

Kathleen Hartnett White, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 13, 2007

The Honorable Craig Bennett
Administrative Law Judge
State Office of Administrative Hearings
Post Office Box 13025
Austin, Texas 78711-3025

CHIEF CLERKS OFFICE

2007 MAR 13 PM 4:12

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Al Jodoin dba Lake Whitney RV Community; TCEQ Docket No. 2004-1768-MWD-E;
SOAH Docket No. 582-05-7639; Executive Director's Exceptions to the Administrative
Judge's Proposal for Decision

Dear Judge Bennett:

Enclosed is a true and correct copy of the "Executive Director's Exceptions to the
Administrative Judge's Proposal for Decision."

The original was filed with the Office of the Chief Clerk of the Texas Commission on
Environmental Quality on this day.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alfred A. Oloko".

Alfred A. Oloko
Attorney
Litigation Division

Enclosure

cc: LaDonna Castañuela, Chief Clerk, TCEQ, MC 105 (original)
Cheryl Thompson, Dallas/Fort Worth Regional Office, TCEQ, MC R-4
Service List

SOAH DOCKET NO. 582-05-7639
TCEQ DOCKET NO. 2004-1768-MWD-E

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

AL JODOIN DBA LAKE
WHITNEY RV COMMUNITY

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

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

TO THE HONORABLE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), and files this, the Executive Director's Exceptions to the Administrative Law Judge's ("ALJ's") Proposal for Decision.

A. INTRODUCTION.

This case alleges that Al Jodoin dba Lake Whitney RV Community ("Respondent") committed five (5) violations at his wastewater treatment facility located at the intersection of FM 1713 and Yellowstone Drive, Whitney, Hill County, Texas (the "Facility") during an investigation conducted by TCEQ staff on September 14, 2004. The Executive Director ("ED") seeks to assess six thousand dollars (\$6,000.00) in administrative penalties and require certain corrective actions of Respondent. The Honorable Administrative Law Judge ("ALJ") issued his Proposal For Decision ("PFD") on November 27, 2006. In the PFD, the ALJ recommends that three (3) of the five (5) violations were proved and that two (2) were not proved. The ALJ also recommends that no penalty should be assessed against the Respondent even for the violations that were proved. The ALJ further recommends that no corrective actions be required of Respondent because Respondent no longer owns the Facility.

B. EXCEPTIONS TO THE PFD.

Upon reviewing the PFD and the proposed order, the ED agrees with the ALJ that no corrective actions be required of Respondent since Respondent no longer owns the Facility. The ED also agrees to not pursue the two violations that the ALJ recommends were not proved. The ED however excepts to the ALJ's recommendation that no penalty be assessed against Respondent even for the three violations that the ALJ recommends were proved. The reasons which the ALJ gave for not recommending any penalty for the violations can be found in pages 8, 9, and 10 of the PFD. The ALJ relied, inter alia, on the mitigating factors of TEX. WATER CODE § 7.053 in concluding that no

penalty be assessed for any of the proven violations. The ED submits that the ED already took into consideration the provisions of TEX. WATER CODE § 7.053 in calculating the penalty¹. Under TEX. WATER CODE § 7.052, the Commission has authority to assess an administrative penalty of up to ten thousand dollars (\$10,000.00) per day for each of the violations. The ED did not assess the full penalty amount of ten thousand dollars (\$10,000.00) per day for each of the violations specifically because the ED took cognizance of the factors in TEX. WATER CODE § 7.053. The Enforcement Coordinator in the case testified that the penalty assessed in this case was based on the September 1, 2002 TCEQ Penalty Policy (the Penalty Policy). The Penalty Policy incorporates all the factors in TEX. WATER CODE § 7.053 in reaching the various matrices for calculating the penalty in each case. According to the testimony of the EC, the ED based his calculation of the penalty on the matrices under the Penalty Policy. The ED suggests that the Commission assess the penalty for the proven violations as recommended by the ED.

The violations and the reasons the ALJ gave for not recommending a penalty are examined below:

Failure to Have a Class D Operator²

In recommending that no penalty be assessed for this violation, the ALJ states that:

Respondent was in the process of obtaining his license at the time and showed good faith in remedying the violation. While ignorance is no excuse, it seems unjust to penalize Respondent under the circumstances of this case where he has shown good faith in working with the Commission and attempting to remedy operating deficiencies.³

The ED submits that this is not a situation of "ignorance" but a wanton disregard of the Commission Rules and the provisions of Respondent's Permit. Respondent was aware, even before the investigation,⁴ that the Facility required a Licensed Operator to operate the Facility hence he was taking classes to obtain his license. Respondent did not do anything different after the investigation

¹ See Executive Director's Second Amended Report and Petition (EDSARP), ED Exhibit 8, paragraphs 8 to 11. Indeed the September 1, 2002 Penalty Policy

² See PFD, page 9, paragraph 1.

³ PFD, page 9, paragraph 1, lines 3 to 7.

⁴ PFD, page 3, paragraph 1, lines 6 and 7.

than he did before the investigation. Under the Penalty Policy, Good Faith Effort to Comply⁵ applies to "efforts to return the site to complete compliance with all applicable rules and regulations *cited in the enforcement action*,"⁶ The italicized phrase clearly suggests that for Respondent's efforts to qualify for the Good Faith Effort to Comply consideration, they must be after the investigation. The Respondent's continued operation of the Facility without the required Operator's License for several months after the investigation but before obtaining his License, does not depict any intention to remedy the violation in a timely manner. There is no requirement that Respondent, the owner of the Facility, had to operate the Facility. A good faith effort to comply would have required Respondent to, at a minimum, hire a Licensed Operator to operate the Facility while he is in the process of obtaining his operator's license. Furthermore, for Good Faith Effort to Comply to apply, Respondent needed to return the site to complete compliance with all applicable rules and regulations. In this case, at least one violation had not been resolved even at the time of the hearing.⁷ Finally, even if Good Faith Effort to Comply was applicable, a point which the ED does not concede, it would only have served to reduce the penalty amount and not completely dispense with the imposition of a penalty. In these circumstances, the ED submits that the recommended penalty amount of two thousand five hundred dollars (\$2,500.00) for this violation is justified.

Failure to Measure Flow After Final Treatment Unit⁸

The ALJ recommended that no penalty be assessed for this violation. The ALJ considered that this violation was "inadvertent"⁹ and "resulted in no actual harm"¹⁰. The ED took the fact that no actual harm resulted from this violation into consideration in classifying the violation as a "Potential Minor" hence the recommended penalty for this violation is five hundred dollars (\$500.00) and not ten thousand dollars. Also, according to the ALJ, Respondent relied on the technical expertise of a third party to perform the work correctly. The ED submits that it is the responsibility of Respondent to ensure that his operations are in conformity with the law and his permit. It will be bad precedence to allow a responsible party to avoid liability because a non-responsible third party, who is the responsible party's independent contractor, did something wrong

⁵ Although the ALJ did not use this phrase definitively, the language used suggests that this was what the ALJ was considering.

⁶ September 1, 2002 Penalty Policy, ED Exhibit 14, Page 13, Good Faith Effort to Comply Section, Line 1. Italics supplied for emphasis.

⁷ This violation relates to failure of the Respondent to take soil samples from the root zone of the irrigation site. See PFD pages 5,6, and 10.

⁸ PFD, page 9, paragraph 2.

⁹ PFD, page 9, paragraph 2, line 3.

¹⁰ PFD, page 9, paragraph 2, line 5.

that resulted in the violation. The ED submits that the penalty amount of five hundred dollars (\$500.00) assessed for this violation is reasonable and justified.

Failure to Take Soil Samples from the Root Zone of the Irrigation Site.¹¹

The ALJ did not recommend a penalty for this violation because Respondent was "essentially ignorant about the workings of his system, the permit requirements, or both" and no actual harm occurred. The ED reiterates his earlier submission that it is Respondent's responsibility to comply with the law and his permit requirements and his ignorance should not be an excuse. Again the fact that no actual harm occurred was factored into the assessed penalty amount of one thousand dollars (\$1,000.00). The ED submits that the penalty assessed for this violation is reasonable and justified.

C. PROPOSED ORDER

The ED has attached a revised Proposed Order which is incorporated herein. The revised Proposed Order sets forth the recommended Findings of Fact and Conclusions of Law supported by the evidence in this case and implementing these exceptions to the ALJ's PFD.

¹¹ PFD, page 10

D. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Executive Director prays the Commission to issue an Order assessing a penalty in the amount of four thousand dollars (\$4,000.00) against Al Jodoin dba Lake Whitney RV Community for the three violations proved in this case.

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

alfred oloko

by _____

Alfred A. Oloko

State Bar of Texas No. 24025571

Litigation Division, MC R-12

5425 Polk Avenue, Suite H

Houston, Texas 77023-1486

(713) 422-8918

(713) 422 8910 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2007, the Executive Director's Exceptions to the Administrative Judge's Proposal for Decision, 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 Executive Director's Exceptions to the Administrative Judge's Proposal for Decision was sent to the following parties by the method indicated:

The Honorable Craig Bennett
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Facsimile: (512) 936-0730

Via Facsimile and Interagency Mail

Al Jodoin
Lake Whitney RV Community
P. O. Box 1334
Whitney, Texas 76692

Via U.S. Mail

Al Jodoin
77 Ficher Court
Pagosa Springs, Colorado 81147

Via U.S. Mail

Chief Clerk
Office of the Chief Clerk, MC 105
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via Facsimile and Hand Delivery

Blas Coy
Office of the Public Interest Counsel, MC 103
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

Via Facsimile and Hand Delivery



Alfred A. Oloko
Attorney
Litigation Division
Texas Commission on Environmental Quality

WYATT SERVICE LIST (2011)

Al Jodoin dba Lake Whitney RV Community

2004-1768-MWD-E; SOAH Docket No. 582-0547639

Al Jodoin
Lake Whitney RV Community
P. O. Box 1334
Whitney, Texas 76692

Al Jodoin
77 Ficher Court
Pagosa Springs, Colorado 81147

Blas J. Coy, Jr., Attorney
Office of Public Interest Counsel, MC 1103
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Austin, Texas 78711-3087

The Honorable Craig Bennett
Administrative Law Judge
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025
Facsimile: (512) 936-0730

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Regarding the Administrative Enforcement Action
Against Al Jodoin d/b/a Lake Whitney RV Center;
TCEQ Docket No. 2004-1768-MWD-E; SOAH
Docket No. 2005-05-7639

On _____, 2007, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Al Jodoin d/b/a Lake Whitney RV Center (Respondent). A Proposal for Decision (PFD) was presented by Craig R. Bennett, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing in this matter on July 27, 2006, 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. Until July 2006, Respondent owned and operated a wastewater treatment facility (the Facility) located at the intersection of FM 1713 and Yellowstone Drive, Whitney, Hill County, Texas. Respondent is subject to the regulation of the Commission and was previously issued Water Quality Permit No. 0013891001 (the Permit), which was subsequently reissued by the Commission as TPDES Permit No. 0013891001 in January 2005.

2. On September 14, 2004, TCEQ staff conducted an inspection of Respondent's Facility to determine if Respondent was complying with the Permit, statutes within the Commission's jurisdiction, and the Commission's rules adopted thereunder.

3. On April 25, 2005, the Executive Director filed the EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent had violated the Permit and 30 TEX. ADMIN. CODE §§ 30.331(b), 30.350(d), 305.125(1) and (5), 319.7(c), and 319.5(a).

4. On July 11, 2005, the Commission referred this case to SOAH.

5. When the Respondent failed to appear at the preliminary hearing, a default proposal for decision was presented to the Commission.

6. After Respondent appeared at the Commission's open meeting, the Commission remanded the case back to SOAH for a hearing.

7. The ED subsequently filed two amended petitions. The Second Amended EDPRP, which governs this matter, was filed on June 1, 2006.

8. The evidentiary hearing in this matter was conducted on July 27, 2006. The ED appeared through staff attorney Alfred Okpohworho. Respondent appeared personally and represented himself.

9. The record closed on September 29, 2006, after the parties were given the opportunity to submit written closing arguments.

10. On September 14, 2004, the Facility was not being operated and maintained by a licensed Class "D" wastewater treatment operator, in violation of 30 TEX. ADMIN. CODE §§ 30.331(b), 30.350(d), 305.125(1) and (5), and the Permit (Other Requirements 1).

11. On September 14, 2004, Respondent was taking classes to obtain his Class C and Class D licenses. Respondent subsequently tested for and obtained his Class C and Class D licenses.
12. Respondent maintained records of effluent sample results at the Facility for a minimum of three years.
 - a. During the TCEQ staff inspection on September 14, 2004, Respondent provided documents showing effluent samples for the Facility for the prior three years. However, two months were missing from the documentation.
 - b. Within two weeks after the TCEQ staff inspection, Respondent located the effluent sample documents for the missing months and mailed them to TCEQ staff.

13. Respondent failed to measure flow after the final treatment unit.
 - a. Respondent had five septic tanks at the Facility and contracted the waste measurement work to Bio-Chem (a third-party company that specialized in this type of work).
 - b. Bio-Chem was measuring the effluent after the fourth septic tank, not the fifth septic tank (which was the final treatment unit).
 - c. By failing to measure effluent after the fifth septic tank, Respondent was not measuring after the final treatment unit.
14. Respondent was unaware that waste was being measured from the wrong septic tank. As soon as he learned of this, he contacted Bio-Chem; they corrected it and began measuring the waste from the fifth septic tank.
15. Respondent failed to take annual soil samples from the root zone of the irrigation site.
16. Respondent had the septic tanks at the Facility cleaned every six months.
17. No actual harm has been shown to have resulted from any of the violations in issue.

18. In July 2006, Respondent sold the Facility to a water subsidiary of Hilco Electric Cooperative.

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 Water Code or of the Texas Health and Safety Code 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 the violations alleged in this proceeding.

3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.

4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the Second Amended EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.

5. 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, Respondent was notified of the hearing on the alleged violations and the proposed penalties.

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. Respondent violated 30 TEX. ADMIN. CODE §§ 30.331(b), 30.350(d), 305.125(1) and (5), and the Permit (Other Requirements 1) by not having the Facility operated and maintained by a licensed Class "D" wastewater treatment operator.
8. Respondent maintained records of effluent sample results at the Facility for a minimum of three years as required by 30 TEX. ADMIN. CODE §§ 319.7(c), 305.125(1) and (5), and the Permit (Monitoring and Reporting Requirements 3.b), and furnished them to the ED within a reasonable time as required by 30 TEX. ADMIN. CODE § 305.125(6).
9. Respondent violated 30 TEX. ADMIN. CODE §§ 319.5(a) and 305.125(1), and the Permit (Interim Effluent Limitations and Monitoring Requirements 1) by failing to measure flow after the final treatment unit.
10. Respondent violated 30 TEX. ADMIN. CODE § 305.125(1) and (5), and the Permit (Other Requirements 2.f) by failing to take annual soil samples from the root zone of the irrigation site.
11. Respondent did not violate 30 TEX. ADMIN. CODE § 305.125(1) and (5), and the Permit (Other Requirements 2.h) by failing to record the accumulation of solids within the septic tanks at least once every six months.
12. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
 - a. Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
 - b. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - c. The history and extent of previous violations by the violator;

13. The violator's degree of culpability, good faith, and economic benefit gained through the violation;

e. The amount necessary to deter future violations; and

f. 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 administrative penalty should be assessed against Respondent.

15. Because Respondent has sold the Facility, no corrective action should be required of Respondent.

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 30 days after the effective date of this Commission Order, Al Jodoin d/b/a Lake Whitney RV Community shall pay an administrative Penalty in the amount of four thousand dollars (\$4,000.00) for violations of 30 TEX. ADMIN. CODE §§ 30.331(b), 30.350(d), 305.125(1) and (5), 319.5(a), and the Permit (Other Requirements 1), the Permit (Interim Effluent Limitations and Monitoring Requirements 1), and the Permit (Other Requirements

2. The imposition of this administrative penalty and Al Jodoin's compliance with all the terms

and conditions set forth in this Order resolve only the violations which are the subject of the Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for violations that are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: Al Jodoin d/b/a Lake Whitney RV Community; Docket No.2004-1768-MWD-E" to:

Financial Administration Division, Revenue Section
Attention: Cashier's Office, MC214
Texas Commission on Environmental Quality
P. O. Box 13088
Austin, Texas 78711-3088

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

5. 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