

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

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Petitioner</b>	§	<b>OF</b>
 	§	
<b>v.</b>	§	
 	§	
<b>CITY OF NORMANGEE,</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess an administrative penalty of \$66,220.00 against the City of Normangee (the City) for violation 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 (the Permit) in regard to effluent limitations and operational requirements for its wastewater treatment plant (the Plant). The City admitted to the violations and did not dispute the correctness of the amount of the proposed penalty. The sole contested issue was whether the City demonstrated that it was unable to pay the proposed penalty. The City asked for one of several forms of alternative relief: deferring payment of some or all of the amount, providing an extended payout period, or allowing the City to apply the penalty amount to water system or Plant improvements in lieu of payment to TCEQ. The ED contended that the City had the financial capacity to fully pay the proposed penalty and recommended a 36-month payout period for that amount. The ED did not seeking any corrective action.

The hearing in this case was held on September 27, 2006, and the record closed on November 30, 2006. The ED was represented by Shannon L. Strong, attorney with the Litigation Division. The City was represented by the Hon. Tim Taylor, Mayor of the City of Normangee, and the City Secretary, Heather Spikes.

The ALJ concluded that the ED established that Respondent violated the statute and Commission rules on wastewater treatment plant operation and also violated the effluent limitations, monitoring requirements, and operational requirements in the Permit. The ALJ further concluded that the penalty of \$66,220.00 proposed by the ED considered the factors in TEX. WATER CODE ANN. § 7.053 which must be considered in assessing an administrative penalty<sup>1</sup> and was consistent with the ED's practice and policy on the determination of penalties.<sup>2</sup> On the issue of the City's inability to pay, the ALJ concluded that the City had the ability to pay the proposed penalty. The Commission should find that the violations occurred and assess Respondent an administrative penalty of \$66,220.00. Further, the ALJ recommends that the Commission authorize a 36-month payout period, to be paid in monthly installments.

## II. PROCEDURAL HISTORY AND SCOPE OF THE CASE

The number and scope of the violations alleged by the ED and the amount of the penalty in the Executive Director's First Amended Report and Petitioner (EDFARP) increased significantly over what had been alleged in the EDPRP. The total administrative penalty being sought increased from \$12,250.00 to \$66,220.00. The number of rules allegedly violated and the instances of alleged violations both increased. The notice of hearing in this case, issued on December 27, 2005, incorporated the EDPRP, which had been issued on April 5, 2005.<sup>3</sup>

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<sup>1</sup> Under Water Code § 7.053, the ED must consider the following factors:

- 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;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

<sup>2</sup> The Commission's 2002 Penalty Policy, although applied by the ED in determining the amount of penalty to assess, was not introduced into the record of this case. It was referenced in the Executive Director's Preliminary Report and Petition (EDPRP). As the City made no allegation that the ED acted contrary to that policy, the ALJ assumed the proposed administrative penalty in this case had been calculated consistently with that policy.

<sup>3</sup> ED Exh. 4.

The ED issued the EDFARP on April 26, 2006.<sup>4</sup> This date was after the preliminary hearing conducted on January 26, 2006, but five months before the hearing on the merits was conducted on September 27, 2006. The EDFARP was sent to the City by both first class U.S. mail and by certified mail, return receipt requested. Further, the City had received notice of all violations included in the EDFARP by mid-2005; notices of violations (NOVs) were sent to the City on March 20, 2004, and August 31, 2005. The City did not assert lack of notice concerning the EDFARP and, at hearing, both parties presented evidence and argument on the City's ability to pay the higher penalty amount sought in the EDFARP.

The ALJ concluded that the City had actual notice of the nature and scope of the violations and substantially-increased penalty in the EDFARP and had an ample opportunity to prepare and present its defense.

### III. APPLICABLE LAW

Under Commission rule, a respondent in an enforcement case may assert that he is unable to pay the proposed administrative penalty. Commission rule 30 TEX. ADMIN. CODE § 70.8 states, in pertinent part, as follows:

- (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.

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<sup>4</sup> On the same day the PFD was issued, the ALJ announced an intention to take official notice of the EDFARP. Any dispute concerning this action will appear in exceptions.

The rules also provide authority to the Commission to approve installment payments for any person, firm, or business by order.<sup>5</sup> A provision of that rule provides specific guidelines for installment payments by small businesses but there here are no guidelines in the rule that specifically address municipalities or other local government entities.<sup>6</sup>

In September 2005, the ED adopted a policy governing Staff reviews of claims of inability to pay.<sup>7</sup> The policy document sets forth the elements Staff must consider as well as a method to review an inability-to-pay claim by a city or a county. This policy was applied by Staff in this case. In the case of a city, the ED uses a computer-based tool titled MUNIPAY. This program, made available to TCEQ by the Environmental Protection Agency (EPA), analyzes a city's current and projected obligation from the perspective of three criteria: the total amount of debt relative to various measures, debt service or payments, and incremental household burden.<sup>8</sup>

#### IV. VIOLATIONS AND PENALTIES ASSESSED

##### A. Violations

During a records review conducted on March 10, 2004, Staff documented that the City failed to comply with the Effluent Limitation and Monitoring Requirement No. 1 of the Permit in regard to the permitted limited for biochemical oxygen demand, total suspended solids,

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<sup>5</sup> 30 TEX. ADMIN. CODE § 70.9.

<sup>6</sup> 30 TEX. ADMIN. CODE § 70.9(b). This rule defines a small business as one with fewer than 100 full-time employees, net annual receipts of less than \$3 million, and which is not a subsidiary of a business that does not qualify as a small business under the rule. It provides for a maximum one-year payout period.

<sup>7</sup> ED Exh. 9. TCEQ Office of Administrative Services, *Financial Review Policy for Administrative Penalty Inability to Pay Claims*, September 19, 2005.

<sup>8</sup> ED Exh. 9, pp. 6-7.

dissolved oxygen, and pH of the effluent on several dates between June 2002 and June 2003.<sup>9</sup> Pollutant releases that were both below and above levels protective of human health and the environment occurred during the periods of non-compliance. All findings of violations were based on self-reported effluent monitoring data.<sup>10</sup>

During investigations conducted on November 10 and 15, 2004, Staff documented additional violations, as follows:

- ◆ 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. These actions, taken together, constituted a failure to properly operate and maintain all systems of collection, treatment, and disposal of wastewater in accordance with the terms of Operational Requirement No. 1 of the Permit and 30 TEX. ADMIN. CODE §§ 305.125(5), 317.3(a), and 317.7(e).
- ◆ 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. This action constituted a violation of Operational Requirement No. 1 of the Permit and also of 30 TEX. ADMIN. CODE §§ 30.350(c), (j), and (l).
- ◆ The City failed to prevent discharge and accumulation of sludge in the receiving stream. This action constituted a violation of 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).

The discharge into the receiving water from 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.<sup>11</sup>

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<sup>9</sup> ED Exh. 10.

<sup>10</sup> ED Exh. 10.

<sup>11</sup> ED Exh. 10.

Mayor Taylor stated that the City has come into compliance with Permit requirements and has had no violations in the months after the period investigated. The City currently has a properly-licensed operator at the Plant.

**B. Penalty—March 10, 2004, Violations**

The ED recommended a total penalty of \$12,250.00 for these violations. This includes a base penalty of \$5,000.00 for one quarter, September to November 2002, when the effluent discharge levels exceeded levels protective of human health and the environment, and a penalty of \$2,000.00 for two quarters, June to August 2002 and April to June 2003, when they did not. The final recommendation included a net addition of \$5,250.00 to the base penalty, including an increase for a poor compliance history, a reduction for good faith effort to comply, and a further reduction in the interest of justice.<sup>12</sup> At the time the EDPRP was issued, the City had 21 months of self-reported effluent limit violations in the five years before the enforcement action.

**C. Penalty—November 10 and 15, 2004, Violations**

The ED recommended a total penalty of \$53,970.00 for these violations. A base penalty of \$1,000.00 was assessed 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. The certified operator was hired effective January 3, 2005. A second base penalty of \$5,000.00, for two events, was assessed for the City's failure to have a properly-licensed operator at the Plant. A third base penalty of \$15,000.00, for three events, was assessed for the City's failure to prevent the discharge and accumulation of sludge in the receiving water. Staff recommended three monthly events from the investigation date, November 10, 2004, through the date the solids were removed from the receiving stream, February 8, 2005. This violation created major, actual harm.

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<sup>12</sup> ED Exh. 10.

Adjustments to the total base penalty of \$21,000.00 included a 157-percent enhancement (\$32,970.00) of the penalty amount, due to the City's poor compliance history. At the time the EDFARP was issued, the City had two NOV's 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 enforcement action. The City was not yet in compliance with the applicable regulations at the time the penalty was calculated.

#### **IV. ANALYSIS OF THE CITY'S ABILITY TO PAY**

The Plant is located on Caney Creek, east of Farm-to-Market Road 39, Normangee, Leon County, Texas. Normangee is a small town located in a ranching community. The City currently has 400 water and sewer customers. In 2000, the population was just over 700 people.<sup>13</sup> Mayor Taylor stated that a significant percentage of the City's population is elderly or poor. This assertion is supported by information from the 2000 census, which shows that the City had some 29 percent of its population below or near the federal poverty line, slightly more than Texas as a whole.<sup>14</sup> Mayor Taylor stated that these characteristics of the City demonstrate that it does not have the resources available to pay the amount of penalty being proposed.

The ED's conclusion regarding the City's ability to pay the proposed penalty was based primarily on its level of reserves. Staff financial analyst Paige Seidenberger acknowledged that the City had a tight budget on a "checkbook" basis, i.e., monthly income and expenditures, but said it nevertheless had sufficient reserved funds to pay the assessment over a 36-month period without harming the City's finances. She concluded that payment could be made from cash reserves or by liquidation of some investments and would not require the city to increase water and sewer rates or to borrow money. Because of the high reserve level, she did not analyze

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<sup>13</sup> ED Exh. 5.

<sup>14</sup> ED Exh. 5, p. 3.

either the impact on ratepayers of potential fee increases necessary to pay the penalty or the potential increase in indebtedness due to borrowing.

Mayor Taylor disputed the ED's conclusion that neither measure would be needed. He said that the City's most realistic options to pay the penalty would be either raising the water and sewer rates by approximately five dollars per month or borrowing the funds. He stated that the City's current reserves have been slowly accumulated over a number of years and that he believed it was in the City's best financial interest to maintain a substantial reserve. He said that the City's Plant and water system are some 50 years old and require regular repair, noting that the City recently had to replace water mains in the center part of town and install a new lift station. The City increased fees for water, sewer, and garbage pickup in February 2005.<sup>15</sup> He also stated that the City's property tax rate is at the maximum allowable rate for a Class B city, \$.25 per \$100.00 of valuation, and that he does not expect the classification of the city to change. He also stated that sales tax revenues in the City are lower than in comparable cities because the few businesses located in the City sell many sales-tax-exempt items such as farm implements and machinery.

The City's 2005 audit, for the fiscal year ending September 30, 2005, showed that the City has unrestricted net assets in the amount of \$154,949.00.<sup>16</sup> 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. To put this in context, in fiscal 2005, the City had operating revenue of \$270,943.00 and expenses of \$323,443.00 in its water and sewer (enterprise) fund and operating revenue of \$208,290.00 and expenses of \$222,716.00 in its general fund.<sup>17</sup> In fiscal 2005, apart from the police vehicle purchase, the City had sufficient

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<sup>15</sup> ED Exh. 5, p. 16. The City's water and sewer rates are both \$15.00 for the first 3,000 gallons, and \$2.00 per thousand gallons after that.

<sup>16</sup> Resp. Exh. 3, Audit Report, City of Normangee.

<sup>17</sup> Resp. Exh. 3, pp. 16-19.

current income to meet current governmental expenses. The City has no contingent liabilities and its only indebtedness is a bank loan taken out to purchase the police vehicle.

By comparison, 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.

The property tax is expected to add \$2,500.00 in revenue in fiscal 2006 due to increased valuation.

In some recent past years, the City has transferred funds, in varying amounts, from the general fund into the water and sewer fund to make up shortfalls. In fiscal 2003, the City transferred \$35,000.00 into the water and sewer fund, and in fiscal 2005 it transferred \$3,812.00. In fiscal 2005, the water and sewer fund showed a net income loss of \$47,287.00.<sup>18</sup> However, in fiscal 2004, no general funds were transferred.

Mayor Taylor requested that the Commission consider allowing the City to invest the amount of the penalty in system upgrades. However, he did not identify particular Plant or system upgrades that were needed in order to address the violations discovered in the ED's investigation or to avoid them in future.

He also requested consideration of a payout period longer than 36 months. The 36-month period is the usual period recommended for municipalities. Ms. Seidenberger explained that, in this case, that period of time would allow the City to retain a five-percent level of reserves. Ms. Seidenberger determined an acceptable level of reserves by considering the City's current level of expenditures, income, and indebtedness. The financial analysis performed by Staff takes account of the need for a city to maintain at least a five-percent

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<sup>18</sup> ED Exh. 5, Resp. Exhs. 1-3.

reserve. She stated that a five-percent level is typical of reserve levels in other cities evaluated by the EPA and the Commission for ability to pay.

The City raised valid concerns regarding its need to maintain its fiscal health and provide for unexpected expenses. The City's general fund has been supporting, in part, the operations of the water and sewer system but the recent rate hike appears to have eased that demand on the general fund. If the penalty is paid out of reserve funds, the City will be operating without the comfortable financial cushion it has assembled. Nevertheless, these elements do not, taken together, support the City's assertion that it is unable to pay the proposed penalty. It only makes it difficult. Under the 36-month payout, the City will have time to adjust its finances to make the payments, including borrowing or raising the utility rates, if City officials conclude that is a more prudent course of action.

There was no evidence to support deferral of some or all of the penalty. In some cases, all or part of a municipality's fine may be deferred, *i.e.*, not collected, as long as no future violations occur. Although not discussed at the hearing, the ED recommended against deferral due to the findings.<sup>19</sup> Further, there is no evidence to support the City's other request, allowing it to apply the penalty to Plant improvements. Despite the age of the system, nothing in the investigation notes concerning the nature of the violations suggested that physical problems with the Plant contributed to the operational violations.<sup>20</sup> Rather, the violations resulted from improper operation procedures and lack of a properly-certified operator.

Based on the City's evidence and the fiscal analysis by Staff, the ALJ concluded that 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 under the 36-month payout terms proposed by the ED.

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<sup>19</sup> ED Exh. 10.

<sup>20</sup> ED Exh. 10, Attachments B and C.

## V. ORDERING LANGUAGE

The EDFARP did not include ordering language. In the course of the hearing, the ED did not submit or propose ordering language for the implementation of the recommended payout plan. Thus the ALJ has drafted a Proposed Order with ordering provisions common to other enforcement orders with penalty assessments, adding basic language regarding the payout terms. The parties are invited in exceptions to propose amendments to the ordering language on payment to make it consistent with other installment payment orders issued by the Commission.

## VI. SUMMARY

The ALJ recommends that the Commission find that the City committed all the violations of the Water Code, Commission rules, and Permit conditions set forth in the EDFARP, assess an administrative penalty of \$66,220.00 against the City, and adopt an Order authorizing the City to pay this penalty over a 36-month period, in monthly installments of \$1,839.44.

**SIGNED January 29, 2007.**

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**CASSANDRA J. CHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**ORDER**  
**Assessing Administrative Penalties Against**  
**the City of Normangee and**  
**Authorizing Installment Payment**  
**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 (BOD<sub>5</sub>) is 30 mg/l. In June, July and August of 2002, the City showed, respectively, a BOD<sub>5</sub> 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.
49. 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.
50. 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.
51. 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.
52. The hearing was conducted on September 27, 2006, by ALJ Cassandra J. Church, after the granting of agreed continuances requested by the parties.
53. At the hearing, the Parties presented evidence and argument on the violations and proposed penalty listed in the EDFARP.

54. 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.
55. 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.
19. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
20. 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.
21. 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.
22. 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. The payment shall be made in equal monthly installments of \$1,839.44. 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

4. 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.

5. 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.
6. 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.
7. 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.
8. 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 Hartnett White, Chairman  
For the Commission