

State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

August 18, 2023

Benjamin Pence, TCEQ Staff Attorney

VIA EFILE TEXAS

Pranjal Mehta, OPIC Staff Attorney

VIA EFILE TEXAS

Sayedali Modi, Respondent
A S K C-Stores, Inc., d/b/a Amigo Mart
2018 Gustave Cook Lane
Richmond, TX 77469

VIA REGULAR MAIL

RE: SOAH Docket Number 582-22-08384; Texas Commission on Environmental Quality No. 2020-0255-PST-E; Executive Director of the Texas Commission on Environmental Quality v. A S K C-Stores, Inc. d/b/a Amigo Mart

Dear Parties:

Please find attached a Proposal for Decision in this case. Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> 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.

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

—
**EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER**

V.

**A S K C-STORES, INC. DBA AMIGO MART,
RESPONDENT**

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that A S K C-Stores, Inc. doing business as Amigo Mart (Respondent) violated the Texas Water Code and the Commission's rules by failing to monitor its underground storage tank (UST) system for releases and by failing to provide corrosion protection for its UST system. The ED requests that the Commission assess an administrative penalty of \$14,751.00 for these

violations. The Administrative Law Judge (ALJ) finds that Respondent committed the alleged violations and recommends that the Commission assess a total administrative penalty of \$14,751.00 against Respondent.

I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Notice and jurisdiction were not disputed and are set out in the proposed order without further discussion here. Jurisdictional exhibits were admitted at the preliminary hearing, which was held on September 22, 2022.

On January 18, 2023, the ALJ granted the ED's Motion to Compel and for Sanctions, finding that under 30 Texas Administrative Code section 70.8, Respondent could not raise the issue of its financial inability to pay a penalty because it failed to produce certain financial information.

The hearing on the merits was held via Zoom videoconference on June 22, 2023, before ALJ Rebecca Smith. The ED was represented by attorney Benjamin Pence. Respondent was represented by its president Sayedi Modi. The Office of Public Interest Counsel was represented by attorney Pranjal Mehta. The record closed with the filing of the admitted exhibits on June 23, 2023.

II. BACKGROUND

At the time of the alleged violations, Respondent operated a UST system and a convenience store with retail sales of gasoline located at 14325 State Highway 6 in Santa Fe, Galveston County, Texas (Facility). Three USTs were installed at the

Facility, and each tank had a 10,000-gallon capacity. The monthly throughput was approximately 3,000 gallons.

III. APPLICABLE LAW

Texas Water Code section 26.3475(c)(1) requires USTs to comply with TCEQ's requirements for tank release detection equipment. TCEQ has adopted rules that require an owner or operator of a UST to use an approved release detection method to monitor tanks for leaks at least once every 30 days.¹ Under the rules, an owner or operator must conduct a reconciliation of inventory control records at least once every 30 days, in a manner sufficiently accurate to detect a release as small as the sum of 1.0% of the total substance flow-through for the 30-day period plus 130 gallons.²

Under the Texas Water Code and TCEQ's rules, UST systems must also comply with corrosion protection requirements.³ These requirements apply to a UST system's "tanks, piping (including valves, fittings, flexible connectors, swing joints, and impact/shear valves), and also to other underground metal components associated with a UST system, including but not limited to, secondary containment devices, manways, manholes, fill pipes, vent lines, submersible pump housings, spill

¹ 30 Tex. Admin. Code § 334.50(b)(1)(A).

² 30 Tex. Admin. Code § 334.50(d)(1)(B)(ii).

³ Tex. Water Code § 26.3475(d); 30 Tex. Admin. Code § 334.49(a)(1).

containers, and riser pipes.”⁴ TCEQ’s rules provide for several options, including cathodic protection, to comply with the corrosion protection requirements.⁵

TCEQ is authorized to assess an administrative penalty against a person who violates a provision of the Texas Water Code or any rule adopted under it.⁶ For the violations alleged in this case, the maximum penalty amount is \$25,000 per day for each violation.⁷ The Texas Water Code sets out the following factors the Commission must consider in determining the amount of an administrative penalty:

- 1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- 2) the impact of the violation on:
 - (A) air quality in the region;
 - (B) a receiving stream or underground water reservoir;
 - (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - (D) affected persons;
- 3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;

⁴ 30 Tex. Admin. Code § 334.49(a)(4).

⁵ 30 Tex. Admin. Code § 334.49(b).

⁶ Tex. Water Code § 7.051(a)(1)(A)-(B).

⁷ Tex. Water Code § 7.052(c).

- (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
- 4) any other matters that justice may require.⁸

TCEQ has adopted a Penalty Policy that takes these factors into account in addressing how the ED should evaluate violations for purposes of recommending an administrative penalty.⁹

IV. EVIDENCE AND ANALYSIS

The ED presented the testimony of two witnesses: Jennifer Thickett, an air program manager with the Galveston County Health District, and Kenneth Moller, a technical specialist with TCEQ. The ED also offered eight exhibits, which were admitted into evidence. Respondent presented the testimony of Mr. Modi and offered no exhibits.

⁸ Tex. Water Code § 7.053.

⁹ ED Ex. 5.

A. ED'S EVIDENCE

1. Testimony of Jennifer Thickett

The Facility was investigated on September 16, 2019.¹⁰ Although Ms. Thickett did not conduct the 2019 compliance investigation of Respondent, she testified that she mentored the investigator throughout the investigation and performed a quality review on the final report.¹¹ The investigation in this case was a routine one conducted under a schedule from the federal Environmental Protection Agency. About two weeks before this kind of investigation, the facility receives notice of the investigation and is also given a list of documents to have available for review. Once on site, the investigator reviews the documents and conducts a physical inspection of the facility.

Ms. Thickett testified that an owner or operator is responsible for maintaining compliance with the UST requirements. Under TCEQ's rules, an operator is the person in day-to-day control of the operation of the UST.¹²

Self-registration forms for the Facility showed that Respondent became the operator on June 20, 2016.¹³ In June 2020, another self-registration form was processed showing that Respondent was both the owner and the operator of the

¹⁰ ED Ex. 4 at 18-19.

¹¹ Ms. Thickett testified that her employer, the Galveston County Health District, has a contract with TCEQ to conduct air quality inspections in Galveston County.

¹² See 30 Tex. Admin. Code § 334.2(75).

¹³ ED Ex. 1 at 1.

Facility.¹⁴ On March 16, 2021, the UST system was transferred to a new owner.¹⁵ Ms. Thickett noted that this transfer took place after the investigation. At the time of the investigation, Respondent was the owner and operator of the UST system and, thus, responsible for the system.

In her testimony, Ms. Thickett set out the various methods of complying with the release detection requirements every thirty days. One of those methods is statistical inventory reconciliation (SIR) with inventory control, the method that Respondent reported it used.¹⁶ Under SIR, a vendor conducts a statistical analysis of the fuel going into and out of a system. TCEQ's rules require that this analysis must analyze inventory control records in such a way as to be able to detect a release of 0.2 gallons per hour from any part of the UST system. Ms. Thickett testified that the SIR reports must be submitted to the owner or operator within 15 calendar days after the last day of the 30-day release detection period.¹⁷

Ms. Thickett testified that Respondent provided the investigator with SIR reports, but those reports showed that the analysis was not done within the 15-day or 30-day window. Instead, the SIR analysis for the period from January 27, 2019, through February 25, 2019, was performed on April 10, 2019. Similarly, the SIR analysis for the period from February 26, 2019, through March 27, 2019, was performed on April 29, 2019.

¹⁴ ED Ex. 2.

¹⁵ ED Ex. 3.

¹⁶ 30 Tex. Admin. Code § 334.50(d)(9).

¹⁷ See 30 Tex. Admin. Code § 334.50(d)(9)(A)(iii).

However, the delays in the SIR analysis were not the only issue with release detection that Ms. Thickett described. She testified that SIR alone would not be enough to meet the release detection requirements: Respondent was also required to perform inventory control.¹⁸ Inventory control is essentially looking at the balance of fuel into and out of the system to determine if there are leaks. It, like the other aspects of release detection, must be performed at least once every 30 days. Ms. Thickett testified that none of the records provided by Respondent contained this sort of reconciliation leak check required for inventory control; thus, it appeared that Respondent had not performed it.

Ms. Thickett also explained TCEQ's corrosion protection requirements. Corrosion is a significant concern for UST systems. Without protection, corrosion in metal components can lead to leaks, resulting in gasoline coming into contact with the environment, including groundwater. An inspection on September 30, 2019, found that the Facility's dispensers and submersible turbine pumps (STPs), both components of the UST system, lacked corrosion protection.¹⁹

Following the inspection, Respondent provided TCEQ with a survey dated October 15, 2019, which showed that the system's tanks have sufficient corrosion protection. Ms. Thickett testified, however, that this survey was incomplete and did not indicate that the components throughout the UST system were tested. In particular, the October 2019 survey did not show that the components that

¹⁸ 30 Tex. Admin. Code § 334.50(d)(9)(A) (providing that "a combination of SIR and inventory control may be used as a release detection method for UST system tanks and piping").

¹⁹ ED Ex. 4 at 55-57.

previously failed inspection—the STPs and dispensers—had been repaired. Ms. Thickett concluded that this survey did not demonstrate compliance with the corrosion protection rules.

Ms. Thickett emphasized the importance of both the leak detection and corrosion protection requirements. Without corrosion protection, metal components can develop leaks, allowing gasoline to be released into the environment. Similarly, without leak detection, owners and operators could be unaware that fuel stored underground was leaking, resulting in gasoline coming into contact with the environment, possibly including groundwater. She added that gasoline contains carcinogens and is flammable, both of which raise health and safety concerns.

2. Testimony of Kenneth Moller

Mr. Moller, the enforcement coordinator on this case, testified regarding the ED's proposed penalty.²⁰ Mr. Moller explained how the penalty was calculated using the Penalty Calculation Worksheet,²¹ a worksheet used to assess penalties in accordance with TCEQ's Penalty Policy. For purposes of calculating the penalty, the two violations are considered separate.

Under the applicable 2014 Penalty Policy, the first violation for failing to monitor the UST for releases, including the failure to reconcile inventory control

²⁰ Mr. Moller currently works as a technical specialist with the TCEQ.

²¹ ED Ex. 5.

records, is analyzed using the environmental, property, and human health matrix, also known as the health and safety matrix. Mr. Moller testified that the Facility is considered a minor source under the Penalty Policy because its monthly throughput is less than 50,000 gallons.²² The violation created the potential for a release of contaminants into the environment that could cause major harm. A leak of gasoline, a carcinogen, could damage groundwater; and, if it catches fire, could release acrid smoke. Because of the classification as a potential major release from a minor source, under the Penalty Policy, the violation penalty is reduced to 15% of the \$25,000 base penalty, or \$3,750, before any other adjustments.²³

Mr. Moller testified that failure to provide release detection is considered a continuing violation, rather than a discrete violation, and was measured from the investigation date to the screening date, for a total of 86 violation days. Mr. Moller testified that although the Penalty Policy prescribes up to monthly events for violations categorized as potential major releases, he used discretion to reduce the number of events to one quarterly event. Thus, the \$3,750 amount is not increased for the number of violation events. Mr. Moller did not find any good faith efforts to comply and so did not credit Respondent for that. On the other hand, Mr. Moller did find \$2,325 in avoided costs by not implementing a release detection method.

According to Mr. Moller, the second violation—for failure to provide corrosion protection for the UST system—is also analyzed under the health and

²² See ED Ex. at 19, ED Ex. 5 at 79.

²³ ED Ex. 6 at 98.

safety matrix. As with the failure to conduct release detection, this violation is classified as a potential major release. As a result of this characterization of the violation, the penalty is reduced to 15% of the \$25,000 base penalty, or \$3,750, before any other adjustments. Mr. Moller recommended one single quarterly violation. He also recommended no downward adjustment for a good faith effort to comply or for compliance history. He determined that the economic benefit to Respondent of not complying with the corrosion protection requirements was \$4,926.

The sum of the two violation base penalties of \$3,750 equals \$7,500. Under the penalty policy, avoided costs (the economic benefit discussed above) are added under the category of other factors as justice may require. With this adjustment, the ED's final proposed penalty totals \$14,751. The ED does not recommend any corrective action.

B. RESPONDENT'S EVIDENCE

Mr. Modi testified about the effects of the COVID-19 pandemic, which reduced sales at the Facility. He does not challenge the violation or the penalty, but requests that he be able to pay off the penalty little by little.

C. ALJ'S ANALYSIS

The ALJ finds that the ED established by a preponderance of the evidence that Respondent failed to use an approved release detection method to monitor tanks for leaks at least once every 30 days. The ALJ also finds that the ED established by a preponderance of the evidence that Respondent failed to use corrosion protection on some of the UST components, specifically STPs and dispensers. Finally, the ALJ finds that the ED complied with its penalty policy, and that the proposed \$14,751 penalty is appropriate, but notes that the Commission may choose to offer Respondent a payment plan. Thus, the ALJ recommends that the Commission adopt the attached proposed order, assessing Respondent a total of \$14,751 in penalties for the violations proven in this case.

Signed August 18, 2023

ALJ Signature:



Rebecca Smith

Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST
A S K C-STORES, INC. DBA AMIGO MART,
TCEQ DOCKET NO. 2020-0255-PST-E,
SOAH DOCKET NO. 582-22-08384**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED) First Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against A S K C-Stores, Inc. dba Amigo Mart (Respondent). A Proposal for Decision (PFD) was drafted by Rebecca Smith, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing via videoconference concerning the First Amended Report and Petition on June 22, 2023.

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

I. FINDINGS OF FACT

1. In 2019, Respondent operated an underground storage tank (UST) system and a convenience store with retail sales of gasoline located at 14325 State Highway 6 in Santa Fe, Galveston County, Texas (Facility).
2. Three USTs were installed at the Facility, and each tank had a 10,000-gallon capacity. The monthly throughput was approximately 3,000 gallons.
3. The USTs contain a regulated petroleum substance.
4. The Facility was investigated beginning September 16, 2019, as part of a routine investigation.
5. Respondent selected statistical inventory reconciliation (SIR) with inventory control as its release detection method for the UST system at the Facility.
6. The SIR report of the Facility's UST system for the 30-day period from January 27, 2019, to February 25, 2019, was not provided until April 10, 2019.
7. The SIR report of the Facility's UST system for the 30-day period from February 26, 2019, to March 27, 2019, was not provided until April 29, 2019.
8. Respondent did not perform the reconciliation required for inventory control every 30 days.
9. Respondent failed to use an approved release detection method to monitor tanks for leaks at least once every 30 days.
10. An inspection on September 30, 2019, determined that submersible turbine pumps (STPs) and dispensers at the Facility lacked corrosion protection.
11. Respondent did not provide corrosion protection for the STPs and dispensers.
12. On November 3, 2021, the ED filed a First Amended Preliminary Report and Petition and mailed a copy of it to Respondent at its last address of record known to the Commission.

13. On November 30, 2021, Respondent filed an answer to the First Amended Preliminary Report and Petition and requested a hearing.
14. On July 29, 2022, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk docketed it with SOAH on August 12, 2022.
15. On August 31, 2022, the Chief Clerk mailed a notice of hearing to Respondent, the ED, and the Office of Public Interest Counsel.
16. 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 factual matters asserted or an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.
17. On September 22, 2022, a preliminary hearing was held via Zoom videoconference, and jurisdictional exhibits were admitted into evidence.
18. On September 26, 2022, the ALJ entered an order memorializing the preliminary hearing and adopting a hearing schedule.
19. On January 18, 2023, the ALJ issued an order prohibiting Respondent from raising the issue of its financial inability to pay a penalty because it failed to produce certain financial information.
20. The hearing on the merits was held via Zoom videoconference on June 22, 2023, before ALJ Rebecca Smith. The ED was represented by attorney Benjamin Pence. Respondent was represented by its president Sayedi Modi. The Office of Public Interest Counsel was represented by attorney Pranjal Mehta. The record closed with the filing of the admitted exhibits on June 23, 2023.
21. The Commission has adopted a Penalty Policy setting out its policy regarding the computation and assessment of administrative penalties, effective April 1, 2014.

22. The ED's calculation of a total penalty of \$14,751.00 is consistent with the Penalty Policy.

II. CONCLUSIONS OF LAW

1. Under Texas Water Code section 7.002, Respondent is subject to the Commission's enforcement authority.
2. 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.
3. Under Texas Water Code section 7.051, 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 any rule, order, or permit adopted or issued thereunder.
4. The UST at the Facility is not exempt or excluded from regulation under the Texas Water Code or the Commission's rules.
5. The ED has the burden of proving the violations in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(b).
6. USTs must comply with TCEQ's requirements for tank release detection equipment. Tex. Water Code §26.3475(c)(1).
7. Respondent violated 30 Texas Administrative Code section 334.50(b)(1)(A), which requires an owner or operator of a UST to use an approved release detection method to monitor tanks for leaks at least once every 30 days.
8. Respondent violated 30 Texas Administrative Code section 334.50(d)(1)(B)(ii), which requires reconciliation of detailed inventory control records to be conducted at least once every 30 days.
9. Respondent also violated Texas Water Code section 26.3475(c)(1), which requires USTs to comply with TCEQ's requirements for tank release detection equipment.

10. By failing to provide corrosion protection for the STPs and dispensers, Respondent violated Texas Water Code section 26.3475(d) and 30 Texas Administrative Code section 334.49(a)(1), which require UST systems to comply with corrosion protection requirements.
11. The penalty that the ED proposed for Respondent's violations in this case conforms to the requirements of Texas Water Code sections 7.052(c) and 7.053.

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 \$14,751.00 for its violations of Texas Water Code section 26.3475(c)(1) and (d); and 30 Texas Administrative Code sections 334.49(a)(1) and 334.50(b)(1)(A) and (d)(1)(B)(ii).
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: A S K C-Stores, Inc. dba Amigo Mart, TCEQ Docket No. 2020-0255-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 payment of the administrative penalty 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. 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 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. Tex. Gov't Code § 2001.144; 30 Tex. Admin. Code § 80.273.
7. 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.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Jon Niermann, Chairman
For the Commission**