

# State Office of Administrative Hearings

Kristofer S. Monson  
Chief Administrative Law Judge

May 19, 2023

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**RE: Docket Number 582-22-2669.TCEQ; Texas Commission on Environmental Quality No. 2021-0064-PST-E; *Executive Director of the Texas Commission on Environmental Quality v. Antonina LLC dba Food & Fuel Express***

Dear Parties:

Here is the Proposal for Decision in this case.

Exceptions and replies may be filed by any party in accordance with 30 Texas Administrative Code section 80.257(a).

CC: Service List

**BEFORE THE  
STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

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

**v.**

**ANTONINA LLC DBA FOOD & FUEL EXPRESS**

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**PROPOSAL FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) brought this action against Antonina LLC dba Food & Fuel Express (Antonina). The ED asserts that Antonina failed to conduct annual Stage I testing during 2020 and that a \$3,000 penalty is appropriate. Antonina does not contest the violation but rather seeks a lower penalty because its previous owner's records were lacking and because COVID-19 affected its business operations. After considering the evidence, the Administrative Law Judge (ALJ) concludes that Antonina failed to conduct required annual testing and recommends that TCEQ assess a \$3,000 penalty against Antonina.

## **I. PROCEDURAL HISTORY**

Antonina operates a gas station in Hays County. In December 2020, a TCEQ investigator inspected the business and concluded that it had failed to conduct required annual Stage I tests. In October 2021, the ED filed a preliminary report and petition. Antonina then requested a hearing and filed an answer. In May 2022, the matter was referred to the State Office of Administrative Hearings (SOAH) for a hearing. The hearing was held on March 29, 2023, before ALJ Andrew Lutostanski. David Keagle represented the ED; Jennifer Jameson represented the Office of Public Interest Counsel; and Pierre Elbayeh represented Antonina. The record closed the day after the hearing.

## **II. APPLICABLE LAW**

TCEQ administers the Texas Clean Air Act.<sup>1</sup> Under that law, a person may not cause the emission of an air contaminant or perform an activity in violation of a statute or applicable administrative rule.<sup>2</sup> TCEQ Rule 115.225, in turn, requires affected gas stations to perform annual Stage I testing, including a pressure vacuum vent cap test and a pressure decay test.<sup>3</sup>

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<sup>1</sup> Tex. Health & Safety Code § 382.011(a)(1).

<sup>2</sup> Tex. Health & Safety Code § 382.085(b).

<sup>3</sup> 30 Tex. Admin. Code § 115.225; 40 C.F.R. § 63.11120(a).

TCEQ has the authority to impose an administrative penalty against a person who violates the Texas Clean Air Act or a rule adopted under it.<sup>4</sup> TCEQ may impose up to a \$25,000 penalty for each day a violation occurs.<sup>5</sup> In determining the amount of the penalty, TCEQ must consider certain factors.<sup>6</sup>

The ED has the burden to prove its allegations by a preponderance of the evidence.<sup>7</sup> After the hearing, the ALJ issues a proposal for decision with findings of fact and conclusions of law.<sup>8</sup> TCEQ then issues a decision, which is subject to judicial review.<sup>9</sup>

### **III. EVIDENCE**

Three witnesses testified. Casey Grunnet works at TCEQ and is responsible for investigations in the petroleum storage tank program. He testified about Antonina's gas station and the investigator's findings. Courtney Gooris also works for TCEQ. She evaluated the violation here and testified in support of a \$3,000 administrative penalty. Pierre Elbayeh owns Antonina, which is responsible for operating the gas station. He did not dispute the violation but asserted a lesser

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<sup>4</sup> Tex. Water Code § 7.051(1).

<sup>5</sup> Tex. Water Code § 7.052(c)-(d).

<sup>6</sup> Tex. Water Code §§ 7.053, .058.

<sup>7</sup> 30 Tex. Admin. Code § 80.17(b).

<sup>8</sup> 30 Tex. Admin. Code § 80.252(e).

<sup>9</sup> 30 Tex. Admin. Code § 80.267; Tex. Gov't Code § 2001.171.

penalty is appropriate. TCEQ's administrative record filed on June 14, 2022, and its hearing exhibits filed on March 29, 2023, were admitted into evidence.

As background, Antonina operates a gas station in Hays County, which is a covered attainment county in the Texas Stage I program. The gas station has a monthly gasoline throughput greater than 50,000 gallons per month, so it qualifies as a major source. Antonina bought the gas station in April 2020,<sup>10</sup> and its TCEQ tank registration was updated to reflect Antonina's ownership in June 2020. Before that, TCEQ investigators had visited the gas station only once in the prior five years and found the station was operating in compliance with law.

An investigator inspected Antonina in December 2020. Records reflect that Mr. Elbayeh was notified of the visit beforehand and was present during it.<sup>11</sup> The investigator found that Antonina had failed to perform annual Stage I testing.<sup>12</sup>

Mr. Grunnet explained that, because Antonina had not conducted and passed the annual Stage I tests, it was required to complete the tests and submit passing results to TCEQ.<sup>13</sup> In January 2021, Antonina took the tests. Antonina failed its first pressure vacuum vent cap test but then replaced the vent cap, retested, and passed.<sup>14</sup> Because Antonina failed the pressure vacuum vent cap test

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<sup>10</sup> ED Ex. 5.

<sup>11</sup> ED Ex. 1 at 5.

<sup>12</sup> ED Ex. 1 at 5.

<sup>13</sup> ED Ex. 1 at 6.

<sup>14</sup> ED Ex. 2 at 7.

the first time, it was very likely the system was out of compliance at the time of the inspection, Mr. Grunnet said, but Antonina was not cited for a system failure, only for not performing the test. Antonina passed the pressure decay test.<sup>15</sup>

Mr. Grunnet discussed the environmental significance of the pressure vacuum vent cap test. The vent cap should equalize the pressure between the tank and the atmosphere. If there is a difference, the cap cracks. The vent cap test is not as important as a leak test, he said, but it's still important for air quality. Failure to do the pressure vacuum vent cap test each year is a Category A violation.

Mr. Grunnet discussed testing availability. Third-party contractors come to gas stations to perform Stage I tests for a fee, he said. Testing costs about \$500. There are several contractors in the Central Texas area, and gas stations arrange for them to perform the tests annually. According to Mr. Grunnet, although it may have been more difficult than usual to get contractors to perform the tests in 2020 because COVID affected so much, out of the 167 gas station inspections in the region during that time, there were only four stations that failed to perform these annual tests.<sup>16</sup>

Ms. Gooris explained how administrative penalties are calculated. First, the environmental, property, and human health matrix part of the penalty calculation worksheet should be used because, if a gas station does not regularly test its equipment, there is a chance fuel vapors could be released, and those fuel vapors

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<sup>15</sup> ED Ex. 2 at 8.

<sup>16</sup> ED Ex. 6 at 43-45.

contain toxic substances and a significant amount of pollutants. She explained that vapor releases are particularly problematic in regions with sensitive or problematic air quality, and gasoline is very toxic and very volatile. Analyzing the risk posed by this violation under the environmental, property, and human health matrix, there was a potential not an actual release of pollutants, and the violation presented a moderate risk of harm because there was a significant amount of pollutants involved but not an amount exceeding the level protective of human health.<sup>17</sup> A potential moderate risk of harm translates to a base penalty of 15% of the maximum \$25,000 penalty: \$3,750. Next, the number of violations is considered.<sup>18</sup> Here, the ED concluded that the failure to test was a single violation.<sup>19</sup> Finally, adjustments are considered. Antonina has no prior violations and falls in the “high performer” classification, resulting in a 10% penalty reduction of \$375.<sup>20</sup> And Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests. This good faith effort to comply results in another 10% reduction in the penalty—another \$375.<sup>21</sup> In all, then, she said a \$3,000 penalty is appropriate.

Mr. Elbayeh testified that the change in ownership made regulatory compliance more difficult. He bought the gas station and began running operations in June 2020. He believed he had a year to perform the Stage I tests; he did not

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<sup>17</sup> ED Ex.4 at 28.

<sup>18</sup> ED Ex. 3 at 9.

<sup>19</sup> ED Ex. 4 at 11.

<sup>20</sup> ED Ex. 3 at 9.

<sup>21</sup> ED Ex. 3 at 3.

understand that, by purchasing the business, he accepted the business's obligations to continue to perform tests on the equipment on the business's annual cycle. The prior owner also kept poor records. Because he could not get records from the previous owner, he thought the Stage I tests might already have been done. He acknowledged, however, that Antonina was required to retain its Stage I records for two years, so he should have known when testing was done or known that the lack of records indicated he needed to take further action. He also acknowledged that TCEQ retains testing records, but he did ask TCEQ for them.

Mr. Elbayeh said COVID-19 pandemic made compliance difficult. He described running a business during the pandemic as "chaos." He told employees to stay home unless it was essential that they be there; sometimes employee didn't show up; and everyone tried their best, but operating was difficult. He described his failure to perform the annual tests as "an extraordinary COVID situation." He believed at the time that "everything was postponed" or in a "grace period." And once he was notified in December 2020 of the need to complete the tests, he quickly scheduled them, and they were done in January 2021.

Mr. Elbayeh disputed the seriousness of the violation. In his experience, there is hardly any vapor release due to a faulty vacuum cap. The tank releases the cap when it attaches to the hose; that's done in seconds. And even if the cap is open, vapor will not be released into the atmosphere. He opined that a lower penalty is appropriate—one not for moderate but only for minor harm.



#### IV. ANALYSIS

The parties agree Antonina failed to perform required annual Stage I testing; they only dispute the penalty.

None of the reasons Antonina provided support a reduced penalty. Antonina was responsible for Stage I annual testing and should have requested records from TCEQ to determine when its annual tests were due if it could not tell from the prior owner's records. And Antonina could have performed Stage I tests in 2020 despite the COVID-19 pandemic because nearly all the other gas stations in the area did, and Antonina was able to get the testing done quickly on a month's notice after it was informed of the violation. Although Antonina disputes the seriousness of the violation, the evidence shows that TCEQ staff followed its penalty matrix and correctly concluded that the failure to perform Stage I testing presented a potential moderate harm, which translates to a \$3,750 base penalty and ultimately a \$3,000 penalty after adjustments for its past performance and response to the violation.

The evidence on the penalty factors in section 7.053 of the Texas Water Code also further supports a \$3,000 penalty:

- Annual Stage I tests are required to protect air quality;
- Failure to perform annual Stage I tests has the potential to negatively affect air quality in the region;
- Antonina has no prior violations and falls in the "high performer" classification;

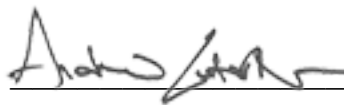
- Antonina is culpable for the violation because it should have known that it was responsible for annual Stage I testing and should have known when the tests were due;
- Antonina could have done the Stage I tests during 2020, as evidenced by the fact that nearly all of the other gas stations in the area who were investigated did their annual tests that year;
- Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests;
- Antonina did not profit from its violation other than by deferring the approximately \$500 cost of annual testing for a short period; and
- A \$3,000 penalty is significant and should deter future violations.

## V. CONCLUSION

The ALJ finds that a violation occurred and recommends that Antonina be assessed a \$3,000 administrative penalty. The ALJ recommends that the ED adopt the following order, which includes findings of fact and conclusions of law.

**Signed May 19, 2023.**

ALJ Signature:



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Andrew Lutostanski

Presiding Administrative Law Judge



## **TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

### **AN ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST ANTONINA LLC DBA FOOD & FUEL EXPRESS TCEQ DOCKET NO. 2021-0064-PST-E; SOAH DOCKET NO. 582-22-2669**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED) Preliminary Report and Petition recommending that TCEQ enter an enforcement order assessing an administrative penalty against Antonina LLC dba Food & Fuel Express (Antonina). After a hearing, a Proposal for Decision (PFD) was issued by Andrew Lutostanski, an Administrative Law Judge with the State Office of Administrative Hearings (SOAH). After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

#### **I. FINDINGS OF FACT**

1. Antonina owns and operates an underground storage tank system and a convenience store with retail sales of gasoline located at 1350 Old Bastrop Highway in San Marcos, Hays County, Texas.

2. The underground storage tanks are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
3. The underground storage tanks contained a regulated petroleum substance.
4. Hays County is a covered attainment county in the Texas Stage I program.
5. Antonina's gas station has a monthly gasoline throughput greater than 50,000 gallons per month.
6. Antonina bought the gas station in 2020. Its TCEQ tank registration was updated to reflect Antonina's new ownership in June 2020.
7. Previously, TCEQ investigators visited the gas station only once in the prior five years and found the station was operating in compliance with law.
8. In December 2020, a TCEQ investigator inspected the gas station to evaluate compliance.
9. Antonina failed to perform and pass the annual Stage I testing, which includes a pressure vacuum vent cap test and a pressure decay test.
10. The factors in section 7.053 of the Texas Water Code apply as follows:
  - a. Annual Stage I tests are required to protect air quality;
  - b. Failure to perform annual Stage I tests has the potential to negatively affect air quality in the region;
  - c. Antonina has no prior violations and falls in the "high performer" classification;
  - d. Antonina is culpable for the violation because it should have known that it was responsible for annual Stage I testing and should have known when the tests were due;

- e. Antonina could have done the Stage I tests during 2020, as evidenced by the fact that nearly all of the other gas stations in the area who were investigated had done their annual tests that year;
  - f. Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests;
  - g. Antonina did not profit from its violation other than by deferring the approximately \$500 cost of annual testing for a short time; and
  - h. A \$3,000 penalty is significant and should deter future violations.
11. TCEQ has adopted a penalty policy setting forth how it computes and assesses administrative penalties.
12. Under the penalty policy, Antonina’s underground storage system is a major source.
13. Under the penalty policy, Antonina’s violation for failing to conduct annual Stage I testing:
- a. is appropriately analyzed under the health-and-safety matrix;
  - b. created the potential for a release of contaminants in the environment that could cause moderate harm;
  - c. is an occurrence that is reasonably categorized as a single event;
  - d. is subject to a base penalty of \$3,750.
14. Antonina has no prior violations and falls in the “high performer” classification, resulting in a 10% penalty reduction.
15. Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests. This good faith effort to comply results in another 10% reduction in the penalty.

16. Under TCEQ's penalty policy, the total payable penalty for the violation is \$3,000.
17. In March 2021, the ED filed a preliminary report and petition, which alleged that Antonina failed to comply with annual Stage I vapor recovery testing requirements in violation of Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225 by failing to conduct annual pressure vacuum (P/V) vent cap and pressure decay tests.
18. In April 2021, Antonina filed an answer and requested a hearing.
19. In May 2022, the ED referred the matter to SOAH for a hearing.
20. The parties waived the preliminary hearing.
21. In January 2023, SOAH sent the parties an order setting the hearing on the merits on March 29, 2023.
22. Together, the order setting the hearing and the ED's preliminary report and petition contained a notice 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 in the complaint or petition filed with the state agency.
23. On March 29, 2023, a hearing was held before Administrative Law Judge Andrew Lutostanski with SOAH. David Keagle represented the ED; Jennifer Jameson represented the Office of Public Interest Counsel; and Pierre Elbayeh represented Antonina. The record closed the next day.

## **II. CONCLUSIONS OF LAW**

1. 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 within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.

2. Under Texas Water Code § 7.002, Antonina is subject to the Commission's enforcement authority.
3. The administrative penalty may not exceed \$25,000 per violation, per day, for the violations at issue in this case. Tex. Water Code § 7.052(c).
4. In determining the amount of an administrative penalty, the Commission must consider several factors. Tex. Water Code § 7.053.
5. 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.
6. 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).
7. As required by Texas Water Code §§ 7.054, .055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Antonina was notified of the preliminary report and petition and of the opportunity to request a hearing on the alleged violations and penalties proposed therein.
8. As required by Texas Government Code §§ 2001.051(1) and .052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Antonina was notified of the hearing on the alleged violation and the proposed penalties.
9. Antonina violated Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225.
10. The penalty that the ED proposed for Antonina's violations in this case conforms to the requirements of Texas Water Code chapter 7 and to TCEQ's penalty policy.
11. Antonina should be assessed a \$3,000 administrative penalty for its violations.

### 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 Order, Antonina shall pay an administrative penalty in the amount of \$3,000.00 for its violations of Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225.
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: Antonina LLC dba Food & Fuel Express, TCEQ Docket No. 2021-0064-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 Antonina if the Executive Director determines that Antonina 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 Antonina.
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**

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**Jon Niermann, Chairman, For the Commission**