluntarily tests for VOC leaks daily, instead of monthly as the Permit requires, it should be given immunity under a section of the Health and Safety Code that grants immunity from enforcement for leaks that would not otherwise have been detected:

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<sup>26</sup> 30 Tex. Admin. Code § 101.222(b)(1).

<sup>27</sup> ED's Brief in Response at 34 (citing 30 Tex. Reg. 8910 (Dec. 30, 2005)).

To the extent consistent with federal requirements, the commission may not take an enforcement action against an owner or operator of a facility participating in the program established under this section for a leak or emission of an air contaminant that would otherwise be punishable as a violation of the law or the terms of the permit under which the facility operates if the leak or emission was detected by using alternative technology and *it would not have been detected under the commission's regulatory program for leak detection and repair in effect on the date of the detection.*<sup>28</sup>

Here, however, the leak would have been detected, just not quite as quickly. CITGO's permit required it to test monthly. CITGO itself argues only that it discovered the leak nine days earlier than it otherwise would have. CITGO's testing program does not fall under this provision, and it is not immune from this enforcement action on this basis.

## V. PROPOSED PENALTY

### A. ED's Proposed Penalty

Rebecca Johnson, an enforcement coordinator for the Commission, testified about the ED's proposed penalty of \$9,775. Ms. Johnson explained the calculation and the Penalty Calculation Worksheet<sup>29</sup> used to reach it. Ms. Johnson also explained that the penalty was calculated using the Penalty Policy in place at the time of the incident, which was the 2002 Penalty Policy.

Ms. Johnson testified that for the failure to prevent unauthorized emissions, the \$10,000 base penalty amount was reduced by 75% to \$2,500 because, under the Penalty Policy, the Incident was a minor actual release. The duration was considered one-quarter year, also based on the Penalty Policy. This did not change the penalty amount. The penalty subtotal for this violation was \$2,500.

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<sup>28</sup> Tex. Health & Safety Code § 382.401(e) (emphasis added).

<sup>29</sup> ED Ex. 7.

As for the failure to report, the base penalty was \$100 (1% of the possible \$10,000) because it was a minor failure under the programmatic matrix. There was one single event, and CITGO was not eligible for a reduction for good faith efforts to comply. The subtotal for this violation was \$100.

The proposed penalty was increased significantly when CITGO's compliance history was taken into account. Ms. Johnson enhanced the penalty for eight Notices of Violation with the same or similar violations, fourteen Notices of Violations with dissimilar violations, eight orders with denial of liability, and three orders without denial of liability. There was a reduction for three Notices of Intent to conduct an audit. This resulted in a \$7,800 (or 300%) enhancement based on compliance history.

The penalty was then reduced by 25% of the \$2,500 base penalty (or \$625) for the unauthorized emission violation because CITGO completed corrective actions before the Notice of Enforcement. The penalty was not reduced for other factors as justice may require. The total proposed penalty was \$9,775.

## **B. Compliance History**

As discussed above, under the ED's proposed penalty, the base penalty was increased by 300% because of CITGO's compliance history. CITGO argues that its compliance-history enhancement should be capped at 100% of the base penalty. This argument is based on House Bill 2694, which became effective September 1, 2011, a few months after the Incident occurred. As a result of House Bill 2694, the law currently in effect states, "[t]he amount of the penalty enhancement or escalation attributed to compliance history may not exceed 100% of the base penalty for an individual violation as determined by the [C]ommission's penalty policy."<sup>30</sup>

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<sup>30</sup> Tex. Water Code § 5.754(e-1).

CITGO argues that this provision should apply retroactively to the proposed penalty here. This argument is based on a provision in the Code Construction Act that provides, “[i]f the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.”<sup>31</sup>

The ED argues that the compliance history provision cannot be examined outside of the comprehensive revision to the enforcement process and penalty calculations that resulted from House Bill 2694.

In general, laws do not apply retroactively. However, the provision of the Code Construction Act that CITGO cites provides an exception to that rule when a penalty would be lower as a result of a later statutory enactment. The ALJ agrees with the ED that when determining the applicability of this section, the entire statutory revision has to be considered, not just one part. CITGO did not establish that it would be subject to a lower penalty under the current law, only that the multiplier for its compliance history would be lower. And in fact, House Bill 2694 increased the maximum penalty amounts from \$10,000 per day per violation to \$25,000 per day per violation. Notably, CITGO does not argue that its entire penalty should be calculated under the newer Penalty Policy adopted as a result of House Bill 2694. The ALJ does not believe that House Bill 2694 reduced the penalty amount or that the Code Construction Act requires the use of the lower multiplier.

### **C. Other Factors as Justice May Require**

CITGO also argues that the proposed penalty should be reduced because of its voluntary supplemental VOC leak detection program. It argues that this reduction should fall under the Penalty Policy category of “other factors as justice may require” because, without this program,

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<sup>31</sup> Tex. Gov’t Code § 311.031(b).

the leak would not have been found until nine days later. It argues that not reducing the penalty on this basis “would send the wrong message to other regulated entities who may consider [a] voluntary supplement[al] program to enhance environmental performance.”<sup>32</sup>

The ALJ agrees with the ED, however, who argues that the early detection is already calculated in the penalty. The Penalty Policy considers the duration of the emissions event and the amount of contaminants released when calculating the penalty. A later-discovered leak could have resulted in increased duration and amount of contaminants released, possibly resulting in a higher proposed penalty. The Penalty Policy does not discourage voluntary testing programs. The ALJ sees no reason to reduce the penalty for “other factors as justice may require.”

#### **D. Corrective Action**

At the time of hearing, the ED requested corrective action. According to Ms. Johnson’s testimony, the ED sought an order requiring CITGO to implement measures to ensure emissions events are properly reported in the future.<sup>33</sup> The ALJ believes that such an order would be appropriate.

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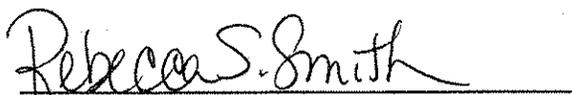
<sup>32</sup> CITGO’s Closing Brief at 21.

<sup>33</sup> The ED’s Preliminary Report and Petition also requested corrective action relating to the emissions. The ED dropped that request at hearing. (Tr. at 12, 91)

**VI. SUMMARY**

The ALJ recommends that the Commission adopt the attached proposed order, assessing CITGO a total of \$9,775 in penalties for the violations proven in this case and requiring CITGO to take the corrective action proposed by the ED.

**SIGNED November 6, 2014.**



**REBECCA S. SMITH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND  
ORDERING CORRECTIVE ACTION BY  
CITGO REFINING AND CHEMICALS COMPANY, L.P.,  
TCEQ DOCKET NO. 2012-1799-AIR-E,  
SOAH DOCKET NO. 582-13-5326**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by CITGO Refining and Chemicals Company, L.P. (Respondent). A Proposal for Decision (PFD) was presented by Rebecca S. Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Executive Director's Preliminary Report and Petition on May 14, 2014, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. Respondent owns and operates a petroleum refinery located at 1801 Nueces Bay Boulevard in Corpus Christi, Nueces County, Texas (the Plant).
2. The Plant consists of one or more sources, as defined in Texas Health & Safety Code § 382.003(12).
3. Respondent's operation of Cooling Tower No. 10, which is part of the Plant, is subject to Commission Permit No. 5418A (Permit), a New Source Review authorization.

4. CITGO also holds a federal operating permit, FOP No. O1423, (Federal Permit) to operate the Plant.
5. A Notice of Enforcement was issued on August 14, 2012.
6. On February 15, 2013, the Executive Director (ED) filed his Preliminary Report and Petition and mailed a copy of it to Respondent at its last address of record known to the Commission.
7. The ED alleged that:
  - a. Respondent violated Texas Health & Safety Code § 382.085(b); 30 Texas Administrative Code §§ 101.201(a)(1)(B) and 122.143(4); Special Terms and Conditions No. 31 of the Federal Permit; and Special Condition No. 4 of the Permit by failing to prevent unauthorized emissions; and
  - b. Respondent violated Texas Health & Safety Code § 382.085(b); 30 Texas Administrative Code §§ 101.201(a)(1)(B) and 122.143(4); and Special Terms and Conditions No. 2.F of the Federal Permit by failing to report the June 28, 2011 incident within 24 hours after discovery.
8. On March 8, 2013, Respondent filed an answer.
9. On July 3, 2013, the case was referred to SOAH for a contested case hearing.
10. On July 16, 2013, the Commission's Chief Clerk mailed a notice of hearing to the Respondent, the ED, and the Office of Public Interest Counsel.
11. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
12. On August 12, 2013, the parties filed an agreed motion stipulating to jurisdiction, waiving the preliminary hearing, and proposing a case schedule, which the ALJ approved.
13. On May 14, 2014, the ALJ convened the hearing on the merits. The ED appeared through his attorney, Jennifer Cook. Respondent appeared through its attorney, Paul Seals. The record closed when the parties filed reply briefs on September 10, 2014.
14. Special Condition No. 4 of the Permit provides that emissions from the cooling tower are not authorized if the volatile organic compound (VOC) concentration of the water returning to the cooling tower exceed 5 parts per million by weight (ppmw).

15. Special Condition No. 31 of the Federal Permit requires Respondent to comply with the requirements of New Source Review authorizations issued to it, including permits.
16. Special Condition No. 2.F of the Federal Permit requires Respondent to comply with 30 Texas Administrative Code § 101.201, relating to emissions event reporting.
17. At 5:30 p.m., on June 28, 2011, Respondent received results of an El Paso Stripper test that showed that the VOC concentration of the water returning to the cooling tower was 25.56 ppmw.
18. When Respondent received these test results at 5:30 p.m., on June 28, 2011, it discovered an emissions event.
19. Respondent filed an initial notification of an emissions event at 8:52 a.m. on June 30, 2011.
20. Respondent's initial notification was filed more than 24 hours after its discovery of an emissions event.
21. The ED proposed administrative penalties of \$9,775 for Respondent's violations due to the above.
22. The ED also recommended that Respondent be required to take corrective action.
23. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties. The Penalty Policy in place at the time of the June 28, 2011 incident was effective September 2002.
24. In calculating a penalty, the ED treated Respondent's failure to prevent unauthorized emissions as one quarterly violation and calculated a penalty that assumed only one penalty event per quarter.
25. In accordance with the Commission's Penalty Policy:
  - a. Respondent's Plant is a major source;
  - b. The base penalty for failure to prevent unauthorized emissions is \$10,000 per violation before adjusting for other factors; and
  - c. The ED reduced the base penalty total by 75% in accordance with the Penalty Policy for a subtotal of \$2,500 for this violation.
26. In calculating a penalty, the ED treated Respondent's failure to timely report an emissions event as one single event.
27. In accordance with the Commission's Penalty Policy:

- a. Respondent's failure to timely file its incident report within 24 hours is a minor violation;
  - b. The base penalty for failure to timely file its incident report is \$10,000 per violation before adjusting for other factors; and
  - c. The ED reduced the base penalty by 99% in accordance with the Penalty Policy for a subtotal of \$100.
28. In accordance with the Commission's Penalty Policy, the ED enhanced the two subtotals by 300%, for a subtotal of \$7,800, to take into account Respondent's compliance history.
29. In accordance with the Commission's Penalty Policy, the ED reduced the subtotal penalty of \$2,500 by 25% for the failure to prevent unauthorized emissions because of Respondent's good faith efforts to comply, resulting in a total penalty of \$9,775.

## II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority under Texas Water Code § 7.002.
2. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction, or any rule, order, or permit adopted or issued thereunder.
3. Under the law in effect at the time of the June 28, 2011 incident, the penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case. Texas Water Code § 7.052 (amended 2011).
4. In determining the amount of an administrative penalty, Texas Water Code § 7.053 requires the Commission to consider several factors, and the Penalty Policy implements those factors.
5. The Commission may order a violator to take corrective action. Tex. Water Code § 7.073.
6. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code, ch. 2003.
7. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).

8. As required by Texas Water Code § 7.055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Respondent was notified of the Preliminary Report and Petition and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein.
9. As required by Texas Government Code §§ 2001.051(1) and 2001.052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violations and the proposed penalties and corrective action.
10. Respondent violated Texas Health & Safety Code § 382.085(b); 30 Texas Administrative Code § 122.143(4); Special Terms and Conditions No. 31 of the Federal Permit; and Special Condition No. 4 of the Permit by failing to prevent unauthorized emissions.
11. Respondent violated Texas Health & Safety Code § 382.085(b); 30 Texas Administrative Code §§ 101.201(a)(1)(B) and 122.143(4); and Special Terms and Conditions No. 2.F of the Federal Permit by failing to report the June 28, 2011 incident within 24 hours after discovery.
12. Respondent failed to show that it is eligible for the affirmative defense set out in 30 Texas Administrative Code § 101.222(b).
13. The penalty and corrective action that the ED proposed for the Respondent's violations considered in this case conform to the requirements of the Texas Water Code, ch. 7 and the Commission's Penalty Policy.
14. Respondent should be assessed a total of \$9,775 in penalties for the violations considered in this case and ordered to take the corrective action proposed by the ED and described in the Ordering Provisions below.

### **III. ORDERING PROVISIONS**

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Within 30 days after the effective date of this Commission Order, Respondent shall pay an administrative penalty in the amount of \$9,975 for its violations of Texas Health & Safety Code § 382.085(b), 30 Texas Administrative Code §§ 101.201(a)(1)(B) and 122.143(4), Special Terms and Conditions Nos. 2.F and 31 of FOP No. O1423, and Special Condition No. 4 of NSR Permit No. 5418A considered in this case.

2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: CITGO Refining and Chemicals Company, L.P., TCEQ Docket No. 2012-1799-AIR-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

3. The payment of the administrative penalty and the performance of all corrective action listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective action or penalties for other violations that are not raised here.
4. Within 30 days of the effective date of this Order, Respondent shall implement measures and procedures to ensure emissions events are properly reported.
5. Within 45 days after the effective date of this Order, Respondent shall submit written certification to demonstrate compliance with Ordering Provision No. 4. The certification shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records; shall be notarized by a State of Texas Notary Public; 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.

6. Respondent shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

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

with a copy to:

Rosario Torres, Air Section Manager  
Texas Commission on Environmental Quality  
Corpus Christi Regional Office  
6300 Ocean Drive, Suite 1200  
Corpus Christi, Texas 76118-6951

7. 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 Order.
8. 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.
9. The effective date of this Order is the date the Order is final. 30 Tex. Admin. Code § 80.273 and Tex. Gov't Code § 2001.144.
10. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
11. 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**

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**Bryan W. Shaw, Ph.D., P.E., Chairman**  
**For the Commission**