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CHIEF CLERK'S OFFICE

SOAH DOCKET NO. 582-06-0662
TCEQ DOCKET NO. 2004-0565-MWD-E

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

CITY OF NORMANGEE,
RESPONDENT

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ"), represented by the Litigation Division, after having reviewed the Administrative Law Judge's Proposal for Decision, and files the following exceptions before the State Office of Administrative Hearings ("SOAH"):

ORDERING PROVISION NO. 1

In order to accommodate the TCEQ Financial Division's accounting practices, the ED respectfully requests that Ordering Provision 1, second sentence be removed and replaced with the following text:

An administrative penalty in the amount of sixty six thousand two hundred twenty dollars (\$66,220.00) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). The City has paid one thousand eight hundred and fifty-five dollars (\$1,855.00) of the administrative penalty. The remaining amount of sixty four thousand three hundred and sixty-five dollars (\$64,365.00) of the administrative penalty shall be payable in 35 monthly payments of one thousand eight hundred thirty-nine dollars (\$1,839.00) each. The next monthly payment shall be paid within 30 days after the effective date of this Agreed Order. The subsequent payments shall each be paid not later than 30 days following the due date of the previous payment until paid in full. If the City fails to timely and satisfactorily comply with the payment requirements of this Commission Order, including the payment schedule, the Executive Director may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, the failure of the City

to meet the payment schedule of this Commission Order constitutes the failure by the City to timely and satisfactorily comply with all of the terms of this Agreed Order.

The remainder of the paragraph should remain as is, beginning with the sentence that reads, "The payment of the administrative penalty herein completely resolves the violations set forth by this Order."

ORDERING PROVISION NO. 4

The Executive Director respectfully recommends that Ordering Provision No. 4 be re-numbered as Ordering Provision No. 2 and the that the remaining Ordering Provisions be changed accordingly. Currently, Ordering Provision No. 4 follows Ordering Provision No. 1.

Respectfully Submitted,

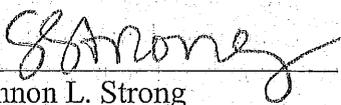
Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue
Deputy Director
Office of Legal Services

Mary R. Risner
Director
Litigation Division

By: _____


Shannon L. Strong
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Litigation Division, MC 175
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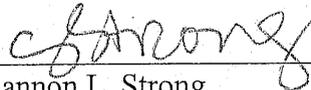
CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2007, an original and eleven (11) copies of the foregoing "Exceptions to Administrative Law Judge's Proposal for Decision" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (Article No. 7002 0860 0004 6476 7809), to the Honorable Tim Taylor, Post Office Box 37, Normangee, Texas 77871.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via inter agency mail, to Blas Coy, Jr., Office of the Public Interest Counsel, Texas Commission on Environmental Quality- MC 103.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via fax to (512) 475-4994 and mailed via inter agency mail, to Hon. Cassandra Church, Administrative Law Judge, State Office of Administrative Hearings, PO Box 13025, Austin, Texas 78711-3025.



Shannon L. Strong

Attorney

Litigation Division

Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties Against
the City of Normangee and
Authorizing Installment Payment and
(Respondent);
TCEQ Docket No. 2004-0565-MWD-E
SOAH Docket No. 582-06-0662**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) and the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties of \$66,220.00 against the City of Normangee (the City) for violations arising from its operation of its wastewater treatment plant. A Proposal for Decision (PFD) was presented by Cassandra J. Church, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP and the EDFARP on September 27, 2006, in Austin, Texas.

The Executive Director (ED), represented by Shannon L. Strong, appeared at the hearing. The City represented by the Hon. Tim Taylor, Mayor of the City, and the City Secretary, Heather Spikes, appeared

at the hearing. The record closed November 30, 2006, after submission and review of additional financial information filed by the City.

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

I. FINDINGS OF FACT

1. The City owns and operates a wastewater treatment plant located on Caney Creek, east of Farm-to-Market Road 39, Normangee, Leon County, Texas (the Plant) under authority of TPDES Permit No. 10356-001 (the Permit).
2. During a records review conducted on March 10, 2004, Commission staff documented that the City failed to comply on several dates between June 2002 and June 2003 with the Effluent Limitation and Monitoring Requirement No. 1 of the Permit in regard to the permitted limits for biochemical oxygen demand, total suspended solids, dissolved oxygen, and pH of the effluent.
3. The Permit limitation for the five-day biochemical oxygen demand (BOD₅) is 30 mg/l. In June, July and August of 2002, the City showed, respectively, a BOD₅ of 45 mg/l, 35 mg/l, and 33.93 mg/l.
4. The Permit limitation for total suspended solids (TSS) is 38 pounds per day (lbs/day). In August, September and October of 2002, the City showed, respectively, a TSS level of 100 lbs/day, 39.6 lbs/day, and 41.7 lbs/day at the Plant.
5. The Permit limitation for dissolved oxygen (DO) is no less than four mg/l. In July, August, September, and October of 2002, the City showed, respectively, a DO level of 1.0 mg/l, 1.6 mg/l, 2.5 mg/l, and 2.6 mg/l at the Plant.

6. In April, May, and June of 2004, the City showed, respectively, a DO level of 2.5 mg/l, 2.3 mg/l, and 1.0 mg/l at the Plant.
7. The Permit limitation for pH is a pH level between 6 and 9 standard units. In October 2002, the City showed a pH of 9.1 at the Plant.
8. On April 5, 2005, the ED issued the EDPRP in accordance with TEX. WATER CODE ANN. § 7.054, alleging that City violated TEX. WATER CODE ANN. § 26.121(a) and 30 TEX. ADMIN. CODE § 305.125 by exceeding the limitations in the Permit for biochemical oxygen demand, total suspended solids, dissolved oxygen, and pH. The EDPRP recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$12,250.00 against the City.
9. The ED sought a base penalty of \$5,000.00 for the City's alleged violation of TEX. WATER CODE ANN. § 26.121(a) and 30 TEX. ADMIN. CODE § 305.125, from September through December 2002.
10. Based on simplified modeling conducted by TCEQ staff, the amount of discharged pollutants caused by exceeding permit limitations for the periods September through November 2002, were significant and exceeded levels protective of human health and the environment. The violations constituted a major, actual harm.
11. The ED sought a base penalty of \$2,000.00 for City's alleged violation of TEX. WATER CODE ANN. § 26.121(a) and 30 TEX. ADMIN. CODE § 305.125, for the periods of June through August 2002 and April through June 2003.
12. Based on simplified modeling conducted by TCEQ staff, the amount of discharged pollutants caused by exceeding permit limitations for the periods June through August 2002 and April through June 2003 were insignificant and did not exceed levels protective of human health and the environment. The violations constituted a minor, actual harm.

13. The City had 21 months of self-reported effluent limit violations in the five years prior to the EDPRP. The self-reported violations occurred from May through September 2003, November 2001 through November 2002, and April through June 2003.
14. The ED sought an enhancement of \$5,250.00 of the base penalty. The enhancement comprised an increase due to the 21 months of self-reported violations regarding effluent limitations in its permit (\$7,350.00), a reduction for the City's good faith effort to comply (\$700.00), and a reduction to avoid a disproportionate effect on the penalty amount (\$1,400.00).
15. During investigations conducted on November 10 and 15, 2004, Staff documented that the City failed to skim and break up the excessive solids on the surface of the Imhoff tank and also permitted grass in the empty sludge drying beds. The Staff also found on-site lift station and Plant gates open, the Plant unmanned, and a high-alarm level at the lift station flashing.
16. During investigations conducted on November 10 and 15, 2004, Staff documented that the City failed to ensure that the Plant was operated by a licensed chief operator or an operator holding the required level of license or higher for a minimum of five days per week.
17. During investigations conducted on November 10 and 15, 2004, Staff documented that the City failed to prevent discharge and accumulation of sludge in the receiving stream. The discharge into the receiving water for the Plant comprised a dense accumulation of sludge approximately seven inches deep at the outfall and extending at least 25 yards into the stream. No aquatic life was observed in the receiving stream at the point of the accumulation.
18. The City employed a certified operator effective January 3, 2005, and has had a properly-certified operator operating the Plant since that date.
19. For violations found on November 10 and 15, 2004, the ED sought a total penalty of \$53,970.00. The base penalty for these violations comprised the following:

- (a) a base penalty of \$1,000.00 for operational violations, including the grass in the sludge bed and excessive solids, that occurred during the period between the date the investigation occurred until the date a new certified operator was hired;
 - (b) a base penalty of \$5,000.00, for two events, for the City's failure to have a properly-licensed operator at the Plant; and
 - (c) a base penalty of \$15,000.00, for three events, for the City's failure to prevent the discharge and accumulation of sludge in the receiving water from the investigation date, November 10, 2004, through the date the solids were removed from the receiving stream, February 8, 2005.
20. The failure to prevent the discharge and accumulation of sludge in the receiving waters constituted a violation creating major, actual harm to human health and the environment.
21. For violations found on November 10 and 15, 2004, the ED recommended a 157-percent enhancement of the penalty amount (\$32,970.00) due to the City's poor compliance history.
22. The City had two notices of violation (NOVs) for the same or similar violations, one NOV for unrelated violations, and 29 months of self-reported effluent violations in the five years before the EDFARP. The City was not yet in compliance with applicable regulations at the time the penalty was calculated.
23. The City has 400 water and sewer customers and in 2000 had a population of just over 700 people. Some 29 percent of its population is below or near the federal poverty line.
24. The City's property tax rate is at the maximum allowable rate for a Class B city, \$.25 per \$100.00 of valuation. The classification of the City is not expected to change.
25. The City's water system and the Plant are approximately 50 years old and often need to be repaired. The City recently replaced water mains in the central part of the city and replaced a lift station.

26. For the fiscal year ending September 30, 2006, the City had unrestricted net assets in the amount of \$154,949.00.
27. The major components of the unrestricted assets comprise two investments in the Lone Star Investment Pool totaling \$53,094.89 in value and cash on hand of \$61,041.00.
28. In fiscal 2005, the City had operating revenue of \$270,943.00 and expenses of \$323,443.00 in its water and sewer fund, and operating revenue of \$208,290.00 and expenses of \$222,716.00 in its general fund. The City purchased a police vehicle in that year.
29. In fiscal 2004, the City had operating revenue of \$129,561.00 and expenses of \$161,650.00 in its general fund and operating revenue of \$237,252.00 and expenses of \$291,396.00 in its water and sewer fund.
30. On September 30, 2005, the City had no long-term bonds, leases, or certificates of obligation outstanding, but had one note payable on which the unpaid principal balance was \$17,950.
31. On September 30, 2006, the City had no contingent liabilities.
32. In fiscal 2005, apart from the police vehicle purchase, the City had sufficient current income to meet current governmental expenses.
33. The City transferred funds from the general fund to the water and sewer fund in two of the last three fiscal years to make up shortfalls in the water and sewer fund.
34. The City increased fees for water, sewer, and garbage pickup in February 2005. The City's current water and sewer rates are both \$15.00 for the first 3,000 gallons, and \$2.00 per thousand gallons after that.
35. The City has no planned upgrades to its water system or to the Plant.
36. Payment of the proposed administrative penalty over a period of 36 months through use of its reserves would allow the City to maintain a reserve of five-percent of its budget.

37. A five-percent reserve level is typical of reserve levels in other cities evaluated by the EPA and by the Commission for ability to pay administrative penalties.
38. On April 5, 2005, the ED mailed a copy of the EDPRP to the City.
39. On April 20, 2005, the City requested a contested case hearing.
40. On November 17, 2005, the ED referred the case to SOAH for hearing.
41. On December 27, 2005, the Chief Clerk of the Commission mailed notice of the scheduled preliminary hearing to the City.
42. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules the ED alleged the City violated;
 - Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the ED;
 - Advised the City, in at least 12-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the ED's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
43. At the preliminary hearing on January 26, 2006, the ED appeared through counsel and established jurisdiction to proceed. The City appeared through its Mayor, the Hon. Tim Taylor, and the City Secretary, Heather Spikes.
44. On April 26, 2005, the ED mailed a copy of the EDFARP to the City by first class U.S. mail and certified mail, return receipt requested.

45. The violations in the EDFARP included all violations that had appeared in the EDPRP and also additional violations, including the discharge into the receiving stream. The total proposed penalty in the EDFARP included the penalty that had appeared in the EDPRP plus additional penalty amounts for the additional violations.
46. The hearing was conducted on September 27, 2006, by ALJ Cassandra J. Church, after the granting of agreed continuances requested by the parties.
47. At the hearing, the Parties presented evidence and argument on the violations and proposed penalty listed in the EDFARP.
48. After the hearing, by permission of the ALJ, the City submitted an audited financial report for the fiscal year ending September 30, 2005, and the ED submitted his response to the additional information.
49. The record closed November 30, 2006.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the TEX. WATER CODE ANN. or of the TEX. HEALTH & SAFETY CODE ANN. within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day for each violation at issue in this case.
3. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, the City was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.

4. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 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, the City was notified of the hearing on the alleged violations and the proposed penalties.
5. The City had actual notice of the nature and scope of all violations in the EDFARP, as well as the increased proposed penalty, and had sufficient opportunity to prepare its defense and present evidence on the issues at the contested-case hearing.
6. 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.
7. Based on the above Findings of Fact and Conclusions of Law, the City failed to comply with permitted limits in TPDES Permit No. 10356-001 for biochemical oxygen demand, total suspended solids, dissolved oxygen, and pH.
8. Based on the above Findings of Fact and Conclusions of Law, the City violated TEX. WATER CODE ANN. § 26.121(a) and 30 TEX. ADMIN. CODE § 305.125(1) by failing to comply with the effluent limits of TPDES Permit No. 10356-001.
9. Based on the above Findings of Fact and Conclusions of Law, the City violated Operational Requirement No. 1 of the Permit and 30 TEX. ADMIN. CODE §§ 305.125(5), 317.3(a), and 317.7(e) by failing to properly operate and maintain all systems of collection, treatment, and disposal of wastewater at the Plant.
10. Based on the above Findings of Fact and Conclusions of Law, the City violated Operational Requirement No. 1 of the Permit and 30 TEX. ADMIN. CODE §§ 30.350(c), (j), and (l) by failing to have on duty an operator holding the required level of license.

11. Based on the above Findings of Fact and Conclusions of Law, the City violated Operational Requirement No. 1, Monitoring Requirement No. 4, and Permit Condition No. 2.g. of the Permit; TEX. WATER CODE ANN. § 26.121(a); and 30 TEX. ADMIN. CODE §§ 305.125(1) and (4) by failing to prevent the discharge and accumulation of sludge in the receiving stream.
12. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
13. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
14. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$66,220.00 is justified, a reasonable exercise of the Commission's authority, and should be assessed against the City.
15. Based on consideration of the factors in the Commission's rules regarding ability to pay, the City failed to meet its burden of proof under 30 TEX. ADMIN. CODE § 70.8 to show that it is unable to pay the proposed administrative penalty.

16. Authorizing the City to pay out the proposed administrative penalty over a 36-month period is a reasonable exercise of the Commission's discretion under 30 TEX. ADMIN. CODE § 70.9 and consistent with payment terms provided to other municipalities.

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. Within 36 months after the effective date of this Commission Order, the City of Normangee shall pay an administrative penalty in the amount of \$66,220.00 for violations of TEX. WATER CODE ANN. § 26.121(a), 30 TEX. ADMIN. CODE §§ 305.125(1), (4), and (5), 317.3(a), 317.7(e), and 30.350(c), (j), and (l), and terms of TPDES Permit No. 10356-001. An administrative penalty in the amount of sixty six thousand two hundred twenty dollars (\$66,220.00) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). The City shall pay an initial installment payment of one thousand eight hundred and fifty-five dollars (\$1,855.00) of the administrative penalty 30 days after the effective date of this Commission Order.. The remaining amount of sixty four thousand three hundred and sixty-five dollars (\$64,365.00) of the administrative penalty shall be payable in 35 monthly payments of one thousand eight hundred thirty- nine dollars (\$1,839.00) each. The subsequent payments shall each be paid not later than 30 days following the due date of the previous payment until paid in full. If the City fails to timely and satisfactorily comply with the payment requirements of this Commission Order, including the payment schedule, the Executive Director may, at his option, accelerate the maturity of the remaining installments, in which event the unpaid balance shall become immediately due and payable without demand or notice. In addition, the failure of the City to meet the payment schedule of this Commission Order constitutes the failure by the City to timely and satisfactorily

comply with all of the terms of this Commission Order. The payment of the administrative penalty herein completely resolves the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: City of Normangee, RN101916385."

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

2. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to the City of Normangee if the Executive Director determines that the City of Normangee has not complied with one or more of the terms or conditions in this Commission Order.
3. 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.
4. 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.
5. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to the City of Normangee.
6. 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

Kathleen Hartnett White, Chairman
For the Commission