

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

October 13, 2015

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HOUSTON  
LEGAL

Sherry Cook  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

VIA REGULAR MAIL

**RE: SOAH Docket No. 458-15-3969; TABC Case No. 629995  
Texas Alcoholic Beverage Commission vs Grider Ventures LLC  
D/B/A G Willickers Pub**

Dear Ms. Cook:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

  
TANYA COOPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TC/lal  
Enclosure

xc ✓ Sheila Lindsey-Sanders, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008 - VIA REGULAR MAIL  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- VIA REGULAR MAIL  
Judith Kennison, Senior Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731 - VIA REGULAR MAIL (with Certified Evidentiary Record and 1 Hearing CD/s)  
Staci Johnson, Attorney At Law, 101 E. Park Blvd., Suite 600, Plano, TX 75074 - VIA REGULAR MAIL

300 W. 15<sup>th</sup> Street, Suite 502, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025  
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Prior to the hearing, Respondent filed a Motion for Summary Disposition asserting that the affirmative defense of “safe harbor” was applicable in this matter, and Respondent presented documentary evidence in support of its position. TABC Staff objected to the application of this affirmative defense. The ALJ, having reviewed the documentary evidence and pleadings agreed with Staff’s position and found that the “safe harbor” defense was not applicable to this Code violation.

## II. APPLICABLE LAW

The Commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found that the permittee, or permittee’s agent, servant, or employee was intoxicated on the premises. Tex. Alco. Bev. Code (Code) §§ 104.01(5), 11.61(b)(13), and 11.61(b)(2).

“Intoxication,” is defined as not having normal use of one’s mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. Tex. Penal Code § 49.01(2)(A).

## III. DISCUSSION

### A. TABC Staff’s evidence

#### 1. Background

On December 27, 2013, TABC issued Mixed Beverage Permit MB-647872, which included a Mixed Beverage Late Hours Permit, for Respondent’s premises located at 310 109<sup>th</sup> Street, Arlington, Tarrant County, Texas. Respondent’s licensing history reflects two prior Code violations, one of which was for an intoxicated licensee or permittee on the premises in April 2008.

#### 2. Testimony of Officer David Todd

Officer David Todd, Arlington Police Department, was dispatched to the licensed

premises on August 29, 2014, for a possible burglary report. The reporting party was the licensed premises' manager, Sonia Fennel. Ms. Fennel had seen suspicious activity near the licensed premises' storage shed from a live security camera video-feed, but wanted to remain anonymous in making the report. She also advised in her report that there were employees inside the licensed premises who were not answering the telephone and may be intoxicated.

Upon Officer Todd's arrival at approximately 4:50 a.m., he checked the exterior of the premises and did not locate anyone outside the Bar. He knocked on the Bar's door. A male voice replied, "closed," but the male opened the door. Officer Todd saw that the male matched the description of the suspicious person report and was identified as Claude Earl Houston, a Bar employee. There was another employee inside the Bar with Mr. Houston who was identified as the licensed premises' bartender, Karen Boydston. Ms. Boydston advised Officer Todd that they were cleaning the Bar, but Officer Todd saw trash around that suggested the Bar had not been cleaned.

Officer Todd has been a Texas peace officer for over seven years. During that time, he has encountered intoxicated persons and is familiar with characteristics of intoxication through his work. He has also received training and is experienced in administering field sobriety tasks, such as the horizontal gaze nystagmus, one-leg stand, and walk-and-turn sobriety evaluations.

Officer Todd testified that both Mr. Houston and Ms. Boydston displayed characteristics of intoxication. According to Officer Todd, Mr. Houston had an odor of alcoholic beverage on his breath; bloodshot, glassy eyes; slurred speech; unsteady balance; and he exhibited indicators suggesting intoxication in the horizontal gaze nystagmus sobriety evaluation despite Mr. Houston failure to complete the evaluation. According to Officer Todd, Ms. Boydston had an odor of alcoholic beverage on her breath; bloodshot, glassy eyes; slurred speech; unsteady balance; and she refused to participate in field sobriety testing. Each admitted to having consumed two alcoholic beverages earlier in the evening, but Officer Todd said he did not factor that information in his assessment of Mr. Houston's or Ms. Boydston's conditions too heavily since in his experience most persons who have been drinking will typically make the 2-drink assertion.

At some point, Ms. Fennel called the Bar and spoke to Officer Todd. Officer Todd informed Ms. Fennel that her employees were intoxicated. Ms. Fennel asked if she could pick Mr. Houston and Ms. Boydston up, and Officer Todd agreed to allow her to do so. Officer Todd remained at the Bar for a considerable period of time until Ms. Fennel arrived and he released Mr. Houston and Ms. Boydston to her without arresting either employee. He stated that he did not see Mr. Houston working on any drain pipes or have wet clothing from working on a drain pipe leak at any point.

## **B. Respondent's Evidence**

### **1. Karen Boydston's Testimony**

Ms. Boydston has been employed at the licensed premises as a bartender for 21 years. She has received TABC seller-server training and understands the definition of intoxication to be having lost normal physical or mental faculties. In her opinion using that definition, she was not intoxicated on August 29, 2014.

According to Ms. Boydston, on August 20, 2014, she awoke around noon, arrived for work at the Bar at approximately 6:30 p.m., and went on duty at 7:00 p.m. There was a leak from the Bar's sink that resulted in the carpet around the sink becoming wet, so she had been standing on the wet carpet for a considerable part of her shift. She asked Mr. Houston to fix the leak after the Bar closed that night because it would have been difficult to move around behind the bar with Mr. Houston on the floor working with the sink pipes. At the Bar's closing, she typically assisted Mr. Houston in cleaning up the Bar and worked in the Bar's office to verify the night's receipts. According to Ms. Boydston, verifying the receipts involved math skills and was not a task that could be accomplished if intoxicated. It was not unusual for employees to still be working at the Bar at 4:30 a.m.

Ms. Boydston confirmed that both she and Mr. Houston had two drinks,<sup>1</sup> as listed on "G

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<sup>1</sup> Ms. Boydston had two shots of tequila with the last shot consumed at the bar's closing time (2:00 a.m.) and Mr.

Willickers Daily Comp Sheet,” which was allowed by the Bar’s owner, Clarence Grider, and she had never been reprimanded for drinking while on the job. She opined that by using her weight and alcohol consumption on TABC Blood Alcohol Chart, she could not have been intoxicated.<sup>2</sup> In addition, she has known Mr. Houston for many years, and concluded that he exhibited no signs of intoxication on that evening. She observed Mr. Houston being administered the horizontal gaze nystagmus test but maintained that she was never offered any field sobriety evaluations.

Ms. Boydston stated she did not know why Ms. Fennel had returned to the Bar; but after her arrival, Ms. Boydston was released to return to the office and complete the night’s receipts work. Ms. Boydston testified that after completing her work, she drove herself home.

## 2. Claude Earl Houston’s Testimony

Mr. Houston said that he had worked at the licensed premises for 19 years. His job duties included security, custodian, maintenance, and disc jockey (DJ) tasks. He was also TABC seller-server trained. He had arrived at work around 11:00 a.m. on August 28 after having approximately four hours of sleep the night before, which he claimed was sufficient for him. He confirmed having two alcoholic beverages at the Bar, but maintained that neither he nor Ms. Boydston was intoxicated.

On the evening of August 28, he completed a DJ set at approximately 9:30 p.m. He left the Bar and went to a nearby theater to see a movie. While at the movie, he ate a hotdog and drank a Coke. He later returned to the Bar to close, clean up and repair the sink drain. In fixing the drain, he used a number of tools, which he opined would not be possible had he been intoxicated. He was working on the drain when he heard a knock at the Bar’s back door. He looked through the door’s peep-hole and saw it was a police officer, so he opened the door and allowed the officer inside. Mr. Houston testified he may have appeared unsteady on his feet to the officer at that point due to having sustained a leg injury some years earlier in a motorcycle

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Houston had a Smirnoff Ice and a tequila shot. The ALJ believes the term, “Comp.” refers to alcoholic beverages not sold (*i.e.* complimentary), but must be accounted for in tax receipt reports. Respondent’s Exhibit 3.

<sup>2</sup> Respondent’s Exhibit 2.

accident. He testified that he initially agreed to submit to a horizontal gaze nystagmus evaluation, but admitted he stopped performing the test as instructed prior to its completion because he thought he was being treated unfairly.

Mr. Houston said he recalled Officer Todd speaking with Ms. Fennel on the telephone and agreeing to remain at the Bar until she arrived. In the interim, Mr. Houston was allowed to resume his work and completed fixing the sink drain. According to Mr. Houston, Ms. Fennel had offered to drive him home, but she never accused him of being intoxicated. He declined Ms. Fennel's offer because he had called his wife to come and pick him up. He had not wanted to risk driving after the officer had accused him of being intoxicated.

### **3. Clarence Grider's Testimony**

Mr. Grider testified that he had owned the Bar for approximately nine years. He had purchased the Bar from a friend and both Mr. Houston and Ms. Boydston had worked at the Bar for some time prior to his purchasing it. He opined that both were hard-working and trustworthy employees.

Mr. Grider said he had allowed the two-drink complimentary policy in conjunction with a policy that if the 2-drink policy were violated, an employee was subject to termination. He also prohibited any employee from coming to work after having consumed alcoholic beverages at home or any other place and from drinking alcoholic beverages on their breaks. After this incident, he had revised the alcohol consumption policy to preclude any consumption of alcoholic beverage while at work. He conceded that there was some incentive for Mr. Houston and Ms. Boydston to fabricate their accounts of the evening due to fears of termination. However, he did not believe any employees were drinking in excess of the policies in place at the time because there had been no alcohol shortages reported.

According to Mr. Grider, Officer Todd had telephoned him to advise him that Mr. Houston and Ms. Boydston were intoxicated in the early morning hours of August 29, 2014. He said he replied to Officer Todd that this was conduct was not allowed. He testified that it would

not have been unusual for Ms. Fennel to report a problem at the Bar to the police if she saw something amiss on the video system, which consisted of 16 cameras. Mr. Grider acknowledged that he did not look at the video-feed associated with this incident.

Mr. Grider said that he and Ms. Fennel were familiar with Officer Todd, as the Bar was within Officer Todd's patrol area. To his knowledge, Mr. Fennel has never made any type of derogatory comments about Officer Todd.

#### IV. ANALYSIS AND RECOMMENDATION

It is undisputed that Mr. Houston and Ms. Boydston were employees of the Bar and at the premises on August 29, 2014. It is also undisputed that they consumed some alcoholic drinks over the course of performing their duties at the licensed premises during their shifts that began on August 28 and carried over to the early morning hours on August 29, 2014.

The issue to be decided is whether either Mr. Houston or Ms. Boydston was intoxicated on the licensed premises. "Intoxication" is defined as not having normal use of one's mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body. Tex. Penal Code § 49.01(2)(A).

Many of the characteristics Officer Todd attributed to intoxication in Mr. Houston's behavior (odor of alcoholic beverage on his breath; bloodshot, glassy eyes; slurred speech; and unsteady balance) and Ms. Boydston's behavior (odor of alcoholic beverage on her breath; bloodshot, glassy eyes, slurred speech; and unsteady balance) are classic signs of intoxication, but they are subjective assessments and may be attributable to other conditions apart from intoxication. Given that both Mr. Houston and Ms. Boydston had consumed some alcohol that night and were working in an area wet with water mixed with alcoholic beverages, it is reasonable both would smell of alcoholic beverages. It was late and both were likely fatigued; thus red, glassy eyes and slurred speech might be expected. Ms. Boydston's balance may have been poor after having worked several hours on her feet behind the bar. Mr. Houston had sustained an injury to one of his legs in a motorcycle accident that impacted his walk.

Accordingly, subjective observations in this instance standing alone would not be sufficient to establish either Mr. Houston or Ms. Boydston was intoxicated on the licensed premises.

However, Officer Todd administered a recognized field sobriety evaluation, the horizontal gaze nystagmus (HGN) test, to Mr. Houston. The HGN evaluation is a validated standardized field sobriety evaluation by the National Highway Traffic and Safety Administration (NHTSA) and is commonly relied upon for determining intoxication by law enforcement officers. Officer Todd was trained in administering this evaluation and what clues or signs of intoxication to look for while administering a HGN evaluation to a suspected intoxicated individual. Officer Todd observed four of six possible HGN clues that is sufficient to suggest Mr. Houston was intoxicated when he was administered the evaluation by Officer Todd. Additional clues could not be determined because Mr. Houston stopped performing the test before it was completed. Based upon this evidence, the ALJ finds that TABC Staff's evidence was sufficient to support that Mr. Houston was intoxicated while on the licensed premises.

With respect to Ms. Boydston, there was no evidence presented about her performance of standardized field sobriety tasks. While Officer Todd said she refused to participate in any testing, Ms. Boydson denied that any tasks were ever offered to her. Because Ms. Boydston did not participate in any field sobriety testing and subjective observations of her physical condition while in contact with Officer Todd could also be attributable to non-intoxication causes, the ALJ finds TABC Staff's evidence was insufficient to support its burden of proof of intoxication in relation to Ms. Boydston.

TABC Staff requested a 28-day suspension of Respondent's permits, or in lieu of suspension, a civil penalty in the amount of \$8,400.00. Respondent has a previous Code violation involving an intoxicated permittee or employee on the licensed premises in 2008. Respondent accepted the violation and received a 10 day suspension or paid a civil penalty in the amount of \$1,500.00 in lieu of its permit suspension. In this instance, the ALJ recommends a lesser penalty than requested by TABC Staff based on several factors. When Respondent's employee was found to be intoxicated on the premises, it was well after operations had closed at the Bar, and no customers were on the licensed premises. Respondent has taken steps to

preclude this type of Code violation in the future by prohibiting all alcohol consumption by employees on the premises and prior to reporting for work. And while it is not an affirmative defense to this Code violation, Respondent appears to be proactive in requiring that all employees be TABC seller-server trained as a condition of their employment. For these reasons, the ALJ recommends a 20-day permit suspension, or in lieu of suspension, payment of a civil penalty in the amount of \$5,000.00

#### V. FINDINGS OF FACT

1. Grider Ventrues LLC d/b/a G Willickers Pub (Respondent) holds a Mixed Beverage Permit, MB-647872, which includes the Mixed Beverage Late Hour Permit, issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 310 109<sup>th</sup> Street, Arlington, Tarrant County, Texas.
2. The permit was issued on December 27, 2013.
3. On August 29, 2014, Arlington Police Department Officer David Todd was dispatched to the licensed premises based on a report by Respondent's manager, Sonia Fennel, that she observed a suspicious person outside the premises on the premises' security video-feed. Ms. Fennel in her request for police service advised that there were employees at the licensed premises, but they were not answering the telephone and were possibly intoxicated.
4. Upon Officer Todd's arrival at the licensed premises, he did not locate anyone outside the premises and made contact with Respondent's employees inside the premises' building.
5. Respondent's employee, Claude Earl Houston, allowed Officer Todd inside the licensed premises.
6. At that time, Mr. Houston was observed by Officer Todd exhibiting characteristics of intoxication: odor of alcoholic beverage on his breath; bloodshot, glassy eyes; slurred speech; unsteady balance; had admittedly consumed alcoholic beverage prior to contact with Officer Todd; and exhibited signs of intoxication in a field sobriety evaluation.
7. Based upon Officer Todd's observations described in Finding of Fact No. 6, he made the determination that Mr. Houston was intoxicated.
8. There is sufficient proof that on August 29, 2014, Mr. Houston was intoxicated on the licensed premises.
9. While Respondent's licensing history contains a prior Alcoholic Beverage Code violation for a permittee or employee intoxicated on the premises, no customers were present when the violation occurred; Respondent has taken steps to avoid future violations by

prohibiting employees from consuming alcoholic beverage prior to and during working hours; and Respondent maintains a policy of having all employees TABC seller-server trained as a condition of employment.

10. On May 29, 2015, Staff issued a notice of hearing informing all parties of the hearing in this matter. Staff's notice to the parties contained the time, place, and nature of the hearing; stated the legal authority and jurisdiction under which the hearing was to be held; referenced the particular sections of the statutes and rules involved; and included a short, plain statement of the matters asserted.
11. The hearing in this matter convened on August 3, 2015, before State Office of Administrative Hearings (SOAH) Administrative Law Judge (ALJ) Tanya Cooper. Shelia A. Lindsey, TABC Staff Attorney, represented TABC Staff at the hearing. Attorneys Timothy Griffith and Staci Johnson represented Respondent. The hearing concluded on that day. The record closed on September 18, 2015, after the parties submitted written arguments in the case.

#### VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under Texas Alcoholic Beverage Code (Code) ch. 5 and §§ 11.61 (b)(2), 11.61 (b)(13) and 104.01 (5).
2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to Tex. Gov't Code ch. 2003.
3. Respondent received notice of the proceedings and hearing, pursuant to Tex. Gov't Code §§ 2001.051-.052 and 1 Tex. Admin. Code ch. 155.
4. Respondent's employee, Claude Earl Houston, was intoxicated on the licensed premises in violation of the Code §§ 104.01(5), 11.61 (b)(13), and 11.61(b)(2).
5. Based on the findings of fact and conclusions of law, the ALJ recommends a 20-day permit suspension, or in lieu of suspension, payment of a civil penalty in the amount of \$5,000.00.

SIGNED October 13, 2015.

  
TANYA COOPER  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**FT. WORTH OFFICE**

6777 Camp Bowie Blvd Suite 400

Fort Worth, Texas 76116

Phone: (817) 731-1733

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**SERVICE LIST**

**AGENCY:** Alcoholic Beverage Commission, Texas (TABC)  
**STYLE/CASE:** GRIDER VENTURES LLC DBA G WILICKERS PUB  
**SOAH DOCKET NUMBER:** 458-15-3969  
**REFERRING AGENCY CASE:** 629995

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE**  
**ALJ TANYA COOPER**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

SHEILA LINDSEY - SANDERS  
STAFF ATTORNEY  
TEXAS ALCOHOLIC BEVERAGE COMMISSION  
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TEXAS ALCOHOLIC BEVERAGE COMMISSION

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GRIFFITH & JOHNSON, PLLC

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xc: Docket Clerk, State Office of Administrative Hearings  
Emily Helm GENERAL COUNSEL, TABC, Fax No. 512-206-3226



All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that the privileges granted by the Commission and the activities authorized under the above permit by the Code will be **SUSPENDED beginning at 12:01 a.m. on November 30<sup>th</sup>, 2016** and shall remain suspended for **TWENTY (20) DAYS, UNLESS** a civil penalty in the amount of **\$5000.00 is paid ON OR BEFORE November 22nd, 2016.**

**This Order will become final and enforceable on the 15th day of November, 2016, unless a Motion for Rehearing is filed by the 14th day of November, 2016.**

**SIGNED** this the 14th day of October, 2016, at Austin, Texas.



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Sherry K-Cook, Executive Director  
Texas Alcoholic Beverage Commission

### **CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 14th day of October, 2016.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Tanya Cooper  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, TX 78701  
**VIA FACSIMILE: (512) 322-2061**

Grider Ventures, LLC  
d/b/a G Willicker's Pub  
**RESPONDENT**  
817 Walter Hill Dr.  
Grand Prairie, TX 75050-3761  
**VIA FIRST CLASS MAIL, CMRRR # 70150640000460340947**

Staci Johnson  
**ATTORNEY FOR RESPONDENT**  
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**VIA FIRST CLASS MAIL, CMRRR #70150640000460340954**

Shelia Lindsey  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division  
**VIA E-MAIL: [Shelia.lindsey@tabc.texas.gov](mailto:Shelia.lindsey@tabc.texas.gov)**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE**

**DOCKET NUMBER: 629995**

**REGISTER NUMBER:**

**NAME: GRIDER VENTURES LLC**

**TRADENAME: G Willickers Pub**

**ADDRESS: 817 Walter Hill Drive, Grand Prairie, Texas**

**DUE DATE: November 22, 2016**

**PERMITS OR LICENSES: MB647872, LB**

**AMOUNT OF PENALTY: \$5,000.00**

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

**Mail this form with your payment to:**

**TEXAS ALCOHOLIC BEVERAGE COMMISSION**

**P.O. Box 13127**

**Austin, Texas 78711**

**Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731**

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.**

**Attach this form and please make certain to include the Docket # on your payment.**

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address                      P.O. Box No.

\_\_\_\_\_  
City              State              Zip Code

\_\_\_\_\_  
Area Code/Telephone No.

