

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge

April 19, 2006

CHIEF CLERKS OFFICE

2006 APR 19 PM 1:47

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Derek Seal  
General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

VIA HAND DELIVERY

**Re: SOAH Docket No. 582-04-0251; TCEQ Docket No. 2000-0396-IHW-E; IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST CHESTER L. SLAY, JR., INDIVIDUALLY; UNION TEXAS LIMITED PARTNERSHIP; AND CHESTER L. SLAY, JR., TRUSTEE OF PECKHAM FAMILY TRUST; SOLID WASTE REGISTRATION NO. 34799**

Dear Mr. Seal:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 9, 2006. Any replies to exceptions or briefs must be filed in the same manner no later than May 19, 2006.

This matter has been designated **TCEQ Docket No. 2000-0396-IHW-E; SOAH Docket No. 582-04-0251**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard S. Seitzman".

Howard S. Seitzman  
Administrative Law Judge

HSS/vg  
Enclosures  
xc: See attached Mailing List

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2006 APR 19 PM 3:47  
CHIEF CLERKS OFFICE

**SERVICE LIST**

AGENCY: TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ)

STYLE/CASE: CHESTER SLAY, JR.

SOAH DOCKET NUMBER: 582-04-0251

TCEQ DOCKET NUMBER: 2000-0396-IHW-E

**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**HOWARD S. SEITZMAN  
ADMINISTRATIVE LAW JUDGE**

**PARTIES**

**REPRESENTATIVE/ADDRESS**

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SOAH DOCKET NO. 582-04-0251  
TCEQ DOCKET NO. 2000-0396-IHW-E

2006 APR 19 PM 1:48  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

IN THE MATTER OF AN  
ENFORCEMENT ACTION AGAINST  
CHESTER L. SLAY, JR.,  
INDIVIDUALLY; UNION TEXAS  
LIMITED PARTNERSHIP; AND  
CHESTER L. SLAY, JR., TRUSTEE OF  
PECKHAM FAMILY TRUST;  
SOLID WASTE REGISTRATION NO.  
34799

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) asks to impose administrative penalties jointly and severally<sup>1</sup> against Respondents Chester L. Slay, Jr., individually; Chester L. Slay, Jr., Trustee of Peckham Family Trust (Peckham Trust); and Union Texas Limited Partnership (Union Texas).<sup>2</sup> The ED alleged that Mr. Slay was the operator of a former barge cleaning and waste storage facility located at 8600 Industrial Inlet, Port Arthur, Jefferson County, Texas (Facility or Palmer Barge Site). The ED alleged that Union Texas and the Peckham Trust owned the Facility. The ED alleged that Respondents:

(1) violated 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J by failing to properly label, inspect, assess, certify, or provide secondary containment for 14 waste tanks;

(2) violated TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b) by failing to conduct spill closure or remediation activities at 10 spill sites at the Facility;

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<sup>1</sup> Alternatively, the ED seeks to impose administrative penalties severally against Respondents.

<sup>2</sup> As explained in Section III, there were originally two additional Respondents, the Birch Family Trust (Birch Trust) and the McGee Family Trust (McGee Trust). The ED subsequently dismissed the Birch Trust and the McGee Trust.

(3) violated 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11 by failing to perform hazardous waste determinations and waste classifications on 15 different wastes generated and stored in 15 different containers at the Facility;

(4) violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to notify TCEQ concerning the storage of industrial waste in four (4) waste management units at the Facility; and

(5) violated 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1 by failing to obtain a permit to store hazardous waste generated on-site and stored in 14 waste tanks at the Facility.

Respondents Slay, Peckham Trust and Union Texas denied liability. Respondents also contested the calculation of the administrative penalties.

The Administrative Law Judge (ALJ) finds that Respondents should be penalized for committing some of the alleged violations. The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Order and assess a \$1,500 penalty against Respondents jointly and severally.

## II. JURISDICTION

The parties did not dispute TCEQ's jurisdiction, the State Office of Administrative Hearings' (SOAH) jurisdiction, or the adequacy of notice. The TCEQ and SOAH have jurisdiction over this matter and notice was proper as reflected by the Findings of Fact and Conclusions of Law in the attached Order.

## III. PROCEDURAL HISTORY

The preliminary hearing convened on December 4, 2003, before ALJ Howard S. Seitzman in a hearing room of the State Office of Administrative Hearings, William P. Clements Building, 300 West 15<sup>th</sup> Street Austin, Texas. Richard S. O'Connell, representing the ED. Respondents Slay, Peckham Trust, Birch Trust and McGee Trust were represented by Messrs. Paul L. Francis and

W. John English, Jr. Union Texas did not appear but, because it was attempting to retain counsel, counsel for Union Texas Limited Partnership was given until 3:00 p.m. on December 19, 2003, to file a notice of appearance. On December 19, 2003, Union Texas filed its appearance.

At the December 4, 2003 preliminary hearing, six exhibits addressing jurisdiction and notice were admitted into evidence without objection. The parties agreed to a procedural schedule and an August 3, 2004 setting for the hearing on the merits. On March 10, 2004, the ED filed an Agreed Motion for Continuance and by Order No. 2 dated March 11, 2004, the hearing on the merits was reset for August 25, 2004. On May 10, 2004, counsel for all Respondents filed a Notice of Withdrawal. On May 28, 2004, Order No. 3 granted Respondents' counsel's withdrawal subject to certain conditions. On July 19, 2004, the ED filed Motions to Default Respondents, for sanctions and to schedule a second preliminary hearing. On July 28, 2004, Order No. 4 set additional filing deadlines for the parties.

The hearing on the merits convened on August 25, 2004, before ALJ Seitzman in a SOAH hearing room, William P. Clements Building, 300 West 15<sup>th</sup> Street Austin, Texas. Respondents appeared *pro se*. The ED was represented by Barbara L. Klein and by Sara Jane Utley. Michael McDonough, Raymond Marlow, Donald Fawn and Terry Murphy testified for the ED. As reflected in Order No. 5, dated August 26, 2004, the parties stipulated into the record the testimony of Abigail Power regarding a March 1998 soil sampling event.<sup>3</sup> Following the stipulation, the parties agreed to recess the hearing on the merits for 60 days to discuss settlement options, attempt to resolve issues regarding legal title and to more specifically identify the location of various storage units on the subdivided property that encompassed the Facility.

On behalf of the parties the ED filed an October 25, 2004 Status Report and requested the hearing on the merits be recessed an additional 60 days. The request was granted by Order No. 6,

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<sup>3</sup> The stipulation of her testimony is set forth at Tr. Vol. 1, pp. 287-288 (August 25, 2004).

dated October 26, 2004. The ED filed a joint status report on December 29, 2005, and by Order No. 7, dated January 5, 2005, the ALJ granted the parties the request for a recess until January 14, 2005. On January 19, 2005, the ED's joint status report requested the hearing be reconvened. Order No. 8, dated January 20, 2005, set the reconvening of the hearing on the merits for the first available date requested by the parties, April 12, 2005.

When the hearing on the merits reconvened on April 12, 2005, the ED amended his EDPRP. The ED dismissed the Birch Family Trust and the McGee Family Trust,<sup>4</sup> amended the date on which the Peckham Trust purchased a portion of the property,<sup>5</sup> and reduced the amount of the administrative penalty sought. The ED's First Amended Report and Petition (EDFARP) was filed on April 15, 2005.

The parties also stipulated into evidence ED Exhibit No. 27, a map with overlays, which superceded and replaced the testimony of Michael McDonough regarding the description of the various tracts of land. Thereafter, Raymond Marlow, Terry Murphy and Chester Slay, Jr., testified.

The hearing adjourned on April 12, 2005, but the administrative and evidentiary records remained open for the filing of conforming exhibits and briefs. By Order No. 10, dated July 29, 2005, Mary Claire Lyons replaced Barbara L. Klein as attorney of record for the ED. In order to adequately address the factual background and matters related to the site, the ALJ proposed to admit, as Court's Exhibit 1, pages taken from the United States Environmental Protection Agency's (USEPA) website.<sup>6</sup> The parties had until 5:00 p.m. on August 12, 2005, to object and no objection was filed. The evidentiary record closed on August 15, 2005.

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<sup>4</sup> Tr. Vol. 2, pp. 4-5 (April 12, 2005).

<sup>5</sup> Tr. Vol. 2, p. 5 (April 12, 2005).

<sup>6</sup> <http://www.epa.gov/earth1r6/6sf/pdffiles/0605212.pdf>.

#### IV. SITE HISTORY

John Palmer (Palmer) acquired 17 acres from the City of Port Arthur in 1982 and began a barge cleaning business on the site. Palmer's operations included using steam or water to remove heels, unpumpable remnants, from barges. When Palmer acquired the property, he executed a deed of trust to Banker Phares, as trustee for the First National Bank of Port Arthur,<sup>7</sup> to secure the loan for the property.<sup>8</sup> The Federal Deposit Insurance Corporation declared the bank insolvent in 1989 and assigned the debt secured by the deed of trust to Bank One of Texas, N.A.<sup>9</sup> Bank One assigned the debt to Wrangler Capital Investment Limited Partnership (Wrangler Capital) on October 27, 1994.<sup>10</sup> On September 2, 1997, David Elder, as Substitute Trustee on behalf of Wrangler Capital, sold the property to Union Texas at a non-judicial foreclosure sale.<sup>11</sup> The barge and marine vessel service operations ceased in 1997.<sup>12</sup> USEPA began studying the Palmer Barge Site in 1997 and conducted an emergency response removal action in late 1999<sup>13</sup> or in 2000.<sup>14</sup> According to USEPA, soil samples collected near the above ground storage tanks in 1999 revealed the presence of volatile organic constituents (VOCs), semi-volatile organic constituents (SVOCs), inorganic contaminants and hazardous constituents at the Palmer Barge Site.<sup>15</sup> The Palmer Barge

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<sup>7</sup> Subsequently, First National Bank of Port Arthur went through a series of mergers and name changes. ED Ex. 21, p. 257.

<sup>8</sup> ED Ex. 21, p. 257.

<sup>9</sup> ED Ex. 21, p. 257.

<sup>10</sup> ED Ex. 21, p. 257.

<sup>11</sup> ED Ex. 21, pp. 257-263.

<sup>12</sup> Court Ex. 1.

<sup>13</sup> Tr: Vol. 1, pp. 114-116 (August 25, 2004).

<sup>14</sup> The evidence in the record does not precisely identify the time of the USEPA action. The best date from the evidence is around November 1999. Such a date is consistent with Weston's, USEPA's contractor, being on the site on August 4, 1999, and USEPA being on the site on October 20, 1999. ED Ex. 21, pp. 4-5.

<sup>15</sup> Court Ex. 1.

Site was proposed for the National Priorities List (NPL) on May 11, 2000 and placed on the NPL on July 27 2000, i.e., the Palmer Barge Site became a USEPA Superfund site in 2000.<sup>16</sup> On September 30, 2002, the USEPA issued a consent order against four potentially responsible parties (PRPs).<sup>17</sup> USEPA did not enter an order against Respondents, and there is no evidence USEPA designated Respondents as PRPs.<sup>18</sup>

The Commission's predecessor agency, the Texas Natural Resource Conservation Commission (TNRCC), entered into an Agreed Order with Palmer regarding the Palmer Barge Site (Palmer Agreed Order).<sup>19</sup> The Palmer Agreed Order arose from an inspection by the General Land Office and the United States Coast Guard on September 24, 1996, and inspections by the TNRCC Beaumont Regional Office in November and December 1996. The Palmer Agreed Order recites 18 types of violations.<sup>20</sup> For these violations, the Commission agreed to a \$250,000 administrative

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<sup>16</sup> Court Ex. 1.

<sup>17</sup> Court Ex. 1.

<sup>18</sup> Ed Ex. 1, paragraph 14; ED Ex. 6, paragraph 14; ED. Ex. 26, paragraph 11.

<sup>19</sup> ED Ex. 31. The Agreed Order in TNRCC Docket No. 1997-0103-MLM-E was signed by the ED and Palmer in November 1999 and approved by the Commissioners on January 26, 2000.

<sup>20</sup> The violations were: (1) allowing contaminated storm water (i) to discharge from a waste storage tank secondary containment area to a canal, and (ii) to commingle with unauthorized discharges from a waste storage tank in earthen secondary containment structures; (2) failing to complete hazardous waste determinations for various materials including tank bottoms in a roll-off container; (3) failing to maintain various records; (4) failing to properly notify the TNRCC of the use of on-site waste management units including a 40-yard roll-off box and two industrial boilers burning waste naphthalene, waste cyclohexane and waste adiponitrile for fuel; (5) failing to submit annual waste reports for 1994 and 1995; (6) failing to Manifest off-site shipments of Class I industrial and hazardous waste; (7) failing to ensure that the off-site shipments were transported only to Commission approved facilities; (8) failing to obtain a permit prior to burning hazardous wastes in on-site boilers; (9) storing hazardous wastes for more than 90 days without a permit; (10) failing to deed record on-site disposal of Class I or hazardous wastes when mixing barge wastes with concrete to build on-site sidewalks; (11) failing to properly maintain a flare operation log; (12) failing to control VOC emissions; (13) unlawfully constructing a VOC water separator; (14) unlawfully replacing one on-site boiler and constructing a second on-site boiler; (15) unlawfully constructing four boiler feeder tanks; (16) illegally operating a flare; (17) failing to ensure all vapors were routed to the flare; and (18) cleaning barges containing chemical compounds not listed in the permit exemption application.

penalty which was reduced to a \$25,000 penalty if paid in accordance to a schedule prior to November 1, 2001.<sup>21</sup>

## V. SUMMARY OF ED'S POSITION

Raymond Marlow, a Commission inspector, commenced a multimedia compliance evaluation inspection of the Facility on June 24-27, 1999. On his initial visit no one was present and he observed numerous tanks, a roll-off container and several railroad tank cars on the unsecured property. He observed stained soil and detected strong hydrocarbon odors. Some of the tanks were located approximately 40 yards from Sabine Lake.<sup>22</sup> Mr. Marlow contacted Donald Fawn at the Commission's emergency response office. On July 21, 1999, Raymond Marlow and Donald Fawn visited the Facility. Mr. Roy Stanley of Marlin Environmental was at the Site.<sup>23</sup> Mr. Slay arrived later in the afternoon and spoke with Mr. Marlow.

On July 23, 1999, Boots and Coots Specialty Services conducted a sampling operation for the Commission. The sample results showed that some tanks contained benzene wastes.<sup>24</sup> Benzene is classified as a hazardous waste based upon a characteristic for toxicity at levels of 0.5 parts per

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<sup>21</sup> ED Ex. 31.

<sup>22</sup> Tr. Vol. 1, p. 59 (August 25, 2004).

<sup>23</sup> According to Mr. Marlow's April 3, 2000 Inspection Report, Mr. Stanley intended to operate an offshore oil platform rebuilding operation and was contemplating leasing land at the Facility.

<sup>24</sup> Tr. Vol. 1, p. 64 (August 25, 2004); ED Ex. 21, pp. 67-270.

million<sup>25</sup> or greater.<sup>26</sup> Benzene was detected in Tanks 3-6,<sup>27</sup> 8-12,<sup>28</sup> 14-15,<sup>29</sup> 19,<sup>30</sup> 21,<sup>31</sup> 26,<sup>32</sup> and Container 17.<sup>33</sup> Tank 14, a railcar, tested at 11,413 ppb, Tank 3 tested at 13,222 ppb and Tank 19 tested at 22,424 ppb.<sup>34</sup> The material tested was a hazardous waste under the Resource Conservation and Recovery Act (RCRA). The Facility was not permitted for the storage of hazardous wastes.<sup>35</sup> The secondary containment around the tanks also contained liquids that were being released from the secondary containment structures.<sup>36</sup> On April 3, 2000, a Notice of Enforcement (NOE) letter was issued only to the Peckham Trust and Union Texas.<sup>37</sup> The dates of violation cited by the ED were June 24, 25, and 27; July 21 and 23; and November 1, 1999.<sup>38</sup> For the alleged violations the ED seeks only administrative penalties.<sup>39</sup>

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<sup>25</sup> 500 micrograms per liter (ug/L) or 500 parts per billion (ppb). To convert from parts per billion to parts per million one divides by 1000.

<sup>26</sup> Tr. Vol. 1, pp. 65-66 (August 25, 2004).

<sup>27</sup> Part of the 12-tank battery. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>28</sup> Part of the 12-tank battery. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>29</sup> Respectively, the central and west vacuum tanks. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>30</sup> Wastewater Tank 102. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>31</sup> Wastewater Tank 101. The analytical result is from the duplicate sample, Sample Number 021-B. The initial sample, Sample Number 021-A, was analyzed as "No Detectable limits." ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>32</sup> The South Boiler Feed Tank. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>33</sup> The roll-off box by the dock. ED Ex. 21, pp. 60-65; Tr. Vol. 1, p. 67 (August 25, 2004).

<sup>34</sup> Tr. Vol. 1, pp. 67-68 (August 25, 2004).

<sup>35</sup> Tr. Vol. 1, pp. 68-69 (August 25, 2004).

<sup>36</sup> Tr. Vol. 1, pp. 71-73 (August 25, 2004).

<sup>37</sup> Tr. Vol. 1, p. 77 (August 25, 2004); ED Ex. 21, p.11.

<sup>38</sup> Tr. Vol. 1, pp. 86-87 (August 25, 2004); ED Ex. 21, p.11.

<sup>39</sup> Although the ED sought corrective action measures in its June 20, 2003 EDPRP (ED Ex. 1 and ED Ex. 6), the ED subsequently withdrew that request. Tr. Vol. 2, pp. 5-6 (April 12, 2005).

## VI. SUMMARY OF RESPONDENTS' POSITION

Respondents contended that all operations, waste generation and waste storage at the Palmer Barge Site occurred during Mr. Palmer's tenure. EPA removed the waste materials, thereby removing any potential threat to the environment. Respondents argued the tanks were under the jurisdiction of the General Land Office. Since he was neither an operator or owner of the Palmer Barge Site, Mr. Slay contended the Commission has no legal basis upon which to hold him individually liable. Mr. Slay also challenged components of the ED's penalty computations and the total penalties sought.

## VII. OWNERS

The approximately 17-acre Palmer Barge Site was purchased by Union Texas on September 2, 1997. On June 12, 1999, Chester Slay purchased Union Capital Recovery Corporation (Union Capital), a District of Columbia corporation.<sup>40</sup> Union Capital, as a limited partner, owned a 99% interest in Union Texas, a District of Columbia limited partnership.<sup>41</sup> Union Capital also owned 100% of the stock of Nuggetman Corporation (Nuggetman), a District of Columbia corporation.<sup>42</sup> Nuggetman, as a general partner, owned a 1% interest in Union Texas.<sup>43</sup> Therefore, as of June 12, 1999, Mr. Slay, through Union Capital and Union Texas, owned and controlled the 17-acre Palmer Barge Site.

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<sup>40</sup> ED Ex. 17.

<sup>41</sup> ED Ex. 17, p. 1.

<sup>42</sup> ED Ex. 17, p. 1.

<sup>43</sup> ED Ex. 17.

On July 21, 1999, Union Texas separately sold the 17-acres, in various portions, to Chester L. Slay Jr., as Trustee of the Birch Trust, the McGee Trust, the Peckham Trust and the Smith Family Trust (Smith Trust).<sup>44</sup> One tank, a "south boiler feed tank," is located on the Peckham Trust portion of the 17-acre site. No tanks or containers sit on the Birch and McGee Trusts' portions of the 17-acres. The owner of the property on which the balance of the tanks and containers sit, the Smith Trust, is not, and never was, a respondent in this case.<sup>45</sup> Because Palmer Barge did not conduct any operations on the Birch and McGee Trust properties and there were no tanks or containers on the properties,<sup>46</sup> the ED dismissed the Birch and McGee Trusts from the litigation.<sup>47</sup>

### VIII. OPERATOR

The ED contended Mr. Slay was an operator<sup>48</sup> because he was present at the site for a portion of the time when investigators were present, appeared to be involved in directing the work "in some manner," and was "taking general responsibility for the direction of things at the site."<sup>49</sup> Mr. Slay testified he spent a considerable sum of his family's money to "clean the Palmer site up" including removal of the pipelines and underground utilities.<sup>50</sup>

Mr. Slay had workers paint over, with silver paint, the identification numbers Boots & Coots had placed on the tanks and containers for identification during the July 23, 1999 sampling event.<sup>51</sup>

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<sup>44</sup> ED Ex. 25.

<sup>45</sup> Tr. Vol. 2, pp. 9-10, 34-35 (April 12, 2005); ED Ex. 25; ED Ex. 27.

<sup>46</sup> Tr. Vol. 2, p. 184 (April 12, 2005).

<sup>47</sup> Tr. Vol. 2, pp. 4-5 (April 12, 2005).

<sup>48</sup> An operator is defined as the person responsible for the overall operation of a facility. 30 TEX. ADMIN. CODE § 335.1(100).

<sup>49</sup> Tr. Vol. 2, p. 124 (April 12, 2005).

<sup>50</sup> Tr. Vol. 2, p. 208 (April 12, 2005).

<sup>51</sup> Tr. Vol. 1, pp. 74-77, 108 (August 25, 2004).

He directed activities at the Site<sup>52</sup> and controlled who accessed the site.<sup>53</sup> While Mr. Slay, on several occasions, tried to show “the Cohens” controlled access to the site,<sup>54</sup> it is clear Mr. Slay, not the Cohens,<sup>55</sup> controlled access to the site.<sup>56</sup> Mr. Slay was negotiating to lease the site to another entity for reconstruction of offshore oil platforms.<sup>57</sup> Mr. Slay was planning remedial activities and operations at the site in order to obtain the lease.<sup>58</sup> Mr. Slay had sufficient legal ties with each of the entities that had ownership of the site to conclude he was not trespassing or operating without the entities’ knowledge. Mr. Slay owned or controlled all of the entities that owned the Palmer Barge Site after June 12, 1999. The ALJ concludes Mr. Slay exercised sufficient control over access to the site and activities on the site to warrant legal status as an operator, the person responsible for the overall operation of a facility.

#### IX. PENALTIES SOUGHT BY ED

In June 2003, the ED originally requested a total of \$605,875 in administrative penalties from the original respondents.<sup>59</sup> In his April 15, 2005 EDFARP, the ED, after dismissing two respondents, sought \$596,625 in administrative penalties.<sup>60</sup>

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<sup>52</sup> Tr. Vol. 1, pp. 79-80, 109-111, 129-132, 147-149, 169 (August 25, 2004).

<sup>53</sup> Tr. Vol. 1, pp. 169, 210 (August 25, 2004); Tr. Vol. 2, pp.189-194 (April 12, 2005).

<sup>54</sup> Tr. Vol. 2, pp. 189-190, 193-194 (April 12, 2005).

<sup>55</sup> The Cohens, who run a scrap metal business, lease a portion of the Birch Tract, from Mr. Slay. Tr. Vol. 1, p. 210 (August 25, 2004); Tr. Vol. 2, pp. 187-188 (April 12, 2005); ED Ex. 17, p. 30.

<sup>56</sup> Tr. Vol. 1, p. 108 (August 25, 2004); Tr. Vol. 2, pp. 190-191 (April 12, 2005).

<sup>57</sup> ED Ex. 21, pp. 2-5.

<sup>58</sup> ED Ex. 21, p. 5.

<sup>59</sup> ED Ex. 1.

<sup>60</sup> ED Ex. 26.

The penalty calculations for the April 15 EDFARP were admitted as ED Exhibits 28, 29, 30 and 32<sup>61</sup> during the April 12, 2005 hearing on the merits session.<sup>62</sup>

ED Exhibit 28 seeks to assess penalties jointly and severally amongst Respondents. For the first cited violation, failing to properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks, the ED calculated a base penalty of \$10,000 and then adjusted it downward by \$5,000 for a base penalty subtotal (BPS) of \$5,000. The BPS was then multiplied by 10 months of violation.<sup>63</sup> Because the ED determined the tanks sat in four (4) separate areas, it then multiplied the \$50,000 adjusted base penalty subtotal by four to arrive at a violation base penalty (VBP) of \$200,000. The ED then calculated an economic benefit of \$8,616 to Respondents by avoiding the cost of compliance. The \$8,616 benefit was calculated by assuming a cost of compliance of \$5,000 per tank.<sup>64</sup> For an unexplained reason, the \$5,000 estimated cost per tank was multiplied by 15 tanks<sup>65</sup> rather than the 14 tanks for which penalties were sought. Also, for a reason not explained, the cost of compliance was calculated from the June 24, 1999 inspection date through February 12, 2001, rather than through the April 12, 2000 screening date.<sup>66</sup> This unexplained variance means an economic benefit is attributed to Respondents after April 12, 2000, and used to increase the penalty sought by the ED even though the ED does not seek a penalty for the period after April 12, 2000. Also, the February 12, 2001 date falls some seven months after the site was

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<sup>61</sup> Exhibit 28 is based on joint and several liability while Exhibits 29, 30 and 32 are based on several liability only.

<sup>62</sup> Tr. Vol. 2, pp. 14-19, 118 (April 12, 2005).

<sup>63</sup> The dates of alleged violation commenced on the June 24, 1999 inspection date and ran continuously through the April 12, 2000 screening date. ED Ex. 28 (EDFARP Penalty Calculation Worksheet (PCW) at p. 3.)

<sup>64</sup> The \$5,000.00 estimate covers tank assessment, engineering certification, labeling and adequate containment. ED Ex 28, p. 4. A five percent interest rate was used in all of the economic benefit calculations as was a 15-year depreciation schedule. ED Ex. 28.

<sup>65</sup> ED Ex. 28, p. 4.

<sup>66</sup> ED Ex. 28, p. 4.

designated a federal Superfund site and approximately 15 months after waste was most likely removed from the tanks by USEPA.

For the second alleged violation, failure to remediate spills in 10 different areas, the ED calculated a base penalty of \$10,000 with a 50% downward adjustment based upon moderate actual harm.<sup>67</sup> The ED multiplied the \$5,000 BPS by 10. It appears the multiplier is derived from the number of months between the initial inspection date of June 24, 1999, and the enforcement screening date of April 12, 2000, although the written notation recommends eleven monthly penalty events "to make the penalty commensurate with the situation."<sup>68</sup> The calculation yielded a VBP of \$50,000. The ED attributed an economic benefit of \$2,906,205 to Respondents for the period June 24, 1999, through February 14, 2001,<sup>69</sup> based upon a \$35.3 million remediation estimate the ED derived from USEPA average Superfund costs.<sup>70</sup>

The third alleged violation, failing to test and classify materials stored on-site in 15 containers, had a base penalty of \$10,000 adjusted downward to \$2,500 based upon a major programmatic violation of failing to comply with 100% of the rule requirements.<sup>71</sup> The \$2,500 BPS was multiplied by 15 annual violations to yield a VBP of \$37,500.<sup>72</sup> The ED calculated an economic benefit of \$1,772 based upon an estimated cost of \$21,600 for compliance between June 24, 1999, and February 12, 2001.<sup>73</sup>

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<sup>67</sup> ED Ex. 28, p. 6.

<sup>68</sup> ED Ex. 28, p. 6.

<sup>69</sup> The use of a February 12, 2001 date for calculating economic benefit was never explained by the ED and the penalty calculation for each alleged violation using that date carries the same negative baggage.

<sup>70</sup> ED Ex. 28, p. 7. Although the ED's estimated remedy cost seems excessive for this site, the USEPA had not issued its Record of Decision (ROD) at the time the record closed in this TCEQ case.

<sup>71</sup> ED Ex. 28, p. 8.

<sup>72</sup> ED Ex. 28, p. 8.

<sup>73</sup> ED Ex. 28, p. 9.

The ED assigned a base penalty of \$10,000 for the fourth alleged violation, failure to notify TNRCC of industrial waste storage in four waste management units at the site.<sup>74</sup> The base penalty was adjusted downward to \$2,500 based upon a major programmatic violation of failing to comply with 100% of the rule requirements.<sup>75</sup> The \$2,500 BPS was multiplied by four, as each waste management unit was considered a single event.<sup>76</sup> The VBP totaled \$10,000. The ED calculated an avoided cost of \$163.00 by assuming an annual cost of compliance of \$100.00 multiplied by 1.6 years for the period extending from June 24, 1999, through January 12, 2001,<sup>77</sup> and adding \$8.00 in interest.<sup>78</sup>

For allegation number five, the failure to obtain a storage permit for hazardous waste generated on-site and stored in 14 tanks, the base penalty was \$10,000.<sup>79</sup> The ED's PCW acknowledged the site ceased operations in 1997.<sup>80</sup> The base penalty was adjusted downward to \$2,500 based upon a major programmatic violation of failing to comply with 100% of the rule requirements.<sup>81</sup> The BPS was multiplied by 10 to account for monthly violations between the first inspection on June 24, 1999, and the screening date of April 12, 2000.<sup>82</sup> The VBP for allegation five is \$25,000.<sup>83</sup> An economic benefit of \$821.00 was calculated on \$10,000 in estimated permitting

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<sup>74</sup> ED Ex. 28, p. 10.

<sup>75</sup> ED Ex. 28, p. 10.

<sup>76</sup> ED Ex. 28, p. 10.

<sup>77</sup> Calculated at \$156.00. ED Ex. 28, p. 11.

<sup>78</sup> ED Ex. 28, p. 11.

<sup>79</sup> ED Ex. 28, p. 12.

<sup>80</sup> ED Ex. 28, p. 12.

<sup>81</sup> ED Ex. 28, p. 12.

<sup>82</sup> ED Ex. 28, p. 12.

<sup>83</sup> ED Ex. 28, p. 12.

costs depreciated over 15 years and multiplied by 1.6 years for the period June 24, 1999, through February 12, 2001.<sup>84</sup>

The total VBP was \$322,500.<sup>85</sup> The ED then enhanced the total VBP by 35%, \$112,875.<sup>86</sup> The 35% adjustment percentage is calculated from a Compliance History Worksheet.<sup>87</sup> A 25% enhancement was added for an adverse Site compliance history based upon the Palmer Agreed Order.<sup>88</sup> An additional 10% enhancement was added because the compliance history of the person was cited as "Poor Performer."<sup>89</sup> The parties agree that Respondents and Palmer are not related in any legal or financial way. The ED assessed no enhancement for culpability because the Respondents did not meet the culpability criteria.<sup>90</sup> The ED offered no reduction for good faith effort to comply because the events "are past events with no opportunity for compliance."<sup>91</sup>

The ED's total estimated cost of compliance was \$35.4 million and the total estimated economic benefit to Respondents was calculated at \$2.9 million.<sup>92</sup> The maximum enhancement for the economic savings to Respondents is 50% of the TPB, \$161,250. When added together, these enhancements brought the final penalty assessed by the ED to \$596,625.<sup>93</sup>

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<sup>84</sup> ED Ex. 28, p. 13.

<sup>85</sup> ED Ex. 28, p. 2.

<sup>86</sup> ED Ex. 28, p. 2.

<sup>87</sup> ED Ex. 28, p. 3.

<sup>88</sup> ED Ex. 28, p. 3.

<sup>89</sup> ED Ex. 28, p. 3.

<sup>90</sup> ED Ex. 28, p. 2.

<sup>91</sup> ED Ex. 28, p. 2.

<sup>92</sup> ED Ex. 28, p. 2.

<sup>93</sup> ED Ex. 28, p. 2.

Reassigning the final assessed penalty amount of \$596,625 to the five alleged violations results in Violation Final Penalty Totals (VFPT) as follows:

Allegation No.	VFPT
1	\$370,000 <sup>94</sup>
2	\$92,500 <sup>95</sup>
3	\$69,375 <sup>96</sup>
4	\$18,500 <sup>97</sup>
5	\$46,250 <sup>98</sup>

For the same violations, the ED also calculated separate penalties totaling \$1,281,125 for the Peckham Trust, Union Texas Limited Partnership and Chester Slay, Jr., in the event the penalties were to be apportioned severally, rather than jointly.<sup>99</sup> The penalties for the four alleged violations

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<sup>94</sup> ED Ex. 28, p. 4.

<sup>95</sup> ED Ex. 28, p. 6.

<sup>96</sup> ED Ex. 28, p. 8.

<sup>97</sup> ED Ex. 28, p. 10.

<sup>98</sup> ED Ex. 28, p. 12.

<sup>99</sup> Tr. Vol. 2, p. 93 (April 12, 2005).

attributable to the Peckham Trust<sup>100</sup> totaled \$212,750.<sup>101</sup> The penalties for the five violations<sup>102</sup> attributed to Union Texas Limited Partnership totaled \$471,750.<sup>103</sup> From Mr. Slay, the ED sought \$596,625<sup>104</sup> for five alleged violations.<sup>105</sup> The following table compares the VFBT sought by the ED from each Respondent based on joint and several liability versus several liability alone.<sup>106</sup> Note the penalty sought from Mr. Slay severally is identical to the penalty the ED seeks from Respondents based on joint and several liability.

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<sup>100</sup> The first alleged violation is failure to label, inspect and provide secondary containment for the south boiler feed tank, inactive since 1997. The second alleged violation is for failure to remediate soils at the south boiler feed tank. The third alleged violation is failure to classify wastes stored in the south boiler feed tank. The fourth alleged violation is for failing to obtain a permit to store hazardous waste in the south boiler feed tank. ED Ex. 29.

<sup>101</sup> ED Ex. 29, p. 1.

<sup>102</sup> The first alleged violation is failure to label, inspect and provide proper secondary containment for 13 tanks located in three separate areas. The second alleged violation is for failure to remediate soils at 13 tanks. The third alleged violation is failure to classify wastes stored in 13 tanks. The fourth alleged violation is for failing to notify the Commission of four industrial solid waste management units, while the fifth alleged violation regards the failure to obtain a permit to store hazardous waste in 13 onsite tanks. ED Ex. 30.

<sup>103</sup> ED Ex. 30.

<sup>104</sup> Ed Ex. 32.

<sup>105</sup> The first alleged violation is failure to label, inspect and provide proper secondary containment for 14 tanks. The second alleged violation involve failure to remediate soils at 10 different plant areas. The third alleged violation is failure to classify 15 different wastes stored in 15 different onsite containers. The fourth alleged violation is for failing to notify the Commission of four industrial solid waste management units, while the fifth alleged violation regards the failure to obtain a permit to store hazardous waste in 14 onsite tanks. Ed Ex. 32.

<sup>106</sup> The figures are taken from ED Exhibits 28, 29, 30 and 32.

Allegation	Peckham		Slay		Union Texas	
	J&S	Severl	J&S	Severl	J&S	Severl
1	\$370,000	\$83,250	\$370,000	\$370,000	\$370,000	\$249,750
2	\$92,500	\$83,250	\$92,500	\$92,500	\$92,500	\$92,500
3	\$69,375	\$4,625	\$69,375	\$69,375	\$69,375	\$64,750
4	\$18,500	N/A	\$18,500	\$18,500	\$18,500	\$18,500
5	\$46,250	\$41,625	\$46,250	\$46,250	\$46,250	\$46,250
<b>TOTAL</b>	<b>\$596,625</b>	<b>\$212,750</b>	<b>\$596,625</b>	<b>\$596,625</b>	<b>\$596,625</b>	<b>\$471,750</b>

**X. ALJ'S ANALYSIS OF VIOLATIONS**

Union Texas, under the ownership control of Mr. Slay, owned the entire 17-acre site from June 12, 1999, through July 21, 1999.<sup>107</sup> During this 39-day period, there is no question but that Union Texas (1) failed to properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks located on the 17-acre site, (2) failed to remediate or conduct spill closures on the 17-acre site, (3) failed to test and classify materials stored in 15 on-site containers, (4) failed to notify TNRCC of industrial waste stored in four tanks at the site, and (5) failed to obtain a storage permit for hazardous waste generated on-site and stored in 14 tanks. However, with respect to the first allegation, failing to properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks located on the 17-acre site, the ED does not assert a violation occurred until July 23, 1999.<sup>108</sup> The alleged violation by Union Texas occurred two days after it no longer owned the property.<sup>109</sup> For this violation alleged against Union Texas separately, Union Texas is not liable. The ED claimed the balance of the violations occurred on June 24, 1999. For these violations Union

<sup>107</sup> The ED produced no credible evidence that Union Texas owned any portion of the site after July 21, 1999.

<sup>108</sup> ED Ex. 30, p. 3.

<sup>109</sup> On July 21, 1999, Union Texas sold the 17-acre property, in various portions, to the Birch, McGee, Peckham and Smith Trusts. ED Ex. 25; Tr. Vol. 2, pp. 9-10 (April 12, 2005).

Texas is legally liable through July 21, 1999, or 18 days. Union Texas is technically liable; although the ED concedes there was no activity at the site, except for what it has labeled as “the storage of hazardous waste,”<sup>110</sup> and the ED, through its inspector Raymond Marlow, proved that the Agreed Order with Palmer was for the exact facilities the ED now seeks to hold Respondents liable.<sup>111</sup>

As to the Peckham Trust, which acquired its portion of the site on July 21, 1999, it (1) failed to label, inspect and provide secondary containment for the south boiler feed tank, inactive since 1997,<sup>112</sup> (2) failed to remediate soils or conduct a spill closure at the south boiler feed tank, (3) failed to classify wastes stored in the south boiler feed tank and (4) failed to obtain a permit to store hazardous waste in the south boiler feed tank. The ED alleged all violations by the Peckham Trust commenced on July 21, 1999, the day it acquired ownership. While it may be a small matter in the entire scheme, it appears to the ALJ that the ED is double counting to attribute identical violations to both Union Texas and Peckham Trust on the day of the ownership transfer.

With respect to Mr. Slay, the ED proved he was an operator at the site on and after June 12, 1999, when he acquired Union Capital and Nuggetman, and consequently Union Texas. Mr. Slay is, therefore, jointly and severally liable with Union Texas for its violations committed during the period June 12, 1999, through July 21, 1999, subject to the double counting error.

Further, the ED proved Mr. Slay was an operator at the site on and after July 21, 1999, with respect to all portions of the site on which the tanks and other containers are situated. Mr. Slay, as an operator on and after July 21, 1999, is jointly and severally liable with the Peckham Trust for its violations on and after July 21, 1999, subject to the double counting error.

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<sup>110</sup> Tr. Vol. 2, pp. 124-125 (April 12, 2005).

<sup>111</sup> Tr. Vol. 2, pp. 182-185 (April 12, 2005).

<sup>112</sup> ED Ex. 29, p. 3.

As an operator, on or after July 21, 1999, Mr. Slay, since the Smith Trust is not a respondent, is severally liable for (1) failing to label, inspect and provide proper secondary containment for tanks located on the Smith Trust property, (2) failing to remediate soils or conduct spill closures at different plant areas on the Smith Trust property (3) failing to classify wastes stored in on-site containers on the Smith Trust property, (4) failing to notify the Commission of industrial solid waste stored on the Smith Trust property and (5) failing to obtain a permit to store hazardous waste in on-site tanks on the Smith Trust property.<sup>113</sup>

The ED concedes there was no activity at the site except for what it has labeled as “the storage of hazardous waste.”<sup>114</sup> The ED, through its inspector Raymond Marlow, proved that the Palmer Agreed Order was for the exact facilities the ED now seeks to hold Respondents liable.<sup>115</sup> It is also undisputed through Mr. Marlow’s testimony and report, that by August 4, 1999, the USEPA had its contractor, Weston, at the site taking samples.<sup>116</sup>

## XI. ALJ’S ANALYSIS OF PENALTIES

The ED calculated administrative penalties against the Respondents assuming joint and several liability and then recalculated administrative penalties against each of Respondent severally.

The PCWs that accompanied the initial EDPRP in ED Exhibit 1 did not list Mr. Slay as a “poor performer.” However, the later created PCWs in ED Exhibits 28-30 and 32 did enhance the

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<sup>113</sup> The PCWs for Slay as an individual (ED Ex. 32) are unchanged from the PCWs for the Respondents jointly. Therefore, the errors noted for ED Ex. 28 are also applicable to ED. Ex. 32. Further the tank counts and management units are incorrect for calculating Slay’s several liability.

<sup>114</sup> Tr. Vol. 2, pp. 124-125 (April 12, 2005).

<sup>115</sup> Tr. Vol. 2, pp. 182-185 (April 12, 2005).

<sup>116</sup> Tr. Vol. 2, p. 190 (April 12, 2005); ED Ex. 21, p. 4.

penalties sought by labeling Mr. Slay as a “poor performer.”<sup>117</sup> Terry Murphy, the enforcement coordinator, explained that both the site’s classification and the person’s classification are determined at the time the PCW is produced based upon a five-year retrospective review.<sup>118</sup> In the instant case, the initial PCWs were produced on May 13, 2003, while the later PCWs were produced on April 5, 2005. Mr. Murphy could not explain why Respondents’ “Compliance History Person Classification” were enhanced.<sup>119</sup> He did acknowledge, assuming that this was the only property with which Respondents were involved and that this was the first action taken against them, that they should not be classified as “poor performers.”<sup>120</sup> Mr. Murphy’s testimony regarding the impact of the “Compliance History Person Classification” was inconsistent. Initially, Mr. Murphy testified the “Compliance History Person Classification” did not impact the penalty calculation, that only the “Compliance History Site Classification” impacts the penalty calculation.<sup>121</sup> He later testified that the 10% penalty enhancement as a poor performer did impact the penalty calculation and that the penalty would have to be recalculated if the correct “Compliance History Person Classification” was “average” rather than “poor.”<sup>122</sup> On ED Exhibit 28, for example, that would result in a penalty reduction of \$59,662.50.<sup>123</sup>

With respect to the “Compliance History Site Classification,” Mr. Murphy explained that the site history is attributed to the current owner, no “matter who owned it previously.”<sup>124</sup> As he

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<sup>117</sup> Tr. Vol. 2, pp. 128-136 (April 12, 2005).

<sup>118</sup> Tr. Vol. 2, pp. 136-137 (April 12, 2005).

<sup>119</sup> Tr. Vol. 2, pp. 139-140, 147 (April 12, 2005).

<sup>120</sup> Tr. Vol. 2, pp. 140, 147 (April 12, 2005).

<sup>121</sup> Tr. Vol. 2, p. 141 (April 12, 2005).

<sup>122</sup> Tr. Vol. 2, p. 145 (April 12, 2005).

<sup>123</sup> Tr. Vol. 2, p. 146 (April 12, 2005).

<sup>124</sup> Tr. Vol. 2, pp. 89-90, 141 (April 12, 2005).

testified, “[y]ou inherit the site compliance history.”<sup>125</sup> As the basis for his interpretation, Mr. Murphy cites 30 TAC § 60.1.<sup>126</sup> Specifically 30 TAC § 60.1 (a)(7)(c) provides that beginning on September 1, 2002, the compliance history prepared pursuant to the chapter shall be used in agency decisions relating to a proceeding that is initiated or an action that is brought on or after September 1, 2002 for the imposition of a penalty in a matter under the jurisdiction of the Commission.<sup>127</sup> 30 TAC § 60.1(d) addresses changes in ownership.<sup>128</sup> Mr. Murphy’s explanation of the site compliance history is consistent with the agency’s comments when adopting 30 TAC § 60.1(d).<sup>129</sup>

The ED seeks to enhance Respondents’ penalty by 25% based upon the January 26, 2000 Agreed Order<sup>130</sup> with Palmer in Docket No. 1997-0103-MLM-E.<sup>131</sup> The result of that application is curious. The Palmer Agreed Order, entered six months after the last inspection that gave rise to the complaint against Respondents in this case, assessed a penalty that is, if timely paid, \$571,625 less than the penalty sought jointly from Respondents and \$1,256,125 less than the penalties sought severally from the Respondents. While the application of the site history enhancement is technically and mathematically correct, the ALJ believes the result is manifestly unjust given the facts of this case. Assessing a higher penalty against a violator because an unrelated person committed violations

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<sup>125</sup> Tr. Vol. 2, pp. 89-90, 141 (April 12, 2005).

<sup>126</sup> Tr. Vol. 2, pp. 89-90 (April 12, 2005).

<sup>127</sup> The effect of the ED not bringing an action until three years after the April 2000 NOE is unknown because the parties did not discuss the impact of “Compliance History Site Classification” prior to September 1, 2002.

<sup>128</sup> Change in ownership. In addition to the requirements in subsections (b) and (c) of this section, if ownership of the site changed during the five-year compliance period, a distinction of compliance history of the site under each owner during that five-year period shall be made. Specifically, for any part of the compliance period that involves a previous owner, the compliance history will include only the site under review. For the purposes of this rule, a change in operator shall be considered a change in ownership if the operator is a co-permittee.

<sup>129</sup> 27 Tex. Reg. 191, 257-261 (January 4, 2002).

<sup>130</sup> ED. Ex. 31.

<sup>131</sup> Tr. Vol. 2, pp. 166-167 (April 12, 2005).

at the same location is arbitrary. Assessing a higher penalty than that prior violator paid, when the prior violator created the problem, is more unjust still.

With respect to the economic benefit portion of the penalty, Mr. Murphy testified the economic benefits from the various alleged violations are totaled. If the total economic benefit attributed to the respondent is \$15,000 or greater, the total base penalty is enhanced by 50%. If it is less than \$15,000, the total base penalty is not enhanced.<sup>132</sup> Thus, once the benefit derived from avoiding the estimated cost of remediating the site is attributed to Respondents, the \$15,000 threshold is a distant point, light years away. However, if one considers that in November 1997,<sup>133</sup> March 1998<sup>134</sup> and July 1999,<sup>135</sup> the USEPA, together with the Commission, was physically investigating the Palmer Barge Site and that the USEPA conducted an emergency response removal action, the factual underpinning of the violation and the attributed economic benefit are more uncertain than the ED acknowledged. Excluding the \$2,906,205 economic benefit calculated for failing to remediate the site, the remaining \$11,372 alleged economic benefit falls below the \$15,000 threshold. According to Mr. Murphy's testimony, the 50% enhancement for economic benefit would not be applied to the TBP.<sup>136</sup>

Leaving all of the other errors aside,<sup>137</sup> the penalties the ED seeks from Respondents are not supportable on the facts presented. Recalling that for 18 violations, many of which were identical to Respondents' alleged violations, the Commission agreed to, in essence, a \$25,000 administrative

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<sup>132</sup> Tr. Vol. 2, pp. 158-162 (April 12, 2005).

<sup>133</sup> ED Ex. 22.

<sup>134</sup> ED Ex. 22.

<sup>135</sup> ED. Ex. 21.

<sup>136</sup> Assuming all other PCW calculations are correct, this would result in a reduction of \$161,250 on ED Ex. 28, p.2.

<sup>137</sup> Additional problems with the ED's PCW calculations are discussed later in this Proposal for Decision.

penalty.<sup>138</sup> In effect, the ED is seeking a penalty from Respondents that is nearly 24 times greater than the penalty sought from the individual who owned and operated the site from 1982 through 1997. The ED agrees that the tanks and containers in issue here are the same as those operated by Palmer.<sup>139</sup> The ED seeks penalties from Respondents even though he acknowledges that Respondents did not build any structures at the site or conduct any active operations at the site. The ED does not deny that Palmer's barge cleaning operations, and the structures Palmer built to support those operations, deposited the contaminants at the site.<sup>140</sup> The ED admits the materials he classified as waste in the various tanks and containers and that he contends posed a potential threat to the environment, remained stored on-site since 1997, when Palmer ceased his barge cleaning operations.<sup>141</sup> For example, Tank 101, which corresponds to the westernmost "Wastewater Tank," Tank 21 on ED Ex. 21,<sup>142</sup> contains barge waste from 1997.<sup>143</sup>

Turning specifically to the January 2000 Palmer Agreed Order, it includes the following findings relevant to the current proceeding:

- (1) discharges from Waste Storage Tank No. 103 commingled with ponded storm water within earthen secondary containments;<sup>144</sup>
- (2) six areas where oily material was discharged to the soil,<sup>145</sup>
- (3) an area where diesel fuel was discharged to the soil from piping;<sup>146</sup>
- (4) failed to complete hazardous waste determinations for:
  - (a) a 40-cubic-yard roll-off container near the vacuum cleaning tanks;

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<sup>138</sup> ED Ex. 31.

<sup>139</sup> Tr. Vol. 2, pp. 183-185 (April 12, 2005).

<sup>140</sup> ED Ex. 31.

<sup>141</sup> ED Ex. 21, pp. 4 and 15.

<sup>142</sup> ED Ex. 21, pp. 7, 9-10, 253

<sup>143</sup> ED. Ex. 21, p. 4. Mr. Slay stated the waste in the tank came from Dixie Barge.

<sup>144</sup> ED Ex. 31, p.2, Finding 3.a.

<sup>145</sup> ED Ex. 31, p.2, Finding 3.a.

<sup>146</sup> ED Ex. 31, p.2, Finding 3.a.

- (b) waste oils disposed of at an on-site boiler;
- (c) liquid waste within the earthen secondary containment of Tank 101;
- (d) liquid waste contained within Tank 101; and
- (e) waste contained inside the secondary containment of the oil/water separator, hazardous waste tanks and vacuum tanks;<sup>147</sup>
- (5) failed to maintain records of waste analysis, hazardous waste determinations, quantities of hazardous and industrial solid waste generated, stored or processed;<sup>148</sup>
- (6) failed to notify the Commission of on-site waste management units including the 40-cubic-yard roll-off container near the vacuum cleaning tanks and the two industrial boilers burning waste Naphthalene, waste Cyclohexane<sup>149</sup> and waste Adiponitrile<sup>150</sup> for fuel;<sup>151</sup>
- (7) failed to obtain a permit for the storage of hazardous wastes for more than 90 days;<sup>152</sup>
- (8) failed to label 15 hazardous waste storage tanks;<sup>153</sup> and
- (9) failed to label a 40-yard-cubic roll-off box containing hazardous waste.<sup>154</sup>

One can compare the tank and container locations from the USEPA's/Commission's November 1998 Site Screening Inspection Report (SSIR)<sup>155</sup> with the tank and container locations from the Commission's Inspection Report (CIR) dated April 3, 2000.<sup>156</sup> The SSIR documented stained soil sampling events from the week of March 23, 1998, while the CIR documented sampling events just over one year later in July 1999. One can also compare the tank and container locations

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<sup>147</sup> ED Ex. 31, p.2, Finding 3.b.

<sup>148</sup> ED Ex. 31, p.2, Finding 3.c.

<sup>149</sup> Also known as benzene hexahydride.

<sup>150</sup> Also known as tetramethylene cyanide.

<sup>151</sup> ED Ex. 31, p. 3, Finding 3.d.

<sup>152</sup> ED Ex. 31, p. 3, Finding 3.i.

<sup>153</sup> ED Ex. 31, p. 3, Finding 3.i.

<sup>154</sup> ED Ex. 31, p. 3, Finding 3.i.

<sup>155</sup> ED Ex. 22, p. 16.

<sup>156</sup> ED Ex. 21, p. 7.

identified by EPA in Court Exhibit 1 with the SSIR, the CIR and ED Exhibit 27.<sup>157</sup> They are virtually identical.<sup>158</sup> Prior to the 1998 SSIR sampling event, Commission staff made a November 1997 site visit to identify potential source areas.<sup>159</sup> Potential source areas included stained soils adjacent to the boiler house, fuel tanks, roll-off boxes and junk pile.<sup>160</sup> A record review conducted prior to the March 1998 sampling indicated that benzene and ethylbenzene were used at the site.<sup>161</sup>

The 1998 SSIR evidenced overflows of liquids from containment berms around the vacuum tanks,<sup>162</sup> 12-tank battery and roll-off box,<sup>163</sup> and wastewater tanks.<sup>164</sup> The 1998 SSIR also identified, but did not evaluate, the following "possible waste sources": (1) demolition area around the former fabrication shop, (2) the oil/water separator near the vacuum tanks; (3) the oil/water separator near the wastewater tanks and (4) the truck loading facility near the 12-tank battery.<sup>165</sup>

Thus, while Palmer used the tanks and containers and spilled their contents onto the soils, he was not cited or fined for failing to remediate the soils or for failing to initiate a spill response. The ALJ recognizes, of course, that until the USEPA conducted the waste removal action,

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<sup>157</sup> A large base map of the Palmer Barge Site with overlays.

<sup>158</sup> Comparing the diagram in ED Ex. 22, p. 16 with the diagrams in ED Ex. 21, pp. 7 and 253, the wastewater tanks correspond to Tanks 19-21 while the adjacent fuel tank is Tank 18. The Oil/Water Separator located to the east/northeast of the Wastewater Tanks is Tank 31. The roll-off box near the 12-tank battery is Tank 17 and the 12-tank battery is comprised of Tanks 1-12. The vacuum tanks are Tanks 13-15 and the three freshwater tanks adjacent to the Pump House are Tanks 22, 24 and 25. The oil/water separator located to the north/northeast of the Pump House is Tank 23. The four fuel tanks located to the west of the carpenter "wood" shop and to the east of the south Boiler House are Tanks 26-29.

<sup>159</sup> ED Ex. 22, p. 23.

<sup>160</sup> ED Ex. 22, p. 23.

<sup>161</sup> ED Ex. 22, p. 23.

<sup>162</sup> ED Ex. 22, pp. 14-15.

<sup>163</sup> ED Ex. 22, pp. 37-38.

<sup>164</sup> ED Ex. 22, p. 44.

<sup>165</sup> ED Ex. 22, p. 51, Table 6.

Respondents did allow rainwater and storm water to come into contact with the material that remained in and around the containment systems and the stained soils adjacent to the site's tanks and containers.

In summary, Respondents did commit the violations cited by the ED. It is also abundantly clear that the Commission's staff knew, and had known for some considerable period of time, of the conditions at the site. The evidence also leaves no doubt that the wastes, waste sources and physical structures identified by the ED at the Palmer Barge Site were placed there by Palmer and resulted from Palmer's operations, not Respondents' operations. Three years before the ED filed his EDPRP, the USEPA conducted an emergency response at the site and removed the source materials the ED considered a threat.

Some, but not all,<sup>166</sup> of the original respondents received their notice of violations on or about May 17, 2000,<sup>167</sup> the same month USEPA proposed the Palmer Barge Site as a Superfund site. The Palmer Barge Site joined the Superfund list just 60 days later. The ED did not file its June 20, 2003 EDPRP<sup>168</sup> until 1173 days after the April 2000 NOE, and 1058 days after the July 2000 listing of the property as a USEPA Superfund site.

The ED's PCWs prepared on April 5, 2005, calculate violations through an April 12, 2000 screening date, while the economic benefit calculations use a February 12, 2001 end-date. The reason for using a February 12, 2001 end-date was unexplained as was the reason for using a date after the Palmer Barge Site became a Superfund site.<sup>169</sup> Further, the EPA's removal of source materials, leaves the ED's theory of a continuing violation through the screening date unproven.

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<sup>166</sup> Neither the McGee Trust nor the Birch Trust were ever sent the April 3, 2000 NOE. Tr. Vol. 1, pp. 122-123 (August 25, 2004). The April 3, 2000 NOE did not notice Mr. Slay individually. He was identified only in his capacity as the Trustee for the Pecham (sic) Trust. ED Ex. 21, pp. 11, 16-18.

<sup>167</sup> ED Ex. 1, p. 4, paragraph 13; ED Ex. 21, p. 11; Tr. Vol. 1, pp. 122-123 (August 25, 2004).

<sup>168</sup> ED Ex. 1.

<sup>169</sup> Respondents could take no unilateral action on the site after it was placed on the NPL.

Mr. Slay is a sophisticated real estate investor<sup>170</sup> and is not a novice in dealing with the Commission and its predecessors.<sup>171</sup> He represented that he was familiar with the property and the adjacent property.<sup>172</sup> Mr. Slay was indeed familiar with the State Marine Site,<sup>173</sup> an adjacent property.<sup>174</sup> The State Marine Site had a barge cleaning operation with which Mr. Slay was involved.<sup>175</sup> As such, he was likely familiar with the Palmer Barge Site operations. He may have created entities in an attempt to shield himself from liability.<sup>176</sup>

The ED based his proposed penalties on the PCWs. The ALJ cannot recommend the penalties sought by the ED pursuant to any of the PCWs because of the errors, unproven assumptions and unexplained bases in ED Exhibits 28, 29, 30 and 32. Further, as previously discussed, the ED's proposed penalties seem extraordinarily excessive when compared to the penalty meted out to Palmer in 2000.

However, all of the foregoing factors weigh into the regulatory criteria for determining the appropriate administrative penalty, if any, to be assessed against one or more of Respondents.

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<sup>170</sup> ED Ex. 17, p. 3, paragraph 5(c).

<sup>171</sup> ED Exhibits 12-15.

<sup>172</sup> ED Ex. 17, p. 3, paragraph 5(c).

<sup>173</sup> Chester Slay, Jr., the Texas Family Trust and the Kaiser Family Trust were all enjoined from denying TNRCC representatives reasonable access onto the State Marine Site for specified purposes. ED Ex. 15. Further, on October 10, 1984, Chester L. Slay, Jr., State Marine of Port Arthur, Inc., State Welding and Marine Works, Inc., Golden Triangle Shipyard, Inc., and Lauren Refining Company (Defendants) were assessed joint and several civil penalties totaling \$370,600 in an action brought by the State of Texas on behalf of the Texas Air Control Board and the Texas Department of Water Resources for violations of the Texas Clean Air Act and the Texas Solid Waste Disposal Act. Injunctive relief against Defendants also issued. The State Marine Site was used for cleaning "chemical barges." ED Ex. 12. None of these were cited by Mr. Murphy as a basis for enhancement.

<sup>174</sup> Tr. Vol. 1, pp. 94-99 (August 25, 2004).

<sup>175</sup> ED Ex. 12, pp. 6-8.

<sup>176</sup> Note the use of the Texas Family Trust and the Kaiser Family Trust at the State Marine Site and the use of the Peckham, Smith, Birch and McGee Family Trusts at the Palmer Barge Site.

## XII. ALJ'S PENALTY RECOMMENDATIONS

The beginning point for any administrative penalty consideration is TEX. WATER CODE § 7.053. It requires the Commission to consider the following:

- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- (2) the impact of the violation on: (A) air quality in the region; (B) a receiving stream or underground water reservoir; (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or (D) affected persons;
- (3) with respect to the alleged violator: (A) the history and extent of previous violations; (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (D) economic benefit gained through the violation; and (E) the amount necessary to deter future violations; and
- (4) any other matters that justice may require.

The Commission has generated an advisory document setting out a policy regarding the computation and assessment of administrative penalties (Penalty Policy).<sup>177</sup> The ED stated its PCWs were based upon the September 2002 Penalty Policy.<sup>178</sup>

As previously discussed, Mr. Slay, Union Texas and the Peckham Trust technically failed to take actions to fulfill legal obligations while they owned or operated the site. While the ALJ does

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<sup>177</sup> TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, PENALTY POLICY, FIRST REVISION, Effective January 1, 1999 (1999 Penalty Policy). The Penalty Policy was revised again effective September 1, 2002, ED Ex. 20 (2002 Penalty Policy). The 2002 Penalty Policy has not been adopted by formal rulemaking procedure and is an internal, nonbinding guidance document.

<sup>178</sup> Another curious result of waiting three years from the date of the notice of violation to filing the initial EDPRP is that the ED applied the 2002 Penalty Policy as opposed to the 1999 Penalty Policy. Whether this would have made a difference is not known since the parties did not raise the issue.

not attempt to rework the PCWs, the ALJ will address the statutory criteria and many of the factors listed in the PCWs.

Before looking at the specific allegations, as discussed earlier, the ALJ finds no factual basis for enhancement of the penalties based on Respondents' own compliance history related to the person. The ALJ also finds no rational basis for enhancement based on the compliance history of the site.<sup>179</sup> The ALJ recommends any penalty imposed by the Commission not be enhanced for compliance history.

With respect to enhancement on the basis of economic benefit or avoided cost, as previously discussed, the ED failed to prove the economic benefit to Respondents associated with the failure to remediate or conduct a spill closure. The ALJ has no reliable data to confirm or assess the economic benefit to Respondents.<sup>180</sup> Excluding the \$2,906,205 economic benefit calculated for failing to remediate the site and assuming that the economic benefit for all other alleged violations are accurate and proven,<sup>181</sup> the remaining \$11,372 alleged economic benefit falls below the \$15,000 threshold. Because the economic benefit falls below \$15,000, under the Commission's criteria, as explained by Mr. Murphy, no penalty would be enhanced on the basis of economic benefit or avoided cost.

Therefore, the ALJ finds no legal or factual basis in the evidence for enhancing any proposed penalty. The ALJ now turns to the specific allegations against Respondents.

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<sup>179</sup> As previously discussed, Palmer and Respondents are not related legal or financially. Respondents did not purchase the property from Palmer and Respondents conducted no operations at the site. All structures, tanks, containers and piping systems were built and used by Palmer alone. All wastes stored at the site are Palmer's.

<sup>180</sup> The ALJ recognizes Respondents probably obtained some economic benefit but has no credible evidence in the record to quantify that benefit.

<sup>181</sup> As discussed in preceding sections, the remaining economic benefit costs are not accurate, are not proven and are overstated.

Allegation 1: failing to properly label, inspect, assess, certify or provide secondary containment for waste tanks. Respondents' failure posed, as best, a minor potential harm. A potential harm was posed because rainwater could mix with the benzene and overflow the containment. However, the 1998 SSIR documented overflows previous to March 23, 1998, and the Palmer Agreed Order did not address these overflows. The photographs from March 1998, which document conditions prior to Mr. Slay's June 12, 1999 acquisition of Union Texas, reveal a hose leading from Tank 6 to the ground,<sup>182</sup> a hose hanging from the catwalk between Tanks 2 and 4,<sup>183</sup> a roll-off box with leaking seams adjacent to the docks and moorings,<sup>184</sup> stained tanks,<sup>185</sup> discharges from bermed areas,<sup>186</sup> discharges from tanks and containers,<sup>187</sup> tanks with holes,<sup>188</sup> and even a tanker truck pumping from the 12-tank battery.<sup>189</sup>

The 1998 SSIR concluded that there is no off-site overland migration route associated with the Palmer Barge Site.<sup>190</sup> It also concluded surface water from the site drains directly into Sabine Lake along the bulkhead and moorings.<sup>191</sup> The 1998 SSIR determined that the following migration pathways were not significant at the Palmer Barge Site: (1) ground water to surface water, (2) soil exposure and (3) air migration.<sup>192</sup> The 1998 SSIR found a release for only four hazardous

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<sup>182</sup> ED Ex. 22, p. 85 (Photograph 11), p. 86 (Photograph 12).

<sup>183</sup> ED Ex. 22, p. 86 (Photograph 13).

<sup>184</sup> ED Ex. 22, p. 87 (Photograph 14).

<sup>185</sup> ED Ex. 22, p. 86 (Photograph 12).

<sup>186</sup> ED Ex. 22, p. 81 (Photographs 2 and 3), p. 87 (Photograph 15), p. 88 (Photograph 16).

<sup>187</sup> ED Ex. 22, p. 83 (Photograph 6), p. 86 (Photograph 13), p. 88 (Photograph 17).

<sup>188</sup> ED Ex. 22, p. 84 (Photograph 9), p. 85 (Photographs 10 and 11).

<sup>189</sup> ED Ex. 22, p. 84 (Photograph 8), p. 89 (Photograph 18).

<sup>190</sup> ED Ex. 22, p. 58.

<sup>191</sup> ED Ex. 22, p. 58.

<sup>192</sup> ED Ex. 22, pp. 76-78.

substances: (1) barium, (2) copper, (3) manganese, and (4) mercury.<sup>193</sup> According to the 1998 SSIR, neither benzene, nor its sister or daughter products, were found to be released from the Palmer Barge Site despite their presence in the tanks, containers, containment areas and soils.<sup>194</sup>

When compared to the contamination already present on the site, the credible evidence in the record does not support a finding that the potential overflow of benzene contaminated rainwater posed a serious threat. The contaminated overflow posed, at worst, nothing more than a minor potential harm. The expiration of three years between the April 2000 NOE and the June 2003 initial EDPRP suggests that there was no major potential threat. If there was, the ED certainly would have taken action sooner.

The ED inflated his proposed penalty by dividing the tanks into four separate areas and then multiplying each area by 10 months of monthly violations. It is just as rationale, perhaps more so, to treat the site as a single unit and to find Respondents' failure was a single or annual violation event. The ALJ evaluates the violation only on a Facility-wide basis and not on a per tank or management unit basis.

The violation is alleged to have occurred beginning June 24, 1999. Union Texas owned the property for 39 days and would have been in violation for 27 days.<sup>195</sup> Peckham Trust acquired the property on July 21, 1999. USEPA removed the waste from the tanks in November 1999.<sup>196</sup> Thus,

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<sup>193</sup> ED Ex. 22, p. 72.

<sup>194</sup> ED Ex. 22.

<sup>195</sup> Twenty-seven days includes the date the property was sold, July 21, 1999.

<sup>196</sup> For purposes of calculating dates, the ALJ assumes the wastes were removed on the last day of November, Tuesday November 30, 1999.

132 days passed between Peckham Trust buying the property and USEPA's removal of the waste. The ED did not address whether Peckham Trust's failure to take action after the USEPA waste removal constituted a violation. Without evidence that it was a continuing violation, the ALJ must assume the violation ceased when the waste was removed. Mr. Slay's liability as an operator would also end on November 30, 1999. So, even if one attributed all the days of violation to him, the total would be 159 days.

It makes little sense to attribute this penalty to each Respondent separately. The ALJ proposes treating the violation as a single event and penalizing Respondents once collectively.

Allegation 2: failing to conduct spill closure or remediation activities at spill sites at the Facility. While technically correct, this allegation seems somewhat nonsensical. The Palmer Agreed Order did not allege that Palmer, who created and stored the wastes and who caused the spills which created the need to remediate, failed to remediate or respond to spills. The Palmer Agreed Order did not require that Palmer remediate or respond to spills. The ED characterized Respondents' failure to act as a moderate actual harm. Again, the producing cause giving rise to the allegation was a pre-existing condition created solely by Palmer's operations. Respondents are subsequent owners who engaged in no actual operations at the site. The ED's three-year delay, and the failure to even allege such a violation in the 2000 Palmer Agreed Order, leads the ALJ to conclude that the potential for harm created by Respondents was minimal at best.

The ED also increased the penalty value of this allegation by using a monthly continuing violation, resulting in a ten-times multiplier. The ALJ also evaluates the violation only on a Facility-wide basis and not on a per tank or management unit basis.

The ED offered no reliable data to confirm the economic benefit to Respondents.<sup>197</sup> The ED failed to prove that using an average of USEPA's Superfund costs is accurate or appropriate for the Palmer Barge Site. Given that the Palmer Barge Site has historically been used for industrial purposes and is located in an industrial area, it would not appear appropriate to use an average that included sites in residential or mixed use areas where cleanup standards require lower constituent thresholds following remediation and more stringent safety and release procedures during remediation. Additionally, disposal costs can vary considerably depending on the nature of the waste, the relevant cleanup levels, transportation requirements, the type of technology needed for remediation and disposal, and the complexity of the site's geology and hydrology. Mr. Murphy's testimony regarding the supposed economic benefit was less than illuminating, did not address any of these issues, and he offered no documentary support for his conclusion.<sup>198</sup>

USEPA and the Commission began reviewing the Palmer Barge Site as a potential Superfund site as early as 1997. The Palmer Barge Site was proposed for the NPL in May 2000 and placed on the NPL in July 2000. In April 2000, to propose penalizing Respondents for failing to remediate the site of the actions of Palmer, when the Commission knew the site would likely become a Superfund site seems awkward. After the site was officially proclaimed a federal Superfund site in July 2000, the ED's decision to pursue a sizeable penalty from Respondents for this alleged violation seems unnecessary. By June 2003, when the ED filed his EDPRP, the source material had long been removed by USEPA and the USEPA's September 2002 consent order with four PRPs was in place.

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<sup>197</sup> The ALJ believes there may well be an economic benefit to Respondents. Given that this site is a Superfund site, the economic benefit to Respondents might be calculated in various ways: (1) the value of the property prior to and after remediation; or (2) Respondents' pro rata share of realistic remediation costs. The ED elected to attribute 100% of the assumed remediation costs to Respondents for purposes of calculating an economic benefit.

<sup>198</sup> With no useful data available at the Commission, Mr. Murphy went to EPA's website and looked at the information about Superfund sites to ascertain typical costs. Tr. Vol. 2, p. 157 (April 12, 2005).

The ED alleges the violation occurred on June 24, 1999, and was a continuing violation. Like Allegation 1, Union Texas owned the property for 39 days and would have been in violation for 27 days. Peckham Trust would have been in violation 132 days before USEPA removed the waste. Mr. Slay, as an operator, would have 159 total days of violation.

Based on the facts taken from the record as a whole, the ALJ does not recommend a penalty be assessed against any of Respondents for failing to conduct spill closure or remediation activities. The site was in the very late stage of being designated a federal Superfund site and to have conducted remedial activities, given the very minimal potential for harm, would not have been the most prudent action. In the ALJ's opinion, Respondents' inaction, given the facts specific to this case, does not warrant a penalty.

Allegation 3: failing to perform hazardous waste determinations and waste classifications on wastes generated and stored in containers at the Facility. The 2000 Palmer Agreed Order found Palmer also failed to complete a similar hazardous waste determination. For this particular violation the ED alleged a major programmatic violation and assigned a 15-multiplier based upon one annual violation for each of the 15 separate containers. This yielded a VBP of \$37,500. The \$1,772 economic benefit the ED assigned to Respondents does not seem unreasonable.

Palmer had the option of paying \$25,000 for some 18 violations. Given the comparative responsibility and the potential for harm arising from the actions of Palmer, who actually discharged material into Sabine Lake, when compared to the inaction of Respondents and the minimal potential for harm, the proposed penalty of \$37,500 for this alleged violation seems excessive.

The violation is alleged to have occurred beginning June 24, 1999. Union Texas owned the property for 39 days and would have been in violation for 27 days. Peckham Trust would be in violation for 132 days before USEPA removed the waste. Although the ED did not address whether failure to take action after the USEPA waste removal constituted a violation, the ED proposed a

penalty based on 15 single violation events.<sup>199</sup> The ALJ evaluates the violation only on a Facility-wide basis and not on a per tank basis. There is no issue of a continuing violation. Mr. Slay's liability as an operator would be concurrent with that of Peckham Trust and Union Texas. Given the fact that the ED proposed the violation as single events, if one were to penalize Respondents, it makes more sense to penalize once collectively, rather than penalize each Respondent separately.

However, the ALJ, under the facts and circumstances peculiar to this case, does not believe a penalty is warranted for Respondents' failure to characterize the waste left in the tanks by Mr. Palmer since 1997 and studied by the Commission and USEPA since, at least, November 1997.

Allegation 4: failing to notify TCEQ concerning the storage of industrial waste in four (4) waste management units at the Facility. Palmer, too, had such a violation. The storage units were constructed by Palmer, and the material stored in the units was generated and put in-place by Palmer. The Commission was aware of these waste management units because its inspections and investigations pre-date Respondents' ownership and control. The ED alleged a major programmatic violation, and with a multiplier of 4, based upon four single events, computed a VBP of \$10,000. The ED assigned an avoided cost of \$163.00. The avoided cost the ED assigned to Respondents does not seem unreasonable.

In the ALJ's estimation, if one decided it was worth pursuing a penalty at a federal Superfund site that is already being remedied by entities other than Respondent, then this alleged violation makes the most sense for the ED to pursue.

The ED calculated his proposed penalty based upon a single event. The ALJ does not question that approach but does question whether the ED unnecessarily inflated the proposed penalty

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<sup>199</sup> Given the facts of this case, the ALJ does not necessarily agree with increasing the proposed penalty by counting each tank as a separate violation.

by treating the failure as four violations rather than one violation.<sup>200</sup> The ALJ believes that the violation should be considered only on a Facility-wide basis. There is no issue of a continuing violation. Mr. Slay's liability as an operator would be concurrent with that of Peckham Trust and Union Texas. Given the fact that the ED proposed the violation as a single event, it makes more sense to penalize Respondents once collectively, rather than penalize each Respondent separately.

Allegation 5: failing to obtain a permit to store hazardous waste generated on-site and stored in waste tanks at the Facility. Palmer likewise failed to obtain such a permit and that failure was a component of his \$25,000 penalty. The ED found Respondents' failure a major programmatic violation and, using a 10-multiplier calculated using monthly violations, computed a VBP of \$25,000. The ED assigned an \$821.00 economic benefit. While the economic benefit does not seem unreasonable, the VPB appears inflated by using a monthly multiplier as opposed to an annual or single event multiplier. Mr. Slay's liability as an operator would be concurrent with that of Peckham Trust and Union Texas. The violation should be considered on a Facility-wide basis rather than on a per tank basis. Any penalty should be imposed on Respondents once collectively, rather than on each Respondent separately.

The ALJ does not recommend a penalty against Respondents given the removal of the wastes by USEPA, the site's investigatory history, the site's inclusion on the NPL and the fact that the site will be remediated to industrial standards.

Based upon the evidence available to the ALJ, the ALJ recommends the Commission assess the following administrative penalties.

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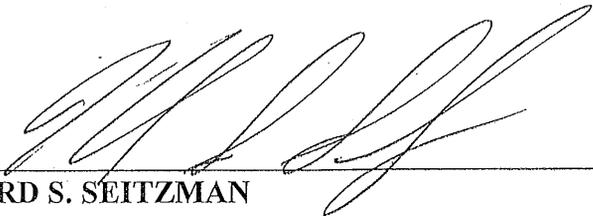
<sup>200</sup> Categorizing the northwest slop oil tank, the northeast slop oil tank, a container at the dock and a fresh water tank as four separate management units.

VIOLATION	EVENTS	PENALTY
(1) violated 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J by failing to properly label, inspect, assess, certify or provide secondary containment for waste tanks;	1	\$500.00
(2) violated TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b) by failing to conduct spill closure or remediation activities at the Facility;	1	\$0.00
(3) violated 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11 by failing to perform hazardous waste determinations and waste classifications on different wastes generated and stored at the Facility;	1	\$0.00
(4) violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to notify TCEQ concerning the storage of industrial waste at the Facility; and	1	\$1,000.00
(5) violated 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1 by failing to obtain a permit to store hazardous waste generated on-site and stored at the Facility.	1	\$0.00
Total Penalties		\$1,500.00

**XIII. CONCLUSION**

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Order, assessing an administrative penalty of \$1,500.00 against Respondents jointly and severally for the violations.

**SIGNED April 19, 2006.**

  
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**HOWARD S. SEITZMAN**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**An Order Assessing Administrative Penalties Against  
Chester L. Slay, Jr., individually; Union Texas Limited  
Partnership; and Chester L. Slay, Jr., Trustee of Peckham  
Family Trust  
TCEQ DOCKET NO. 2000-0396-IHW-E  
SOAH DOCKET NO. 582-04-0251**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Preliminary Report and Petition (EDFARP or First Amended Petition) recommending that the Commission enter an order assessing administrative penalties against Chester L. Slay, Jr., individually; Union Texas Limited Partnership; and Chester L. Slay, Jr., Trustee of Peckham Family Trust (collectively Respondents). A Proposal for Decision (PFD) was presented by Howard S. Seitzman, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the First Amended Petition on August 25, 2004, and April 12, 2005, in Austin, Texas.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. The Palmer Barge Site is a former barge cleaning and waste storage facility located at 8600 Industrial Inlet, Port Arthur, Jefferson County, Texas (Facility or Palmer Barge Site).

2. The Palmer Barge Site is located in an industrial area and has been used for industrial purposes.
3. John Palmer (Palmer) acquired 17 acres from the City of Port Arthur in 1982 and began a barge cleaning business on the site.
4. Palmer's operations included using steam or water to remove heels, unpumpable remnants, from barges.
5. The barge and marine vessel service operations ceased in 1997.
6. When Palmer acquired the property, he executed a deed of trust to secure the bank loan to purchase the property.
7. On September 2, 1997, David Elder, as Substitute Trustee on behalf of the debt holder, sold the property to Union Texas Limited Partnership (Union Texas) at a non-judicial foreclosure sale.
8. On June 12, 1999, Chester Slay purchased Union Capital Recovery Corporation (Union Capital), a District of Columbia corporation.
9. Union Capital, as a limited partner, owned a 99% interest in Union Texas, a District of Columbia limited partnership.
10. Union Capital also owned 100% of the stock of Nuggetman Corporation (Nuggetman), a District of Columbia corporation.
11. Nuggetman, as a general partner, owned a 1% interest in Union Texas.
12. With his June 12, 1999 purchase of Union Capital, Chester Slay purchased 100% of the stock of Nuggetman and complete ownership of Union Texas.
13. As of June 12, 1999, Mr. Slay, through Union Capital and Union Texas, owned and

controlled the 17-acre Palmer Barge Site.

14. On July 21, 1999, Union Texas separately sold the 17-acres, in various portions, to Chester L. Slay Jr., as Trustee of the Birch Family Trust, the McGee Family Trust, the Peckham Family Trust and the Smith Family Trust.
15. One tank, a south boiler feed tank, is located on the Peckham Family Trust's portion of the Palmer Barge Site.
16. No tanks or containers sit on the Birch and McGee Family Trusts' portions of the 17-acres.
17. The owner of the property on which the balance of the tanks and containers sit, the Smith Family Trust, is not, and never was, a respondent in this case.
18. After June 12, 1999, Chester L. Slay, Jr., controlled access to, and controlled activities at, the Palmer Barge Site.
19. Mr. Slay directed workers' activities at the Facility and controlled who accessed the Facility.
20. Mr. Slay was negotiating to lease the Palmer Barge Site to another entity for reconstruction of offshore oil platforms and was planning remedial activities and operations at the Facility in order to obtain the lease.
21. Mr. Slay was the person responsible for the overall operation of the Facility.
22. The Commission's predecessor agency, the Texas Natural Resource Conservation Commission (TNRCC), on January 26, 2000, entered into an Agreed Order with Palmer (Palmer Agreed Order) regarding the Palmer Barge Site.
23. The Palmer Agreed Order arose from an inspection by the General Land Office and the United States Coast Guard on September 24, 1996, and inspections by the TNRCC Beaumont Regional Office in November and December 1996.

24. The Palmer Agreed Order recited 18 types of violations including allowing the discharge of contaminated storm water, failing to complete hazardous waste determinations for wastes in various tanks and containers, failing to label hazardous waste storage tanks and containers, failing to notify the Commission of on-site waste management units, and failing to obtain a permit for the storage of hazardous wastes for more than 90 days.
25. The Commission and the United States Environmental Protection Agency (USEPA) began studying the Palmer Barge Site for inclusion on the National Priorities List in November 1997.
26. The USEPA and the Commission conducted a soil sampling investigation in March 1998.
27. The soil sampling results were contained in the Site Screening Investigation Report (SSIR) dated November 1998.
28. On June 24, 25, and 27, 1999, Raymond Marlow, a Commission inspector, conducted a multimedia compliance inspection at the Palmer Barge Site.
29. On July 21, 1999, Mr. Marlow again visited the Palmer Barge Site, and on July 23, 1999, Boots and Coots Specialty Services conducted a sampling operation for the Commission.
30. The July sampling detected benzene, in excess of 0.5 parts per million (500 parts per billion), in the wastes stored in 14 on-site tanks and one on-site roll-off container.
31. Additional site visits were made on August 4, 1999, October 20, 1999, and October 28, 1999.
32. Mr. Marlow's October 20, 1999 site visit was in conjunction with USEPA's site visit.
33. A Notice of Enforcement (NOE) letter was issued by the Commission on April 3, 2000, to the Peckham Family Trust and to Union Texas.

34. On May 11, 2000, USEPA proposed including the Palmer Barge Site on the National Priorities List (NPL).
35. On July 27, 2000, the Palmer Barge Site was placed on the NPL and designated a federal Superfund site.
36. On September 30, 2002, the USEPA issued an administrative order on consent (USEPA Consent Order) against four responsible parties who had arranged for disposal or treatment of hazardous substances at the Facility or who selected the Facility as a disposal site and transported hazardous substances to the Facility.
37. The responsible parties who executed the USEPA Consent Order agreed to assess and remediate the Facility.
38. Respondents are not parties to the USEPA Consent Order nor is there any evidence in the record that they were denominated potentially responsible parties by USEPA.
39. On June 20, 2003, the Executive Director issued his Preliminary Report and Petition (EDPRP) alleging violations by Mr. Slay, individually; Mr. Slay as Trustee for the Birch Family Trust, the McGee Family Trust and the Peckham Family Trust; and by Union Texas (collectively Initial Respondents).
40. The EDPRP alleged the Initial Respondents:
  - a. violated 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J by failing to properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks;
  - b. violated TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b) by failing to conduct spill closure or remediation activities at 10 spill sites at the Facility;
  - c. violated 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11 by failing to perform hazardous waste determinations and waste classifications on 15 different wastes generated and stored in 15 different containers at the Facility;

- d. violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to notify TCEQ concerning the storage of industrial waste in four (4) waste management units at the Facility; and
- e. violated 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1 by failing to obtain a permit to store hazardous waste generated on-site and stored in 14 waste tanks at the Facility.

- 41. The Executive Director, in his EDPRP, requested an administrative penalty of \$605,875, payable jointly and severally from Initial Respondents.
- 42. On May 23, 2003, Mr. Slay requested a contested case hearing on his behalf and on behalf of the Birch Family Trust, the McGee Family Trust and the Peckham Family Trust.
- 43. On September 12, 2003, the Commission's Chief Clerk, at the ED's request, referred this dispute to SOAH for hearing.
- 44. A Notice of Hearing was mailed to Initial Respondents and the Commission's Public Interest Counsel on September 25, 2003.
- 45. A preliminary hearing convened on December 4, 2003, and a hearing on the merits was scheduled for August 2004.
- 46. Mr. Slay and the Birch, McGee and Peckham Family Trusts were represented by counsel while Union Texas, who was attempting to retain counsel, filed an appearance on December 19, 2003.
- 47. Following withdrawal of counsel, a continuance, and resolution of several preliminary issues, the hearing on the merits convened on August 25, 2004 in a SOAH fourth floor hearing room in the William P. Clements Building, 300 West 15<sup>th</sup> Street in Austin, Texas. Mr. Slay appeared *pro se* and on behalf of all Respondents. Barbara L. Klein and Sara Jane Utleby represented the Executive Director.

48. Following the testimony of several witnesses for the Executive Director, the parties stipulated certain testimony into the record regarding the March 1998 SSIR soil samples and then recessed the hearing.
49. At the request of the parties, the hearing on the merits reconvened on April 12, 2005.
50. At the April 12, 2005 hearing on the merits, the Executive Director introduced his EDFARP and dismissed the Birch and McGee Family Trusts.
51. The EDFARP was formally filed on April 15, 2005.
52. The EDFARP alleged the same violations by Respondents, sought \$596,625 jointly and severally from Respondents in administrative penalties, and requested no corrective action.
53. In the event Respondents were not jointly and severally liable, the Executive Director alternatively sought \$1,281,125 in penalties severally from Respondents: (1) Mr. Slay individually-\$596,625; (2) Peckham Family Trust-\$212,750; and (3) Union Trust-\$471,750.
54. The hearing concluded on April 12, 2005, but the record remained open through August 15, 2005, for the filing of briefs and exhibits, including Court Exhibit 1.
55. On July 29, 2005, Mary Claire Lyons substituted as counsel of record for Barbara L. Klein.
56. Respondents did not properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks at the Facility.
57. Respondents did not conduct any spill closure or remediation activities at the 10 spill sites at the Facility.
58. Respondents did not perform any hazardous waste determinations or waste classifications for the 15 different wastes generated and stored in 15 different containers at the Facility.
59. Respondents did not notify TCEQ concerning the storage of industrial waste at the Facility

- in the northwest slop oil tank, the northeast slop oil tank, a container at the dock and a fresh water tank.
60. The four containers constitute one waste management unit at the Facility.
  61. Respondents did not obtain a permit to store, in 14 waste tanks at the Facility, hazardous waste generated on-site.
  62. None of Respondents engaged in any active operations at the Facility.
  63. All of the tanks and containers in issue were constructed by Palmer beginning in 1982 and operated by Palmer until he ceased operations in 1997.
  64. Respondents did not build or actively operate any tanks, containers or other structures at the Facility.
  65. All of the waste stored in the various tanks and containers were generated and stored by Palmer prior to his cessation of operations in 1997.
  66. Respondents did not store any wastes other than those previously placed into the tanks and containers by Palmer.
  67. The wastes that are the subject of this enforcement action against Respondents were stored between 1997 and June 12, 1999, by entities who are not respondents.
  68. The stained soils identified by the Executive Director were present at the Facility in November 1997.
  69. The wastes in the tanks and containers identified by the Executive Director were present at the Facility in November 1997.
  70. For 18 violations, including the types of violations alleged against Respondents, Palmer's Agreed Order assessed an administrative penalty, in essence, of \$25,000.

71. On or after November 1999, the USEPA removed the wastes from the tanks and containers at the Facility.
72. All of the penalty calculation worksheets (PCWs) prepared by the Executive Director to support its proposed administrative penalties contain errors, unproven assumptions and unproven bases.

## II. CONCLUSIONS OF LAW

1. For each violation of the Water Code, and the rules adopted thereunder, the Commission may assess an administrative penalty of up to \$10,000 per day. TEX. WATER CODE ANN. § 7.051.
2. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondents were notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
3. As required by TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondents were notified of the hearing on the alleged violations and the proposed penalties.
4. Respondents were notified of the EDFARP and had an opportunity during the hearing on the merits to contest the alleged violations or the penalties or corrective actions proposed therein.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

6. Union Texas owned the Facility from September 2, 1997, through July 21, 1999.
7. Mr. Slay owned Union Texas on and after June 12, 1999.
8. The Peckham Family Trust was an owner of a portion of the Facility on and after July 21, 1999.
9. Pursuant to 30 TEX. ADMIN. CODE § 335.1(100), the person responsible for the overall operation of a facility is an operator of the facility.
10. Chester L. Slay, Jr., was an operator of the Facility on and after June 12, 1999.
11. Each violation is considered only on a Facility-wide basis.
12. Respondents violated 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J by failing to properly label, inspect, assess, certify or provide secondary containment for 14 waste tanks.
13. The collective violation by Respondents constitutes one violation event.
14. Respondents violated TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b) by failing to conduct spill closure or remediation activities at 10 spill sites at the Facility.
15. The collective violation by Respondents constitutes one violation event.
16. Respondents violated 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11 by failing to perform hazardous waste determinations and waste classifications on 15 different wastes generated and stored in 15 different containers at the Facility.
17. The collective violation by Respondents constitutes one violation event.
18. Respondents violated 30 TEX. ADMIN. CODE § 335.6(c) by failing to notify TCEQ concerning the storage of industrial waste at the Facility in the northwest slop oil tank, the northeast slop oil tank, a container at the dock and a fresh water tank.

19. The collective violation by Respondents constitutes one violation event.
20. Respondents violated 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1 by failing to obtain a permit to store, in 14 waste tanks at the Facility, hazardous waste generated on-site.
21. The collective violation by Respondents constitutes one violation event.
22. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider the following:
  - i. the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
  - ii. the impact of the violation on: (A) air quality in the region; (B) a receiving stream or underground water reservoir; (C) instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or (D) affected persons;
  - iii. with respect to the alleged violator: (A) the history and extent of previous violations; (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided; (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (D) economic benefit gained through the violation; and (E) the amount necessary to deter future violations; and
  - iv. any other matters that justice may require.
23. The PCWs prepared by the Executive Director do not support the administrative penalties proposed by the Executive Director.
24. Based on the facts and circumstances peculiar to this case, Respondents should not be assessed a penalty for their violation of TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b).

25. Based on the facts and circumstances peculiar to this case, Respondents should not be assessed a penalty for their violation of 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11.
26. Based on the facts and circumstances peculiar to this case, Respondents should not be assessed a penalty for their violation of 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1.
27. Respondents should be assessed, jointly and severally, a \$500 penalty for violation of 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J.
28. Respondents should be assessed, jointly and severally, a \$1,000 penalty for violation of 30 TEX. ADMIN. CODE § 335.6(c).
29. Respondents should be assessed, jointly and severally, a total penalty of \$1,500 for their violations.

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Chester L. Slay, Jr., individually; the Peckham Family Trust, Chester L. Slay, Jr., Trustee; and Union Texas Limited Partnership are assessed, jointly and severally, a \$1,500 administrative penalty for violations of 30 TEX. ADMIN. CODE § 335.112(a)(9) and 40 CFR Part 265, subpart J; and 30 TEX. ADMIN. CODE § 335.6(c).
2. Based on the facts and circumstances peculiar to this case, Respondents are not assessed penalties for their violations of TEX. WATER CODE § 26.121(a) and 30 TEX. ADMIN. CODE § 335.8(b); 30 TEX. ADMIN. CODE § 335.62 and 40 CFR § 262.11; and 30 TEX. ADMIN. CODE §§ 335.2 and 40 CFR § 270.1.

3. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ". Administrative penalty payments shall be sent with the notation Chester L. Slay, Jr., individually; the Peckham Family Trust, Chester L. Slay, Jr., Trustee; and Union Texas Limited Partnership , TCEQ Docket No. 2002-0396-IHW-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

4. The imposition of the administrative penalties listed herein completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondents if the Executive Director determines that Respondents have not complied with one or more of the terms or conditions in this Commission Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied for want of merit.
7. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by TEX. WATER CODE ANN § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondents by certified mail.

9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Kathleen White Hartnett, Chairman  
For the Commission**