

EXECUTIVE SUMMARY - ENFORCEMENT MATTER
DOCKET NO.: 2006-2175-MSW-E TCEQ ID: RN105084453 CASE NO.: 31939
RESPONDENT NAME: DAVID D. SMITH CONSTRUCTION, INC.

ORDER TYPE:		
<input checked="" type="checkbox"/> 1660 AGREED ORDER	<input type="checkbox"/> FINDINGS AGREED ORDER	<input type="checkbox"/> FINDINGS ORDER FOLLOWING SOAH HEARING
<input type="checkbox"/> FINDINGS DEFAULT ORDER	<input type="checkbox"/> SHUTDOWN ORDER	<input type="checkbox"/> IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER
<input type="checkbox"/> AMENDED ORDER	<input type="checkbox"/> EMERGENCY ORDER	
CASE TYPE:		
<input type="checkbox"/> AIR	<input type="checkbox"/> MULTI-MEDIA (check all that apply)	<input type="checkbox"/> INDUSTRIAL AND HAZARDOUS WASTE
<input type="checkbox"/> PUBLIC WATER SUPPLY	<input type="checkbox"/> PETROLEUM STORAGE TANKS	<input type="checkbox"/> OCCUPATIONAL CERTIFICATION
<input type="checkbox"/> WATER QUALITY	<input type="checkbox"/> SEWAGE SLUDGE	<input type="checkbox"/> UNDERGROUND INJECTION CONTROL
<input checked="" type="checkbox"/> MUNICIPAL SOLID WASTE	<input type="checkbox"/> RADIOACTIVE WASTE	<input type="checkbox"/> DRY CLEANER REGISTRATION
<p>SITE WHERE VIOLATION(S) OCCURRED: 5401 Bunny Trail Road, Killeen, Bell County</p> <p>TYPE OF OPERATION: Trucking business that transports solid waste within the State of Texas</p> <p>SMALL BUSINESS: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>OTHER SIGNIFICANT MATTERS: There was one complaint about a fish kill in a pond on property adjacent to 5401 Bunny Trail Road, Killeen, Bell County. There is no record of additional pending enforcement actions regarding this facility.</p> <p>INTERESTED PARTIES: A complaint has been received but the complainant has not indicated that they wish to protest this action or speak at Agenda. No one other than the ED and the Respondent has expressed an interest in this matter.</p> <p>COMMENTS RECEIVED: The <i>Texas Register</i> comment period expired on April 21, 2008. No comments were received.</p> <p>CONTACTS AND MAILING LIST: TCEQ Attorney: Ms. Kathleen C. Decker, Litigation Division, MC 175, (512) 239-6500 Ms. Jennifer Cook, Litigation Division, MC.175, (512) 239-1873 TCEQ Enforcement Coordinator: Mr. Marlin Bullard, Waste Enforcement Section, MC R-9, (254) 761-3038 TCEQ Regional Contact: Mr. Frank Burleson, Waco Regional Office, MC R-9, (254) 761-3001 Respondent: Mr. David D. Smith, Owner, David D. Smith Construction, Inc., 2581 FM 2657, Copperas Cove, Texas 76522-3860 Respondent's Attorney: Mr. Allen Eli Bell, Hilgers Bell & Richards, 816 Congress Avenue, Suite 1200, Austin, Texas 78701</p>		

VIOLATION SUMMARY CHART:

VIOLATION INFORMATION	PENALTY CONSIDERATIONS	CORRECTIVE ACTIONS TAKEN/REQUIRED
<p>Type of Investigation: <input checked="" type="checkbox"/> Complaint <input checked="" type="checkbox"/> Routine <input type="checkbox"/> Enforcement Follow-up <input checked="" type="checkbox"/> Records Review</p> <p>Date of Complaint Relating to this Case: October 25, 2004</p> <p>Date of Investigation Relating to this Case: October 27, 2004</p> <p>Date of NOE Relating to this Case: November 16, 2006</p> <p>Background Facts: An EDRP was filed on June 12, 2007. A signed Agreed Order was received on February 28, 2008.</p> <p>The Respondent in this case does not owe any other penalties according to the Administrative Penalty Database Report.</p> <p>MSW: Failed to prevent the transportation of municipal non-hazardous solid waste for disposal at an unauthorized site [30 TEX. ADMIN. CODE § 330.5(a)¹].</p>	<p>Total Assessed: \$18,525</p> <p>Total Deferred: \$0</p> <p>SEP Conditional Offset: \$0</p> <p>Total Paid/Due to General Revenue: \$1,025/\$17,500</p> <p>The Respondent has paid \$1,025 of the administrative penalty. The remaining amount of \$17,500 of the administrative penalty shall be payable in thirty-five monthly payments of \$500 each.</p> <p>Site Compliance History Classification <input type="checkbox"/> High <input checked="" type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p>Person Compliance History Classification <input type="checkbox"/> High <input checked="" type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p>Major Source: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p>Applicable Penalty Policy: September 2002</p>	<p>Ordering Provisions: The Respondent shall undertake the following technical requirements:</p> <ol style="list-style-type: none"> 1. Immediately, cease transporting additional waste material to the site. 2. Within 30 days, respond completely and adequately to all TCEQ request, or by any other deadline specified in writing. 3. Within 60 days, develop and implement a plan to prevent contaminated runoff from leaving the site. 4. Within 135 days, demonstrate compliance with Ordering Provisions Nos. 1, 2, and 3 and include detailed supporting documentation including photographs, receipts and/or other records.

¹30 TEX. ADMIN CODE § 330.5(a) is now found at 30 TEX. ADMIN. CODE § 330.15(c) adopted to be effective March 27, 2006, 31 Tex. Reg. 2502.



Penalty Calculation Worksheet (PCW)

Policy Revision 2 (September 2002)

PCW Revision December 8, 2006

TCEQ

DATES	Assigned	28-Nov-2006	Screening	6-Dec-2006	EPA Due	
	PCW	8-Jan-2007				

RESPONDENT/FACILITY INFORMATION			
Respondent	David D. Smith Construction, Inc.		
Reg. Ent. Ref. No.	RN105084453		
Facility/Site Region	9-Waco	Major/Minor Source	Minor

CASE INFORMATION				
Enf./Case ID No.	31939	No. of Violations	1	
Docket No.	2006-2175-MSW-E	Order Type	1660	
Media Program(s)	Municipal Solid Waste	Enf. Coordinator	Marlin Bullard	
Multi-Media		EC's Team	EnforcementTeam 8	
Admin. Penalty \$	Limit Minimum	\$0	Maximum	\$10,000

Penalty Calculation Section

TOTAL BASE PENALTY (Sum of violation base penalties)	Subtotal 1	\$65,000
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ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

Compliance History	0% Enhancement	Subtotals 2, 3, & 7	\$0
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Notes: The Respondent has no prior orders or NOV's.

Culpability	No	0% Enhancement	Subtotal 4	\$0
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Notes: Respondent does not meet the culpability criteria.

Good Faith Effort to Comply	0% Reduction	Subtotal 5	\$0
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	Before NOV	NOV to EDRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	X	(mark with x)
Notes	The Respondent does not meet the good faith criteria.	

Total EB Amounts	\$43,740	50% Enhancement*	Subtotal 6	\$32,500
Approx. Cost of Compliance	\$309,400	*Capped at the Total EB \$ Amount		

SUM OF SUBTOTALS 1-7	Final Subtotal	\$97,500
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OTHER FACTORS AS JUSTICE MAY REQUIRE	-81%	Adjustment	-\$78,975
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Reduces or enhances the Final Subtotal by the indicated percentage. (Enter number only; e.g. -30 for -30%.)

Notes: Recommend reduction to prevent the processing time for this case from overly impacting the penalty amount.

Final Penalty Amount	\$18,525
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STATUTORY LIMIT ADJUSTMENT	Final Assessed Penalty	\$18,525
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DEFERRAL	0%	Reduction	Adjustment	\$0
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Reduces the Final Assessed Penalty by the indicated percentage. (Enter number only; e.g. 20 for 20% reduction.)

Notes: No deferral because this is a non-expedited case.

PAYABLE PENALTY	\$18,525
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Screening Date 6-Dec-2006

Docket No. 2006-2175-MSW-E

PGW

Respondent David D. Smith Construction, Inc.

Policy Revision 2 (September 2002)

Case ID No. 31939

PCW Revision December 8, 2006

Reg. Ent. Reference No. RN105084453

Media [Statute] Municipal Solid Waste

Enf. Coordinator Marlin Bullard

Compliance History Worksheet

>> Compliance History Site Enhancement (Subtotal 2)

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written NOVs with same or similar violations as those in the current enforcement action (number of NOVs meeting criteria)	0	0%
	Other written NOVs	0	0%
Orders	Any agreed final enforcement orders containing a denial of liability (number of orders meeting criteria)	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government (number of judgements or consent decrees meeting criteria)	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government (number of counts)	0	0%
Emissions	Chronic excessive emissions events (number of events)	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (number of audits for which notices were submitted)	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (number of audits for which violations were disclosed)	0	0%

Please Enter Yes or No

Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 0%

>> Repeat Violator (Subtotal 3)

No

Adjustment Percentage (Subtotal 3) 0%

>> Compliance History Person Classification (Subtotal 7)

Average Performer

Adjustment Percentage (Subtotal 7) 0%

>> Compliance History Summary

Compliance History Notes

The Respondent has no prior orders or NOVs.

Total Adjustment Percentage (Subtotals 2, 3, & 7) 0%

Screening Date 6-Dec-2006

Docket No. 2006-2175-MSW-E

PCW

Respondent David D. Smith Construction, Inc.

Policy Revision 2 (September 2002)

Case ID No. 31939

PCW Revision December 8, 2006

Reg. Ent. Reference No. RN105084453

Media [Statute] Municipal Solid Waste

Enf. Coordinator Marlin Bullard

Violation Number 1

Rule Cite(s)

30 Tex. Admin. Code § 330.15 (c) [formerly 330.5(a)]

Violation Description

Failure to prevent the transportation of municipal non-hazardous solid waste for disposal at an unauthorized site, as documented during an investigation conducted on October 27, 2004 and a record review on October 12, 2006. Specifically, approximately 23,800 cubic yards of concrete waste was transported to 5401 Bunny Trail Road, Killeen, Bell County, a site that was not authorized to accept the waste.

Base Penalty \$10,000

>> Environmental, Property and Human Health Matrix

OR

Release	Harm		
	Major	Moderate	Minor
Actual		x	
Potential			

Percent 25%

>> Programmatic Matrix

Falsification	Major	Moderate	Minor

Percent 0%

Matrix Notes

Human health or the environment has been exposed to significant amounts of pollutants which do not exceed levels that are protective of human health or environmental receptors.

Adjustment \$7,500

\$2,500

Violation Events

Number of Violation Events 26

770 Number of violation days

mark only one with an x	daily	
	monthly	x
	quarterly	
	semiannual	
	annual	
single event		

Violation Base Penalty \$65,000

Twenty six monthly events are recommended from the October 27, 2004 investigation date to the December 6, 2006 screening date.

Economic Benefit (EB) for this violation

Statutory Limit Test

Estimated EB Amount \$43,740

Violation Final Penalty Total \$18,525

This violation Final Assessed Penalty (adjusted for limits) \$18,525

Economic Benefit Worksheet

Respondent David D. Smith Construction, Inc.
Case ID No. 31939
Reg. Ent. Reference No. RN105084453
Media Municipal Solid Waste
Violation No. 1

Percent Interest	Years of Depreciation
5.0	15

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
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No commas or \$

Delayed Costs

Equipment				0.0	\$0	\$0	\$0
Buildings				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0
Engineering/construction				0.0	\$0	\$0	\$0
Land				0.0	\$0	n/a	\$0
Record Keeping System				0.0	\$0	n/a	\$0
Training/Sampling				0.0	\$0	n/a	\$0
Remediation/Disposal	\$309,400	27-Oct-2004	25-Aug-2007	2.8	\$43,740	n/a	\$43,740
Permit Costs				0.0	\$0	n/a	\$0
Other (as needed)				0.0	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to dispose of approximately 23,800 cubic yards of waste at an authorized facility at \$13 per cubic yard. Date required is the date of the investigation. Final date is the estimated date of compliance.

Avoided Costs

ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)

Disposal				0.0	\$0	\$0	\$0
Personnel				0.0	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.0	\$0	\$0	\$0
Supplies/equipment				0.0	\$0	\$0	\$0
Financial Assurance [2]				0.0	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.0	\$0	\$0	\$0
Other (as needed)				0.0	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance	\$309,400	TOTAL	\$43,740
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PERFORMANCE CATEGORY	<u>EXCEEDS EXPECTATIONS</u> (Score = 3)	<u>SATISFACTORY PERFORMANCE</u> (Score = 2)	<u>MARGINAL PERFORMANCE</u> (Score = 1)	<u>UNSATISFACTORY PERFORMANCE</u> (Score = 0)
1. <u>Quality and Accuracy</u> Quality, sufficiency, and accuracy of contract-required work, including work or tasks performed by subcontractors	Work product always, with rare exceptions, of excellent quality. No revisions required.	Work product of satisfactory quality with only typical errors and omissions, which were corrected upon request.	Work product is acceptable, although many errors and/or omissions had to be corrected prior to product being acceptable.	Work product not acceptable or of very low quality, with many errors and omissions noted. Not all errors and omissions corrected.
2. <u>Timeliness</u> Timeliness with respect to completing contract-required work and/or work-related tasks, including work performed by subcontractors	All tasks and contract deliverables on time or ahead of schedule. Quality of work did not suffer as a result of the time line.	Some intermediate task delays, not expected to cause major deadlines to be missed or to require contract extension. Prior approval granted for any other delays.	Some major work performance delays caused (or expected to cause) delivery schedules to be missed.	Required work product not completed on time, due to factors that should have been under contractor's control.
3. <u>Reports</u> Accuracy, adequacy, and timeliness of contract-required activity/progress reports, notifications, financial reports, invoices, pay requests and other required documents, excluding HUB reports	All reports accurate and complete, as well as on time. No rewrites or additional information required.	Reports satisfactory with respect to both quality and timeliness. Contractor responded quickly and appropriately to questions or comments raised.	Numerous errors and/or omissions corrected prior to reports being acceptable (or reminders of reports due were required to be sent). Reports not later than 5 working days.	Reports consistently of poor quality and/or late. Contents inadequate to permit interpretation or analysis. Reports more than 5 working days late.
4. <u>HUB</u> Contractor's achievement of (or continued responsiveness toward) contract-contained HUB subcontracting goals and/or Good Faith Effort (GFE) requirements, including timely and accurate submittal of contract-required HUB-related reports	Prime Contractor's consistently meets or exceeds (and has adequately documented) the HUB goals established in contract, or consistently meets and documents HUB GFE requirements.	Contractor's HUB/GFE activities satisfactory, although not all goals achieved or reported in a timely manner.	Reports either not received on time, or have lacked information necessary to fully document GFE or other HUB subcontracting commitments.	Contractor did not meet (or did not document) the HUB GFE requirements goals established in the contract.
5. <u>Communication</u> Contractor's accessibility, responsiveness, and cooperativeness with respect to any contract-related concerns communicated by the Contract Manager; plus contractor's demonstrated relationship with subcontractors	Contractor consistently maintains excellent standing with subcontractors, including timely payments. Works as a team member and is flexible and responsive to changes in circumstances or scope of work.	Contractor is usually flexible and responsive to changes in circumstances or scope of work. Generally maintains good standing with subs, and ensures that they are paid promptly.	Contractor is only intermittently responsive to changes in contract scope or other circumstances. Marginal team player. Failed to make timely payments to subs on one or two occasions.	Not flexible to changes in scope or other circumstances. Not cooperative or accessible. Failed to maintain good standing with subs and failed to make payments on more than two occasions.
*6. <u>Cost Control</u> Contractor's cost control effectiveness and/or budget management skills	Contract performed at or below allowed cost, with no loss of quality.	Contract performed at less than 5% above allowed cost with adequate quality	Contract performed at 5 - 10% above allowed cost.	Contract performed at >10% above allowed cost.
7. <u>Technology</u> Contractor's demonstrated technical competence and/or expertise (including competence and expertise of subcontractors); plus contractor's innovativeness and willingness to apply, within the limitations of the contract, new techniques or technologies	Contractor is comfortable with and applies current proven technology. But is familiar with, and willing to use, latest techniques and solutions where such are appropriate.	Contractor is capable of applying current proven technology. Is aware of, but not experienced in the use of latest techniques and solutions.	Contractor usually uses more basic technology to solve contract problems. Is aware of, but has little or no experience in the use of more current proven techniques and solutions.	Contractor can only apply basic technology to tasks. Requires direction concerning appropriate technology and solutions.
8. <u>Other</u> DESCRIBE	DESCRIBE	DESCRIBE	DESCRIBE	DESCRIBE

* I believe a question has been raised by Katharine in regard to whether it is an appropriate criterion and whether it is applied correctly. In some cases 10% may be okay under some circumstances whereas +/-5% may not.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



IN THE MATTER OF AN
ENFORCEMENT ACTION
AGAINST
DAVID D. SMITH
CONSTRUCTION, INC.;
RN105084453

§
§
§
§
§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

AGREED ORDER
DOCKET NO. 2006-2175-MSW-E

I. JURISDICTION AND STIPULATIONS

At its _____ agenda, the Texas Commission on Environmental Quality ("Commission" or "TCEQ") considered this agreement of the parties, resolving an enforcement action regarding David D. Smith Construction, Inc. ("Smith Construction") under the authority of TEX. WATER CODE ch. 7 and TEX. HEALTH & SAFETY CODE ch. 361. The Executive Director of the TCEQ, represented by the Litigation Division, and Smith Construction, represented by Mr. Allen Eli Bell of the law firm of Hilgers, Bell and Richards, appear before the Commission and together stipulate that:

1. Smith Construction owns and operates a trucking business that transports solid waste within the State of Texas. Its principal place of business is located at 2581 FM 2657, Copperas Cove, Lampasas County, Texas (the "Business").
2. This Agreed Order is entered into pursuant to TEX. WATER CODE §§ 7.051 and 7.070. The Commission has jurisdiction of this matter pursuant to TEX. WATER CODE § 5.013 because it alleges violations of TEX. HEALTH & SAFETY CODE ch. 361 and TCEQ rules.
3. The Commission and Smith Construction agree that the Commission has jurisdiction to enter this Agreed Order, and that Smith Construction is subject to the Commission's jurisdiction.
4. Smith Construction received notice of the violations alleged in Section II ("Allegations") on or about November 21, 2006.
5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by Smith Construction of any violation alleged in Section II ("Allegations"), nor of any statute or rule.

6. An administrative penalty in the amount of eighteen thousand five hundred twenty-five dollars (\$18,525.00) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). Smith Construction has paid one thousand twenty-five dollars (\$1,025.00) of the administrative penalty. The remaining amount of seventeen thousand five hundred dollars (\$17,500.00) of the administrative penalty shall be payable in thirty-five monthly payments of five hundred dollars (\$500.00) each. The next monthly payment shall be paid within 30 days after the effective date of this Agreed Order. The subsequent payments shall each be paid not later than 30 days following the due date of the previous payment until paid in full. If Smith Construction fails to timely and satisfactorily comply with the payment requirements of this Agreed Order, including the payment schedule, the Executive Director may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, the failure of Smith Construction to meet the payment schedule of this Agreed Order constitutes the failure of Smith Construction to timely and satisfactorily comply with all of the terms of this Agreed Order.
7. Any notice and procedures which might otherwise be authorized or required in this action are waived in the interest of a more timely resolution of the matter.
8. The Executive Director of the TCEQ and Smith Construction have agreed on a settlement of the matters alleged in this enforcement action, subject to the approval of the Commission.
9. The Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas ("OAG") for further enforcement proceedings if the Executive Director determines that Smith Construction has not complied with one or more of the terms or conditions in this Agreed Order.
10. This Agreed Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Agreed Order, whichever is later.
11. The provisions of this Agreed Order are deemed severable and, if a court of competent jurisdiction or other appropriate authority deems any provision of this Agreed Order unenforceable, the remaining provisions shall be valid and enforceable.

II. ALLEGATIONS

Smith Construction is alleged to have violated 30 TEX. ADMIN. CODE § 330.5(a)¹, by failing to prevent the transportation of municipal non-hazardous solid waste for disposal at an unauthorized site, as documented during an inspection conducted on October 27, 2004. Specifically, approximately 23,800 cubic yards of concrete waste was transported to 5401 Bunny Trail Road, Killeen, Bell County, Texas, (the "Site"), a site that was not authorized to accept the waste.

III. DENIALS

Smith Construction generally denies each allegation in Section II ("Allegations").

IV. ORDER

1. It is, therefore, ordered by the TCEQ that Smith Construction pay an administrative penalty as set forth in Section I, Paragraph 6 above. The payment of this administrative penalty and Smith Construction's compliance with all the terms and conditions set forth in this Agreed Order resolve only the allegations in Section II. The Commission shall not be constrained in any manner from considering or requiring corrective action or penalties for violations which are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: David D. Smith Construction, Inc., Docket No. 2006-2175-MSW-E." to:

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

2. Smith Construction shall undertake the following technical requirements:
 - a. Immediately upon the effective date of this Agreed Order, Smith Construction shall cease transporting additional waste material to the Site.

¹ 30 TEX. ADMIN. CODE § 330.5(a) is now found at 30 TEX. ADMIN. CODE § 330.15(c) adopted to be effective, March 27, 2006, 31 Tex. Reg. 2502.

- b. Within 60 days after the effective date of this Agreed Order, Smith Construction shall develop and implement a plan to prevent contaminated runoff from leaving the Site. The plan shall be submitted for approval to:

Mr. Frank Burlison, Waste Section Manager
Waco Regional Office
Texas Commission on Environmental Quality
6801 Sanger Avenue, Suite 2500
Waco, Texas 76710-7826

- c. Respond completely and adequately to all TCEQ requests for additional information within 30 days of such requests, or by any other deadline specified in writing.
- d. Within 135 days after the effective date of this Agreed Order, Smith Construction shall demonstrate compliance with Ordering Provision Nos. 2.a. through 2.c. as described below, and include detailed supporting documentation including photographs, receipts, and/or other records.

The certification shall be notarized by a State of Texas Notary Public and 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.”

The certification shall be submitted 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:

Mr. Frank Burluson
Waste Section Manager
Waco Regional Office
Texas Commission on Environmental Quality
6801 Sanger Avenue, Suite 2500
Waco, Texas 78710-7826

3. The provisions of this Agreed Order shall apply to and be binding upon Smith Construction. Smith Construction is ordered to give notice of the Agreed Order to personnel who maintain day-to-day control over the Business operations referenced in this Agreed Order.
4. If Smith Construction fails to comply with any of the Ordering Provisions in this Agreed Order within the prescribed schedules, and that failure is caused solely by an act of God, war, strike, riot, or other catastrophe, Smith Construction's failure to comply is not a violation of this Agreed Order. Smith Construction shall have the burden of establishing to the Executive Director's satisfaction that such an event has occurred. Smith Construction shall notify the Executive Director within seven days after Smith Construction becomes aware of a delaying event and shall take all reasonable measures to mitigate and minimize any delay.
5. The Executive Director may grant an extension of any deadline in this Agreed Order or in any plan, report, or other document submitted pursuant to this Agreed Order, upon a written and substantiated showing of good cause. All requests for extensions by Smith Construction shall be made in writing to the Executive Director. Extensions are not effective until Smith Construction receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.
6. This Agreed Order, issued by the Commission, shall not be admissible against Smith Construction in a civil proceeding, unless the proceeding is brought by the OAG to: (1) enforce the terms of this Agreed Order; or (2) pursue violations of a statute within the Commission's jurisdiction, or of a rule adopted or an order or permit issued by the Commission under such a statute.
7. This agreement may be executed in multiple counterparts, which together shall constitute a single original instrument. Any executed signature page to this Agreement may be transmitted by facsimile transmission to the other parties, which shall constitute an original signature for all purposes.
8. Under 30 TEX. ADMIN. CODE § 70.10(b) and TEX. GOV'T CODE § 2001.142, the effective date of this Agreed Order is the date of hand-delivery of the Order to Smith Construction, or three days after the date on which the Commission mails notice of the Order to Smith

David D. Smith Construction, Inc.
Docket No. 2006-2175-MSW-E
Page 6

Construction, whichever is earlier. The Chief Clerk shall provide a copy of this Agreed Order to each of the parties.

SIGNATURE PAGE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

For the Commission

Gregory Ferline

For the Executive Director

3/25/2008

Date

I, the undersigned, have read and understand the attached Agreed Order. I represent that I am authorized to agree to the attached Agreed Order on behalf of the entity, if any, indicated below my signature, and I do agree to the terms and conditions specified therein. I further acknowledge that the TCEQ, in accepting payment for the penalty amount, is materially relying on such representation.

I also understand that Smith Construction's failure to comply with the Ordering Provisions, if any, in this order and/or Smith Construction's failure to timely pay the penalty amount, may result in:

- A negative impact on Smith Construction's compliance history;
- Greater scrutiny of any permit applications submitted by Smith Construction;
- Referral of this case to the Attorney General's office for contempt, injunctive relief, additional penalties, and/or attorney fees, or to a collection agency;
- Increased penalties in any future enforcement actions against Smith Construction;
- Automatic referral to the Attorney General's Office of any future enforcement actions against Smith Construction; and
- TCEQ seeking other relief as authorized by law.

In addition, any falsification of any compliance documents may result in criminal prosecution.

David D. Smith

Signature

2.8.08

Date

David D. Smith

Name (Printed or typed)

Owner / Pres.

Title

Authorized representative of
David D. Smith Construction, Inc.