

CHESTER SLAY
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July 7, 2007

State Office of Administrative Hearings
Honorable Howard Seitzman
Administrative Law Judge

William P. Clements Building
300 West Fifteenth Street
Austin, Texas 78711

Re: **SOAH Docket Number: 582-04-0251; TCEQ Docket Number: 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 NUMBER 34799**

Dear Judge Seitzman:

Defendants Chester Slay, Individually, and Chester Slay as Trustee of Peckham Family Trust object to the ALJ's allocation of proposed penalties as set forth in the May 30, 2007 Supplemental Proposal for Revision for the following reasons:

- 1) TWIC has no basis for assessing any penalties against any party. Finding of Fact #72, of the Proposed Order Assessing Administrative Penalties states, "All of the penalty calculation worksheets (PCW's) prepared by the Executive Director to support its proposed administrative penalties contain errors, unproven assumptions and unproven bases." Without any proven basis, any and all data used by the Commission is mere speculation, arbitrary and capricious. Texas Government Code, Title 10, Chapter 2003, Subchapter C, Section 2003.047(m) provides that if the Commission wishes to amend the ALJ proposal, it must provide an explanation of the basis for the amendment and be based solely on the record made before the ALJ. The Commission, at the April 25th hearing significantly modified the ALJ proposal by increasing the proposed penalty from \$1500 to \$178,000. The commission determined to use a "Four Waste Management Area" theory for assessing penalties rather than the 31 tank basis initially requested by the ED. Whatever theory the Commission may choose to use is insignificant if the base data is insufficient and/or faulty, which is exactly the finding of fact determined by the ALJ in #72 of the PFD. Whatever theory the Commission

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decides to use for penalty calculation, it can only use "unproven assumptions and unproven bases" to support its proposal which makes calculations without merit and arbitrary.

- 2) Objection number 1 above, notwithstanding, the Commission has directed the ALJ to use a "Four Waste Management Area" calculation in determining the allocation of proposed penalties. These instructions were made despite the ALJ's finding that only one "Waste Management Area" existed in #60 Findings of Fact. Again using S2003.047(m), the Commission is acting contrary to statute by providing no explanation for its proposed amendment and citing no evidence in the record to substantiate its reasoning. Finding of Fact #60 must stand, and the directions of the Commission to the ALJ are erroneous.
- 3) Objections Numbers 1 and 2, notwithstanding, the ALJ's Conclusion of Law #10, while not totally incorrect, is insufficient in detail and at times contradictory to the Finding of Facts, to allow the conclusion to be used against Chester Slay individually and universally in this case. The ALJ rightly concludes on page 10 (VIII Operator) that Chester Slay, by his actions, was an Operator but "when" Chester Slay was an operator is critical to the determination of whether he should be found liable for penalties. There is insufficient detail to make an exact determination of when the status of "operator" should be applied, but the Findings of Fact will provide "beyond reasonable doubt" that Chester Slay individually was not an operator during the time that penalties could be assessed, if indeed, penalties can be assessed.

The ALJ bases his conclusion of operator status on two points: (a) Slay directed activities at the site and (b) Slay controlled access to the site. Finding of Fact # 62 relates, "None of the respondents engaged in any active operations at the Facility." While the ALJ relates on pages 10 and 11 ED's contentions of activity by Slay, ALJ determines in Findings of Fact #62 that none of the respondents engaged any active operations. The ALJ further states in Finding of Facts #63 through #69 that all construction, storage, and operations at the Palmer Facility took place prior to respondents' involvement with the facility. Further, the ALJ finds that the TCEQ was aware of all the violations and had, indeed, already collected a fine from the perpetrator. Did Slay cause actions to occur? The answer is yes, but those actions occurred only after the time period in which the ED now seeks penalties. To further confirm the point, as a matter of law, no activity could take place without EPA consent after EPA came on site. The removal of pipelines and underground utilities had to have occurred after EPA took over the site or Slay would have had additional legal steps taken against him by

the EPA. Therefore, any actions that may have been taken by Slay had to have occurred after the time period of the penalty assessment.

If pipelines were removed by Slay in 2003, 2004, or 2005, are we compelled to classify him as an operator in 1999, 2000, 2001, or 2002? The answer is no. Neither the Findings of Fact nor the Proposal for Decision brief definitively determine when active operations, under Slay's direction, actually began. Apparently the conclusion of the TCEQ, at the time, was also "no operator status", because, as noted on page 8, Section

V, a Notice of Enforcement letter was issued to Union Texas and Peckham Trust only. There is no evidence in the record that Slay individually ever received an NOE. If we can conclude, and there are no other Findings of Fact to conclude otherwise, that Slay is not classified as an operator because of active operations during the alleged penalty period, then we are left only with the assertion that Slay was an operator based on the fact that he controlled access to the site. (103) defines operator as, "the person responsible for the overall operation of a facility." The courts have used a number of criteria to attach liability to a person as an operator. Controlling access to an operation has been one such criterion. The key to such a finding is, "when there is an operation." Finding of Fact #62 clearly determines that none of the respondents were engaged in active operations. Controlling access of an ongoing operation, may or may not be an element of defining an operator, but simple possession of a key to a gate does not make one an operator. If the access theory were correct, then every person in the state with a pipeline going through their property would become an operator by virtue of the fact that they lock the gate to keep the cows in or the burglars out. This, quite obviously, is not where public policy is headed.

Slay, as a trustee, has a legal fiduciary responsibility to protect the assets of the beneficiaries. Does Slay's fiduciary responsibility, which means to the best his ability keeping persons off the property, mean that he automatically becomes an operator? Apparently the TCEQ believes that it does not. Finding of Fact #68 and #69 show the presence of violations during the time period of 1997, after Palmer had ceased operations and at which time David Elder was trustee of Wrangler Capital, found on page 5, section IV Site History of the PFD, TCEQ did not file the same violations against Elder as they have Slay. We must conclude that TCEQ does not hold Slay to be an operator on the basis of his having control or authority over a trust asset because it did not apply the exact same violations against Elder. To have not concluded the foregoing, would be a violation of the Constitutional "equal protection guarantees."

A further consideration of the element of control is that, if Slay had sufficient control of the site to be classified as an operator, he would have either had knowledge that Marlow was going to enter the site June 24 through June 27, or Marlow's access would have been denied. Page 7, section V, summary of ED's position, POD, describes for the record Marlow's entry into the site. The entry was made without Slay's knowledge over a four day period. If Slay had sufficient control of the site to be classified as an operator, he would have been aware of Marlow's visit.

Marlow's visit brings an additional consideration into view. Did Marlow have legal authority to access the site? The answer has serious implications for all parties involved and is not a finding of either law or fact in the POD.

Marlow entered without Slay's permission or knowledge; therefore, without some other provision of authority, any and all evidence secured then and thereafter would be illegally obtained and unusable in a legal proceeding. If the "poisoned fruit" principle is applied from the point of Marlow's visit, then there is no evidence before the commission, relative to the penalty time period, and therefore no violations to consider. This case would then be over.

If Marlow did not have the Trustee's permission to enter the premises, from what authority did Marlow act in entering the property? On page 7 of the PFD the ALJ relates Marlow's entry and determination of a presumed possible release into the waterway and notification to the emergency response division. However, the ALJ also found that the conditions at the site were virtually the same for almost the previous three years. Findings of Fact #63, #64, #65, #66, #67, #68, #69, and #70, relate that TCEQ knew the status of the site, the contents of the tanks, and the determination of soil samples. For almost three years no action whatsoever was taken by the TCEQ. Understanding that the TCEQ used exactly the same knowledge as a basis for entering the Site in 1999 that it possessed almost three years earlier; can any reasonable person conclude that the emergency nature of a possible release was anything other than a charade excuse for entry? An illegal entry compels the Commission to find that any evidence obtained thereafter be inadmissible for its consideration. The ED has refused to apply the exact same regulations over the exact same tanks and materials against Bank One, against David Elder, against the FDIC, or against Wrangle Capital that it now seeks to use against Respondents. Not only has the ED unequally applied the rules but, moreover, has taken no action to correct danger to the public's waterways and air for almost three years. Respondent Chester Slay received a stem cell transplant to treat Non-Hodgkins Lymphoma determined by court

decision to be caused by exposure to benzene fumes. Any reasonable person would wonder if the overly aggressive action by the ED is not actually a defensive legal maneuver. Is it reasonable to fine any respondent when, if the TCEQ had taken care of its responsibilities in a timely manner, there would be no violations on the site at the time of purchase?

The next consideration must be whether any evidence alleged to be, or have occurred on Smith Family Trust property can be used in ascertaining penalty allocation, if any is required, against any other party. All but one alleged violation occurred in or on Smith property. The aforementioned violations on Smith go unchallenged. Smith, who is not a party, most assuredly would not expose itself by becoming involved for the benefit of another. If Smith produced evidence that would exonerate Smith from a violation, then no violation would have occurred for either Peckham or Slay. It is insufficient to hold that because Slay was trustee of Smith and Peckham, that he, Slay, could have provided defenses for Peckham because of his position as trustee for Smith. Slay's fiduciary responsibilities to each trust would prohibit such an action. The beneficiaries of the two trusts are different, and Slay could not endanger beneficiary interest of Smith with only a possibility of protecting the beneficiary interest of Peckham. Neither Slay nor Peckham can occupy Smith's position. It is unreasonable to hold Peckham responsible for acts that may have occurred on Smith when Peckham had no standing to defend neither itself nor opportunity to address the infractions\

All of the aforementioned notwithstanding, if the ALJ is to apportion penalties, said penalties must be determined by the rules as they existed at the time of the alleged offenses. The ALJ has worked on the basis as if rules have already yet been fully developed.

ALJ's speculation concerning the location is misplaced and inappropriate. Such speculation makes the Commissioners' actions appear to be more "revenue production effort" rather than an effort to protect the environment and the people of Texas.

The Commission has amended ALJ's POD and has instructed the ALJ in its conclusions while failing to follow the statutory requirements of Texas Government Code, Title 10, Chapter 2003, Subchapter C, Section 2003.047(m). If the ALJ is compelled to apportion penalties, the Commission's statutory failures, notwithstanding, the respondents recommend that all responsibility and penalties be assessed solely against Union Texas.

Sincerely

A handwritten signature in cursive script, appearing to read "Chester Slay". The signature is written in dark ink and is positioned below the typed name "Chester Slay".

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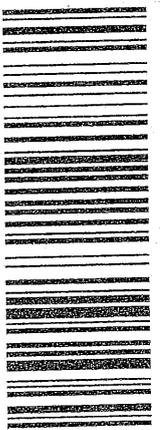
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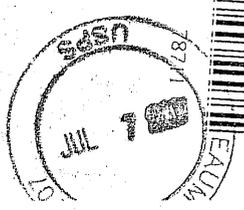
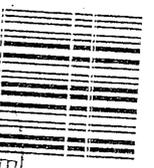


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