

**EXECUTIVE SUMMARY - ENFORCEMENT MATTER**

**DOCKET NO.:** 2009-1426-MSW-E **TCEQ ID:** RN104751177 **CASE NO.:** 38330

**RESPONDENT NAME:** FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials

<b>ORDER TYPE:</b>		
<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	
<b>CASE TYPE:</b>		
<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><b>SITE WHERE VIOLATION(S) OCCURRED:</b> Mother Earth Landscape Materials, 3037 Farm-to-Market 665, Robstown, Nueces County</p> <p><b>TYPE OF OPERATION:</b> Composting, brush recycling, concrete recycling, and sand and select fill mining operation</p> <p><b>SMALL BUSINESS:</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><b>OTHER SIGNIFICANT MATTERS:</b> There are no complaints. There is no record of additional pending enforcement actions regarding this facility location.</p> <p><b>INTERESTED PARTIES:</b> No one other than the ED and the Respondent has expressed an interest in this matter.</p> <p><b>COMMENTS RECEIVED:</b> The <i>Texas Register</i> comment period expired on January 4, 2010. No comments were received.</p> <p><b>CONTACTS AND MAILING LIST:</b>  <b>TCEQ Attorney/SEP Coordinator:</b> None  <b>TCEQ Enforcement Coordinator:</b> Mr. Keith Frank, Enforcement Division, Enforcement Team 7, MC 128, (512) 239-1203; Ms. Cari-Michel La Caille, Enforcement Division, MC 219, (512) 239-1387  <b>Respondent:</b> Mr. Daniel Caballero, President, FOX TREE &amp; LANDSCAPE NURSERY, INC., 5949 La Costa Drive, Corpus Christi, Texas 78414  <b>Respondent's Attorney:</b> Not represented by counsel on this enforcement matter</p>		

VIOLATION SUMMARY CHART:		
VIOLATION INFORMATION	PENALTY CONSIDERATIONS	CORRECTIVE ACTIONS TAKEN/REQUIRED
<p><b>Type of Investigation:</b>  <input type="checkbox"/> Complaint  <input checked="" type="checkbox"/> Routine  <input type="checkbox"/> Enforcement Follow-up  <input type="checkbox"/> Records Review</p> <p><b>Date(s) of Complaints Relating to this Case:</b> None</p> <p><b>Date of Investigation Relating to this Case:</b> June 2, 2009</p> <p><b>Date of NOV/NOE Relating to this Case:</b> August 28, 2009 (NOE)</p> <p><b>Background Facts:</b> This was a routine investigation.</p> <p><b>WASTE</b></p> <p>1. Failure to prevent the unauthorized disposal of municipal solid waste ("MSW"). Specifically, the Respondent allowed approximately 20 cubic yards of MSW to be disposed of at the Facility [30 TEX. ADMIN. CODE § 330.15(c)].</p> <p>2. Failure to maintain the required waste minimization and recycling records [30 TEX. ADMIN. CODE § 328.5(f)].</p>	<p><b>Total Assessed:</b> \$3,600</p> <p><b>Total Deferred:</b> \$720  <input checked="" type="checkbox"/> Expedited Settlement  <input type="checkbox"/> Financial Inability to Pay</p> <p><b>SEP Conditional Offset:</b> \$0</p> <p><b>Total Paid to General Revenue:</b> \$2,880</p> <p><b>Site Compliance History Classification</b>  <input type="checkbox"/> High <input type="checkbox"/> Average <input checked="" type="checkbox"/> Poor</p> <p><b>Person Compliance History Classification</b>  <input type="checkbox"/> High <input checked="" type="checkbox"/> Average <input type="checkbox"/> Poor</p> <p><b>Major Source:</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No</p> <p><b>Applicable Penalty Policy:</b> September 2002</p>	<p><b>Ordering Provisions:</b></p> <p>The Order will require the Respondent to:</p> <p>a. Immediately upon the effective date of this Agreed Order:</p> <p>i. Cease disposing of any additional MSW at the Facility;</p> <p>ii. Begin maintaining all waste minimization and recycling records;</p> <p>b. Within 30 days after the effective date of this Agreed Order, remove all MSW and dispose of the waste at an authorized facility; and</p> <p>c. Within 45 days after the effective date of this Agreed Order, submit written certification to demonstrate compliance with Ordering Provisions a. through b.</p>

Additional ID No(s): 76846



# Penalty Calculation Worksheet (PCW)

Policy Revision 2 (September 2002)

PCW Revision October 30, 2008

**TCEQ**

<b>DATES</b>	Assigned	31-Aug-2009		
	PCW	14-Sep-2009	Screening	9-Sep-2009
			EPA Due	

<b>RESPONDENT/FACILITY INFORMATION</b>	
Respondent	FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials
Reg. Ent. Ref. No.	RN104751177
Facility/Site Region	14-Corpus Christi
Major/Minor Source	Minor

<b>CASE INFORMATION</b>			
Enf./Case ID No.	38330	No. of Violations	2
Docket No.	2009-1426-MSW-E	Order Type	1660
Media Program(s)	Municipal Solid Waste	Government/Non-Profit	No
Multi-Media		Enf. Coordinator	Kelth Frank
		EC's Team	Enforcement Team 7
Admin. Penalty \$ Limit Minimum	\$0	Maximum	\$10,000

## Penalty Calculation Section

**TOTAL BASE PENALTY (Sum of violation base penalties)** *Subtotal 1*

### ADJUSTMENTS (+/-) TO SUBTOTAL 1

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

**Compliance History**  Enhancement *Subtotals 2, 3, & 7*

Notes

**Culpability**   Enhancement *Subtotal 4*

Notes

**Good Faith Effort to Comply Total Adjustments** *Subtotal 5*

**Economic Benefit**  Enhancement *Subtotal 6*

Total EB Amounts    
 Approx. Cost of Compliance    
 \*Capped at the Total EB \$ Amount

**SUM OF SUBTOTALS 1-7** *Final Subtotal*

**OTHER FACTORS AS JUSTICE MAY REQUIRE**  *Adjustment*

Reduces or enhances the Final Subtotal by the indicated percentage.

Notes

**Final Penalty Amount**

**STATUTORY LIMIT ADJUSTMENT** *Final Assessed Penalty*

**DEFERRAL**  Reduction *Adjustment*

Reduces the Final Assessed Penalty by the indicated percentage. (Enter number only; e.g. 20 for 20% reduction.)

Notes

**PAYABLE PENALTY**

Screening Date: 9-Sep-2009

Docket No: 2009-1426-MSW-E

PCW

Respondent: FOX TREE & LANDSCAPE NURSERY, INC. dba

Policy Revision 2 (September 2002)

Mother Earth Landscape Materials

PCW Revision October 30, 2008

Case ID No: 38330

Reg. Ent. Reference No: RN104751177

Media [Statute]: Municipal Solid Waste

Enf. Coordinator: Keith Frank

### 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)	1	20%
	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) 20%

>> 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

Enhancement for one Agreed Order containing a denial of liability.

Total Adjustment Percentage (Subtotals 2, 3, & 7) 20%

**Screening Date** 9-Sep-2009 **Docket No.** 2009-1426-MSW-E **PCW**  
**Respondent** FOX TREE & LANDSCAPE NURSERY, INC, dba Mother Earth  
 Landscape Materials *Policy Revision 2 (September 2002)*  
**Case ID No.** 38330 *PCW Revision October 30, 2008*  
**Reg. Ent. Reference No.** RN104751177  
**Media [Statute]** Municipal Solid Waste  
**Enf. Coordinator** Kelth Frank  
**Violation Number** 1  
**Rule Cite(s)** 30 Tex. Admin. Code § 330.15(c)  
**Violation Description** Failed to prevent the unauthorized disposal of municipal solid waste ("MSW"). Specifically, the Respondent allowed approximately 20 cubic yards of MSW to be disposed of at the Facility.  
**Base Penalty** \$10,000

**>> Environmental, Property and Human Health Matrix**  
**OR**

Release	Harm			Percent
	Major	Moderate	Minor	
Actual			x	10%
Potential				

  
**>> Programmatic Matrix**

Falsification	Harm			Percent
	Major	Moderate	Minor	
				0%

  
**Matrix Notes** Human health or the environment has been exposed to insignificant amounts of pollutants which do not exceed levels that are protective of human health or environmental receptors as a result of the violation.  
**Adjustment** \$9,000

**\$1,000**

**Violation Events**  
 Number of Violation Events   Number of violation days  

daily	
weekly	
monthly	
quarterly	x
semiannual	
annual	
single event	

*mark only one with an x*  
**Violation Base Penalty** \$2,000  
 Two quarterly events are recommended from the June 2, 2009 investigation date to the September 9, 2009 screening date.

**Good Faith Efforts to Comply**  Reduction **\$0**  

	Before NOV	NOV to EJPRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	x	(mark with x)

  
**Notes** The Respondent does not meet the good faith criteria for this violation.  
**Violation Subtotal** \$2,000

**Economic Benefit (EB) for this violation** **Statutory Limit Test**  
**Estimated EB Amount** \$36 **Violation Final Penalty Total** \$2,400  
**This violation Final Assessed Penalty (adjusted for limits)** \$2,400

## Economic Benefit Worksheet

**Respondent** FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials  
**Case ID No.** 38330  
**Reg. Ent. Reference No.** RN104751177  
**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
No commas or \$							

### Delayed Costs

Equipment				0.00	\$0	\$0	\$0
Buildings				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0
Engineering/construction				0.00	\$0	\$0	\$0
Land				0.00	\$0	n/a	\$0
Record Keeping System				0.00	\$0	n/a	\$0
Training/Sampling				0.00	\$0	n/a	\$0
Remediation/Disposal	\$693	2-Jun-2009	12-Jun-2010	1.03	\$36	n/a	\$36
Permit Costs				0.00	\$0	n/a	\$0
Other (as needed)				0.00	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to remove and properly dispose of the MSW at an authorized facility. Date Required is the investigation date. Final Date is the estimated date of compliance.

### Avoided Costs

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

Disposal				0.00	\$0	\$0	\$0
Personnel				0.00	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.00	\$0	\$0	\$0
Supplies/equipment				0.00	\$0	\$0	\$0
Financial Assurance [2]				0.00	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance

\$693

TOTAL

\$36

**Screening Date** 9-Sep-2009 **Docket No.** 2009-1426-MSW-E **PCW**  
**Respondent** FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth  
 Landscape Materials *Policy Revision 2 (September 2002)*  
**Case ID No.** 38330 *PCW Revision October 30, 2008*  
**Reg. Ent. Reference No.** RN104751177  
**Media [Statute]** Municipal Solid Waste  
**Enf. Coordinator** Keith Frank  
**Violation Number** 2  
**Rule Cite(s)** 30 Tex. Admin. Code § 328.5(f)  
**Violation Description** Failed to maintain the required waste minimization and recycling records.  
**Base Penalty** \$10,000

**>> Environmental, Property and Human Health Matrix**

OR	Release	Harm			Percent
		Major	Moderate	Minor	
Actual					0%
Potential					

**>> Programmatic Matrix**

Matrix Notes	Falsification	Harm			Percent
		Major	Moderate	Minor	
		X			10%

100% of the rule requirement was not met.

**Adjustment** \$9,000

\$1,000

**Violation Events**

Number of Violation Events: 1 Number of violation days: 143

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

**Violation Base Penalty** \$1,000

One single event is recommended based on documentation of the violation during an investigation conducted on June 2, 2009.

**Good Faith Efforts to Comply**

0.0% Reduction Before NOV NOV to EDRP/Settlement Offer \$0

Extraordinary		
Ordinary		
N/A	X	(mark with x)

Notes: The Respondent does not meet the good faith criteria for this violation.

**Violation Subtotal** \$1,000

**Economic Benefit (EB) for this violation**

**Statutory Limit Test**

Estimated EB Amount \$51

Violation Final Penalty Total \$1,200

This violation Final Assessed Penalty (adjusted for limits) \$1,200

## Economic Benefit Worksheet

**Respondent:** FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials  
**Case ID No.:** 38330  
**Reg. Ent. Reference No.:** RN104751177  
**Media:** Municipal Solid Waste  
**Violation No.:** 2

Percent Interest	Years of Depreciation
5.0	15

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

### Delayed Costs

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Equipment				0.00	\$0	\$0	\$0
Buildings				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0
Engineering/construction				0.00	\$0	\$0	\$0
Land				0.00	\$0	n/a	\$0
Record Keeping System	\$1,000	2-Jun-2009	12-Jun-2010	1.03	\$51	n/a	\$51
Training/Sampling				0.00	\$0	n/a	\$0
Remediation/Disposal				0.00	\$0	n/a	\$0
Permit Costs				0.00	\$0	n/a	\$0
Other (as needed)				0.00	\$0	n/a	\$0

Notes for DELAYED costs

Estimated cost to maintain waste minimization and recycling records. Date Required is the investigation date. Final Date is the estimated date of compliance.

### Avoided Costs

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

Item Description	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Disposal				0.00	\$0	\$0	\$0
Personnel				0.00	\$0	\$0	\$0
Inspection/Reporting/Sampling				0.00	\$0	\$0	\$0
Supplies/equipment				0.00	\$0	\$0	\$0
Financial Assurance [2]				0.00	\$0	\$0	\$0
ONE-TIME avoided costs [3]				0.00	\$0	\$0	\$0
Other (as needed)				0.00	\$0	\$0	\$0

Notes for AVOIDED costs

Approx. Cost of Compliance

\$1,000

**TOTAL**

\$51

# Compliance History Report

Customer/Respondent/Owner-Operator:	CN602673766	FOX TREE & LANDSCAPE NURSERY INC	Classification: AVERAGE	Rating: 44.78
Regulated Entity:	RN104751177	MOTHER EARTH LANDSCAPE MATERIALS	Classification: POOR	Site Rating: 128.33
ID Number(s):	AIR NEW SOURCE PERMITS	REGISTRATION		76846
	MUNICIPAL SOLID WASTE NON	ID NUMBER		100167
Location:	3037 FM 665, ROBSTOWN, TX, 78380			
TCEQ Region:	REGION 14 - CORPUS CHRISTI			
Date Compliance History Prepared:	September 08, 2009			
Agency Decision Requiring Compliance	Enforcement			
Compliance Period:	September 08, 2004 to September 08, 2009			
TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History				
Name:	<u>Keith Frank</u>	Phone:	<u>(512) 239-1203</u>	

## Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? Yes
2. Has there been a (known) change in ownership/operator of the site during the compliance period? No
3. If Yes, who is the current owner/operator? N/A
4. If Yes, who was/were the prior owner(s)/operator(s) ? N/A
5. When did the change(s) in owner or operator occur? N/A
6. Rating Date: 9/1/2009 Repeat Violator: NO

### Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.

Effective Date: 12/04/2008                      ADMINORDER 2007-1841-MLM-E  
 Classification: Major  
 Citation: 30 TAC Chapter 328, SubChapter A 328.5(b)  
             30 TAC Chapter 330, SubChapter A 330.11(e)

Description: Failure to submit a Notice of Intent to operate a Recycling Facility to the Executive Director at least 90 days prior to engaging in these activities. The investigation confirmed that the regulated entity receives financial compensation to accept recyclable material. As per 30 TAC 328.4, the regulated entity failed to meet the exemption criteria from the registration and permit requirements.

Classification: Moderate

Citation: 30 TAC Chapter 328, SubChapter A 328.5(c)(1)

Description: Failure to provide a written cost estimate showing the cost of hiring a third party to close the facility by disposition of all processed and unprocessed materials in accordance with all applicable regulations. The cost estimate for financial assurance must be submitted with any new registration application or at least 90 days prior to receipt of materials for new facilities.

Classification: Moderate

Citation: 30 TAC Chapter 328, SubChapter A 328.5(d)  
             30 TAC Chapter 37, SubChapter J 37.921

Description: Failure to establish and maintain financial assurance for closure of the facility in accordance with 30 TAC Chapter 37, Subchapter J of this title (relating to Financial Assurance for Recycling Facilities).

Classification: Moderate

Citation: 30 TAC Chapter 328, SubChapter A 328.5(h)

Description: Failure to have a fire prevention and suppression plan and made available to the local fire prevention authority having jurisdiction over the facility.

Classification: Moderate

Citation: 30 TAC Chapter 116, SubChapter F 116.602(a)(2)

Description: Failure to comply with the conditions of the Standard Permit for the Tier II Portable Rock

Crusher. On October 8, 2007, it was documented that the runtime meter on the rock crusher exceeded the authorized limit of 1,080 hours, and has been on site for more than 180 non-consecutive calendar days.

Classification: Moderate

Citation: 30 TAC Chapter 106, SubChapter E 106.146(2)

Description: Failure to comply with the conditions of the PBR, Registration Number 76846 for the Soil Stabilization Plant. On October 8, 2007, it was observed that one of the conveyor belts transferring dry material to the pug mill was not top covered.

Classification: Major

Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)

Description: Failure to prevent the unauthorized discharge of ground water from the dewatering activities which drain accumulated ground water from the sand mining pit.

B. Any criminal convictions of the state of Texas and the federal government.

N/A

C. Chronic excessive emissions events.

N/A

D. The approval dates of investigations. (CCEDS Inv. Track. No.)

1 11/07/2007 (572960)

2 08/28/2009 (746655)

E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

N/A

F. Environmental audits.

N/A

G. Type of environmental management systems (EMSs).

N/A

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



IN THE MATTER OF AN  
ENFORCEMENT ACTION  
CONCERNING  
FOX TREE & LANDSCAPE  
NURSERY, INC. DBA MOTHER  
EARTH LANDSCAPE MATERIALS  
RN104751177

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BEFORE THE  
  
TEXAS COMMISSION ON  
  
ENVIRONMENTAL QUALITY

AGREED ORDER  
DOCKET NO. 2009-1426-MSW-E

I. JURISDICTION AND STIPULATIONS

At its \_\_\_\_\_ agenda, the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") considered this agreement of the parties, resolving an enforcement action regarding FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials ("the Respondent") under the authority of TEX. HEALTH & SAFETY CODE ch. 361 and TEX. WATER CODE ch. 7. The Executive Director of the TCEQ, through the Enforcement Division, and the Respondent appear before the Commission and together stipulate that:

1. The Respondent owns and operates a composting, brush recycling, concrete recycling, and sand and select fill mining operation at 3037 Farm-to-Market 665 in Robstown, Nueces County, Texas (the "Facility").
2. The Facility involves or involved the management of municipal solid waste ("MSW") as defined in TEX. HEALTH & SAFETY CODE ch. 361.
3. The Commission and the Respondent agree that the Commission has jurisdiction to enter this Agreed Order, and that the Respondent is subject to the Commission's jurisdiction.
4. The Respondent received notice of the violations alleged in Section II ("Allegations") on or about September 2, 2009.
5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by the Respondent of any violation alleged in Section II ("Allegations"), nor of any statute or rule.

6. An administrative penalty in the amount of Three Thousand Six Hundred Dollars (\$3,600) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). The Respondent has paid Two Thousand Eight Hundred Eighty Dollars (\$2,880) of the administrative penalty and Seven Hundred Twenty Dollars (\$720) is deferred contingent upon the Respondent's timely and satisfactory compliance with all the terms of this Agreed Order. The deferred amount will be waived upon full compliance with the terms of this Agreed Order. If the Respondent fails to timely and satisfactorily comply with all requirements of this Agreed Order, the Executive Director may require the Respondent to pay all or part of the deferred penalty.
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 the Respondent 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 the Respondent 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

As owner and operator of the Facility, the Respondent is alleged to have:

1. Failed to prevent the unauthorized disposal of municipal solid waste ("MSW"), in violation of 30 TEX. ADMIN. CODE § 330.15(c), as documented during an investigation conducted on June 2, 2009. Specifically, the Respondent allowed approximately 20 cubic yards of MSW to be disposed of at the Facility.
2. Failed to maintain the required waste minimization and recycling records, in violation of 30 TEX. ADMIN. CODE § 328.5(f), as documented during an investigation conducted on June 2, 2009.

## III. DENIALS

The Respondent generally denies each allegation in Section II ("Allegations").

#### IV. ORDERING PROVISIONS

1. It is, therefore, ordered by the TCEQ that the Respondent pay an administrative penalty as set forth in Section I, Paragraph 6 above. The payment of this administrative penalty and the Respondent'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 requiring corrective action or penalties for violations which are not raised here. Administrative penalty payments shall be made payable to "TCEQ" and shall be sent with the notation "Re: FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials, Docket No. 2009-1426-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. It is further ordered that the Respondent shall undertake the following technical requirements:
  - a. Immediately upon the effective date of this Agreed Order,
    - i. Cease disposing of any additional MSW at the Facility;
    - ii. Begin maintaining all waste minimization and recycling records, in accordance with 30 TEX. ADMIN. CODE § 328.4;
  - b. Within 30 days after the effective date of this Agreed Order, remove all MSW and dispose of the waste at an authorized facility; and
  - c. Within 45 days after the effective date of this Agreed Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision Nos. 2.a. through 2.b. 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 fines 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:

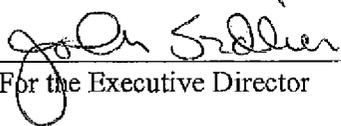
Waste Section Manager  
Corpus Christi Regional Office  
Texas Commission on Environmental Quality  
6300 Ocean Drive, Suite 1200  
Corpus Christi, Texas 78412-5503

3. The provisions of this Agreed Order shall apply to and be binding upon the Respondent. The Respondent is ordered to give notice of the Agreed Order to personnel who maintain day-to-day control over the Facility operations referenced in this Agreed Order.
4. If the Respondent 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, the Respondent's failure to comply is not a violation of this Agreed Order. The Respondent shall have the burden of establishing to the Executive Director's satisfaction that such an event has occurred. The Respondent shall notify the Executive Director within seven days after the Respondent 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 the Respondent shall be made in writing to the Executive Director. Extensions are not effective until the Respondent 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 the Respondent 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 Agreed Order may be executed in multiple counterparts, which together shall constitute a single original instrument. Any executed signature page to this Agreed Order may be transmitted by facsimile transmission to the other parties, which shall constitute an original signature for all purposes under this Agreed Order.
8. Under 30 TEX. ADMIN. CODE § 70.10(b), the effective date is the date of hand-delivery of the Order to the Respondent, or three days after the date on which the Commission mails notice of the Order to the Respondent, 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

  
\_\_\_\_\_  
For the Executive Director

12/8/2009  
Date

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity 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 failure to comply with the Ordering Provisions, if any, in this order and/or failure to timely pay the penalty amount, may result in:

- A negative impact on compliance history;
- Greater scrutiny of any permit applications submitted;
- 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;
- Automatic referral to the Attorney General's Office of any future enforcement actions; and
- TCEQ seeking other relief as authorized by law.

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

  
\_\_\_\_\_  
Signature

10/28/2009  
Date

DAN CABAWERO  
\_\_\_\_\_  
Name (Printed or typed)

PRESIDENT  
\_\_\_\_\_  
Title

Authorized Representative of

FOX TREE & LANDSCAPE NURSERY, INC. dba Mother Earth Landscape Materials

**Instructions:** Send the original, signed Agreed Order with penalty payment to the Financial Administration Division, Revenues Section at the address in Section IV, Paragraph 1 of this Agreed Order.

