

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

July 18, 2007

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: **Executive Director's Reply to Respondents' Exceptions to the Supplemental Proposal for Decision**

Enforcement Action against Chester L. Slay, Jr., Individually; Union Texas Limited Partnership; and Chester Slay Jr., Trustee of Peckham Family Trust;
TCEQ Docket No. 2000-0396-IHW-E; SOAH Docket No. 582-04-0251

Dear Ms. Castañuela:

Enclosed for filing is the original and eleven copies of the "Executive Director's Reply to Respondents' Exceptions to the Supplemental Proposal for Decision" (the "Reply") in the above referenced matter.

Enclosed also find one copy of this letter to you and one copy of the Reply. Please file stamp these documents and return them to Jim Sallans, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-2053.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Sallans".

Jim Sallans
Attorney
Litigation Division

Enclosures

cc: Mr. Chester Slay, P.O. Box 20782, Beaumont, Texas 77720
The Honorable Howard S. Seitzman, State Office of Administrative Hearings, 300 West
Fifteenth Street, Suite 502, Austin, Texas 78701
Mr. Terry Murphy, Enforcement Division, MC 149
Mr. Blas Coy, Public Interest Counsel, MC 103

Kathleen Hartnett White, *Chairman*
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Protecting Texas by Reducing and Preventing Pollution

July 18, 2007

The Honorable Howard S. Seitzman
State Office of Administrative Hearings
300 West Fifteenth Street, Suite 502
Austin, Texas 78701

Re: **Executive Director's Reply to Respondents' Exceptions to the Supplemental Proposal for Decision**
Enforcement Action against Chester L. Slay, Jr., Individually; Union Texas Limited Partnership; and Chester Slay Jr., Trustee of Peckham Family Trust;
TCEQ Docket No. 2000-0396-IHW-E; SOAH Docket No. 582-04-0251

Dear Judge Seitzman:

Enclosed is a copy of the "Executive Director's Reply to Respondents' Exceptions to the Supplemental Proposal for Decision" in the above referenced matter.

The original was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality on this day. If you have any questions or comments, please call me at (512) 239-2053.

Sincerely,

A handwritten signature in cursive script that reads "Jim Fallans".

Jim Fallans
Attorney
Litigation Division

Enclosures

cc: Ms. LaDonna Castañuela, Chief Clerk, MC 105 (original)
Mr. Chester Slay, P.O. Box 20782, Beaumont, Texas 77720
Mr. Terry Murphy, Enforcement Division, MC 149
Mr. Blas Coy, Public Interest Counsel, MC 103

II. Respondents' Exception No. 1

Respondents claim that the Commission has no basis for assessing penalties against any party in this matter and contest the Commission's application of agency procedure to assess penalties based on the "Four Waste Management Areas" of the Facility. Respondents contend that any changes to the PFD shall be limited to matters on the record and the Commission must provide an explanation for the basis of such amendment(s).

Executive Director's Reply to Respondents' Exception No. 1

A party has 20 days from the date a PFD is issued to file exceptions.¹ The Respondents' failure to file exceptions to the initial PFD waives their right to now raise these matters.² The deadline for the Respondents to file exceptions to the PFD was May 10, 2006. Respondents neither filed exceptions to the PFD nor filed replies to the exceptions filed by the Executive Director. Respondents now attempt to raise matters that could have been raised only by the timely filing of exceptions to the initial PFD. The Executive Director objects to the Respondents' attempt to reopen the record for consideration of these matters beyond the procedural deadline.

Notwithstanding the fact that the Respondents' exceptions should be disallowed on procedural grounds, the Executive Director rejects Respondents' claim that the Commission has no basis to assess penalties in this matter. At the administrative hearing, Mr. Slay, on behalf of all Respondents, did not dispute the Commission's authority to impose penalties for violations of 30 TEX. ADMIN. CODE ch. 335, TEX. WATER CODE ch. 26, and TEX. HEALTH & SAFETY CODE ch. 361 pursuant to TEX. WATER CODE § 7.051. The penalty calculation worksheets in this case were based upon the statutory factors set forth in TEX. WATER CODE § 7.053 and the agency penalty policy. The Commission may utilize its authority to take these and other factors under consideration to amend a PFD to determine the appropriate penalty to be assessed.³ This authority along with the evidence on the record adequately supports the penalty recommended by the Commission on April 25, 2007.

Respondents claim that amendments to the ALJ's PFD must include an explanation by the Commission and that an amendment must be based on evidence in the record. Any suggestion that this did not occur is without merit. In exercising its authority to amend the penalty amount of a PFD, the Commission provided ample explanation and justification of its revised penalty amount, limited to matters in the record, during two and one-half hours of

¹ Procedural Rules for the Texas Commission on Environmental Quality, 30 TEX. ADMIN. CODE § 80.257.

² *Gentry v. Squires Construction, Inc.*, 188 S.W.3d 396, 408 (Tex. App. 2006).

³ TEX. WATER CODE § 5.102(b), TEX. GOVT. CODE § 2003.047(m) and Procedural Rules for the Texas Commission on Environmental Quality, 30 TEX. ADMIN. CODE § 80.269(b) and (c).

deliberation of this matter at the April 25, 2007, Commission meeting. Mr. Slay, on behalf of all Respondents, was present and participated in the deliberations.

III. Respondents' Exception No.2

Respondents claim that the revised penalty was improperly calculated because evidence of four waste management areas on the Facility is not supported by evidence on the record or explained by the Commission.

Executive Director's Reply to Respondents' Exception No. 2

With regard to Respondents Exception No. 2, the evidence in the record supports the use of four waste management areas of the Facility.⁴ The application of multiple waste management areas is consistent with the Commission practice and procedure in its assessment of penalties for violations involving multiple waste streams of a single facility. The Commission, in its lengthy deliberations of April 25, 2007, provided extensive explanation in support of this application. Respondents, represented by Mr. Slay, were present during and participated in these deliberations.

The evidence in this case, the Commission's authority to amend penalties and its extensive deliberations support the Commission's revised penalty amount. Respondents' exceptions under Exception No. 2 should be denied and the penalty of \$177,500.00 as assessed by the Commission should be imposed.

IV. Respondents' Exception No. 3

Under Respondents' Exception No. 3, Respondents contest the findings of the ALJ of Mr. Slay as the Operator of the Facility. Respondents further maintain that it is unreasonable to hold the Peckham Family Trust responsible for acts that may have occurred on property owned by the Smith Family Trust – not a party to this action. Respondents request also that penalties should be assessed only against Union Texas Limited Partnership.

Executive Director's Reply to Respondents' Exception No. 3

Respondents have waived the right to oppose Mr. Slay's status as Operator. This claim should be denied by the Commission as Respondents failed to raise this matter as an exception to the initial PFD. The Deadline to file exceptions to the initial PFD was May 10, 2006.⁵

⁴ TR Vol.1, page 225, TR Vol. 1, pages 241-242 and TR Vol. 2, page 449.

⁵ Procedural Rules for the Texas Commission on Environmental Quality § 80.257.

Beyond the fact that Respondents are precluded from contesting this matter on procedural grounds, the Executive Director submits that no evidence was introduced to show that there was an Operator other than Mr. Slay. He was the contact person both at the Facility during the term of investigation and in correspondence, meetings and phone calls with the TCEQ.⁶ Other parties looked to Mr. Slay for direction on what to do and how to handle matters at the Facility.⁷ The evidence on the record establishes Mr. Slay's authority over the Facility and that he was acting as Operator.⁸ The Commission and the ALJ have properly concluded that Mr. Slay is the common factor among all Respondents in this case and that he is the Operator. Respondents' exception should be refused based upon the evidence in the record, as well as, on procedural grounds.

The issue of whether it is reasonable to find the Peckham Family Trust responsible for acts that may have occurred on the property owned by the Smith Family Trust is without merit. In the Supplemental PFD, the ALJ did not allocate penalties to the Peckham Family Trust for violations that occurred on property of the Smith Family Trust.⁹ In addition, this issue was addressed at length during the Commissions' April 25, 2007 consideration of the initial PFD. The specific consideration of this matter contributed to the Commission's calculation of the penalty. For those reasons, the imposition of penalties against the Peckham Family Trust is reasonable and Respondents' request to assess penalties only against Union Texas Limited Partnership should also be denied.

V. Conclusion

Pursuant to its authority to consider and amend a PFD, and impose penalties,¹⁰ the Commission on April 25, 2007, assessed a total penalty of \$177,500 and resolved all matters in this case – except one item – the apportionment of the penalty among all Respondents. The Commission instructed the ALJ to apportion the penalty among all Respondents based on the Executive Director's prayer for joint and several liability against all Respondents due to the

⁶ On July 23, 1999, Mr. Slay instructed his employees to paint over identification numbers the TCEQ Contractor had placed on tanks and containers for identification during a sampling event (TR Vol. 1, pages 74 – 77 and 108). He attempted to keep contractors from taking samples at the Facility (TR Vol. 1, page 109). He instructed people what to do with regard to operations at the Facility (TR Vol. 1, pages 79 and 80). He sent correspondence to the TCEQ on August 24, 1999, to inquire about the TCEQ jurisdiction over the Facility (TR Vol. 1, page 128). Mr. Slay was negotiating to lease the Facility to a company that reconstructed offshore oil platforms. He owned or controlled all of the entities that owned the Facility after June 12, 1999 and controlled access to the Site and activities on the Site to warrant legal status as Operator – the person responsible for all overall operation of the Facility (PFD, 2000-0396-IHW-E, page 11, April 19, 2006).

⁷ TR Vol. 1, page 108 and ED – Exhibit 21, page 2.

⁸ TR Vol. 1, pages 136 and 198 and TR Vol. 2, page 174.

⁹ Supplemental Proposal for Decision, 2000-0396-IHW-E, Tables 4 and 5, May 30, 2007.

¹⁰ TEX. WATER CODE § 5.102(b), TEX. GOVT. CODE § 2003.047(m) and Procedural Rules of the Texas Commission on Environmental Quality, 30 TEX. ADMIN. CODE § 80.269.

unique connection among all Respondents to Respondent Slay - the Operator. The evidence conclusively shows Respondent Slay was the operator throughout the time period covered by the case, regardless of the conveyances, and that transactions related to the facility among the Respondents were connected to Respondent Slay. The Commission exercised its authority to amend the PFD and it considered the evidence in the record, pleadings and arguments of the parties, to achieve a just penalty amount. As stated earlier, the Commission only requested that the ALJ propose an apportionment of the penalties. In addition, the Commission provided extensive explanations of these matters during its April 25, 2007 meeting further supporting the basis for the imposed penalties among the Respondents. Accordingly, the Executive Director respectfully requests that the Respondents' exceptions to the Supplemental PFD be denied.

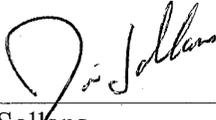
Respectfully submitted,

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Mary R. Risner, Division Director
Litigation Division

by: 

Jim Sallans
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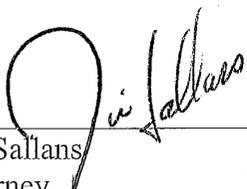
CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2007, the original and eleven copies of the foregoing "Executive Director's Reply to Respondents' Exceptions to the Supplemental Proposal for Decision" ("the Reply") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Reply was mailed via First Class Mail, postage prepaid, to Mr. Chester Slay, P.O. Box 20782, Beaumont, Texas 77720.

I further certify that on this day a true and correct copy of the foregoing Reply was hand-delivered to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Reply was sent via Inter-Agency Mail and via facsimile (512) 475-4994 to The Honorable Howard S. Seitzman, Administrative Law Judge, State Office of Administrative Hearings, 300 West Fifteenth Street, Suite 502, Austin, Texas 78701.



Jim Sallans
Attorney
Litigation Division
Texas Commission on Environmental Quality

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