

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 14, 2007

Derek Seal
General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

CHIEF CLERK'S OFFICE

2007 MAY 14 PM 12:43

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: **SOAH Docket No. 582-07-0103; TCEQ Docket No. 2005-0419-MLM-E; In Re: the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Gilbert Carrillo, Respondent**

Dear Mr. Seal:

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

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **June 4, 2007**. Any replies to exceptions or briefs must be filed in the same manner no later than **June 14, 2007**.

This matter has been designated **TCEQ Docket No. 2005-0419-MLM-E ; SOAH Docket No. 582-07-0103**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Catherine C. Egan".

Catherine C. Egan
Administrative Law Judge

CCE:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: GILBERT CARRILLO

SOAH DOCKET NUMBER: 582-07-0103

REFERRING AGENCY CASE: 2005-0419-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ CATHERINE C. EGAN

REPRESENTATIVE / ADDRESS

PARTIES

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GILBERT CARRILLO

Note: MR. GILBERT CARRILLO REQUESTS TO RECEIVE ALL FILINGS VIA E-MAIL IN LIEU OF FAX.

xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-07-0103
TCEQ DOCKET NO. 2005-0419-MLM-E**

THE EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§ § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
V. GILBERT CARRILLO, RESPONDENT		

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) alleges that Gilbert Carrillo (Respondent) violated 30 TEX. ADMIN. CODE (TAC) §§ 327.5(a) and (c), 330.5(a), 335.504; TEX. WATER CODE (Water Code) § 26.121(a); and 40 CODE OF FEDERAL REGULATIONS (CFR) § 262.11. According to the ED, Respondent stored waste printing chemicals in corroded drums on his property and failed to do the following: (1) prevent unauthorized spills and discharges of these waste printing chemicals into or adjacent to waters in the State; (2) failed to submit written information describing the details of the discharges or spills and the adequacy of any response action; and (3) failed to conduct a hazardous waste analysis on the solid wastes stored on Respondent's property to assess whether the wastes were hazardous. The ED seeks a penalty of \$24,300 in administrative penalties and corrective action.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to the Water Code §§ 7.002 and 5.013. Respondent owns the real property located at 207 Brooks Street in San Antonio, Bexar County, Texas, that involved the management of municipal solid waste as defined in TEX. HEALTH & SAFETY CODE ch. 361. According to the ED, Respondent discharged municipal waste into or adjacent to waters in the state in violation of chapter 26 of the Water Code.

Respondent received notice of the ED's First Amended Report and Petition (EDFARP) and filed an answer on July 26, 2006. On August 30, 2006, the ED referred this matter to the State Office of Administrative Hearings (SOAH) pursuant to 30 TAC § 70.109. On October 12, 2006, the ED and Respondent filed an agreed hearing schedule requesting the hearing be set on March 13, 2007. Order No. 1 incorporated the agreed hearing schedule and admitted the jurisdictional exhibits.

On December 13, 2006, the ED filed his Second Amended Report and Petitioner (EDSARP) and sent it to Respondent at his address by both first class mail and certified mail. The ED also sent discovery requests to Respondent. Respondent received the discovery requests but did not respond. The ED moved for sanctions and the matter was set for a prehearing conference at 9:00 a.m. on January 29, 2007. Respondent failed to appear at 9:00 a.m. as ordered, but called later in the day and asked that the matter be reconvened at 2:00 p.m. that same day. The Administrative Law Judge (ALJ) reconvened the prehearing conference as Respondent requested. Respondent asked for and was granted an additional ten days to respond to the ED's discovery requests.

Despite being given additional time to respond to the ED's discovery requests, Respondent did not answer. The ALJ convened a prehearing conference on February 16, 2007. Respondent claimed that he had sent a response to the discovery to both the ALJ and the ED. However, neither the ALJ nor the ED had received it. The ALJ found Respondent had not answered the discovery as ordered and issued the following sanctions against Respondent:

1. Respondent was deemed to have waived all objections and claims of privilege in responding to the ED's discovery requests of November 8, 2006;
2. Respondent was deemed to have admitted to all of the ED's requests for admissions of November 8, 2006;
3. Respondent was not allowed to introduce at the hearing any information that either contradicted the deemed admissions or that was not produced in response to the ED's discovery requests of November 8, 2006; and

4. Respondent was not allowed to introduce any evidence at the hearing in support of his defense.

On March 13, 2007, the undersigned ALJ convened the hearing on the merits. Attorney Kathleen Decker appeared on behalf of the ED. Although properly notified of the hearing date, Respondent failed to appear either in person or through a representative.

The ALJ recommends that the Commission issue the attached default order, deem as true the facts alleged by the ED, assess the proposed \$24,300 administrative penalty against Respondent, and order the corrective action recommended by the ED.

SIGNED May 14, 2007.



**CATHERINE C. EGAN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties Against
Gilbert Carrillo
TCEQ Docket No. 2005-0419-MLM-E
SOAH Docket No. 582-07-0103

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Second Amended Report and Petition (EDSARP) recommending that the Commission enter an order assessing administrative penalties against Gilbert Carrillo (Respondent). A Proposal for Decision (PFD) was presented by Catherine C. Egan, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing in this case on March 13, 2007, in Austin, Texas.

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

I. FINDINGS OF FACT

1. At the time of the violations, Respondent owned and operated an unauthorized facility located at 207 Brooks Street, San Antonio, Bexar County, Texas (the Site), covering approximately 0.133 acres of real property where waste commercial printing chemicals were and are stored.

2. Respondent stored the waste printing chemicals in corroded drums on the Site that discharged to the ground in areas adjacent to an uncapped sanitary sewer inlet and off-site to a storm drain.
3. Respondent's facility involves or involved the management of municipal solid waste as defined in TEX. HEALTH & SAFETY CODE (Health & Safety Code) ch. 361.
4. On February 19, 20, 21, 24, 26, and 27, 2003; March 3, 5, 7, 10, 13, 21, and 26, 2003; September 29, 2004; December 17 and 29, 2004; and January 4, 2005, a San Antonio Regional investigator for TCEQ investigated the Site and found dark brown to black colored liquid on Respondent's property containing the following:
 - a. 70 micrograms per liter (ug/L) of n-Propylbenzene;
 - b. 790 ug/L of 1,2,4-Trimethylbenzene;
 - c. 220 ug/L of 1,3,5-Trimethylbenzene;
 - d. 10.1 ug/L of 2-Butoxyethanol;
 - e. 28 ug/L of p-Benzoquinone;
 - f. 2.1 ug/L of Undecane;
 - g. 46.9 ug/L of Triethylene glycol; and
 - h. 18.1 ug/L of Hydroquinone.
5. On February 19, 20, 21, 24, 26, and 27, 2003; March 3, 5, 7, 10, 13, 21, and 26, 2003; September 29, 2004; December 17 and 29, 2004; and January 4, 2005, Respondent discharged municipal waste into or adjacent to waters in the state of Texas by doing the following:
 - a. failing to abate and contain spills and discharges;

- b. failing to neutralize the effects of spills, remove the discharged or spilled substances and manage the waste; and
 - c. failing to prevent unauthorized discharges and/or imminent threats of unauthorized discharges of municipal waste into or adjacent to waters in this state.
6. Respondent failed to submit written information to the appropriate TCEQ Regional Office within 30 working days after discovery of the emergency response spill incident on February 19, 2003, describing the details of the discharge or spill and supporting the adequacy of Respondent's response action.
 7. Respondent failed to conduct a hazardous waste determination on the solid wastes stored at the Site, as documented during the investigations conducted from February 19, 2003, to January 4, 2005.
 8. Respondent received notice of the violations described above from TCEQ on or about February 27, 2005.
 9. On July 3, 2006, the Executive Director (ED) filed his First Amended Report and Petition (EDFARP), in accordance with Water Code § 7.054, alleging that Respondent had committed the above-described violations.
 10. In the EDFARP, the ED sought \$27,000 in administrative penalties for the violations and proposed corrective action.
 11. On July 3, 2006, the same date the EDFARP was filed, the ED mailed a copy of the EDFARP to Respondent.

12. On July 26, 2006, Respondent filed an answer to the EDFARP requesting a hearing, and the matter was subsequently referred to SOAH for hearing.
13. On September 21, 2006, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to the Respondent. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the ED alleged Respondent violated;
 - d. Referred to the EDFARP, a copy of which was attached, which indicated the matters asserted by the ED;
 - e. Advised Respondent, 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 EDFARP being deemed as true and the relief sought in the notice possibly being granted by default; and,
 - f. Included a copy of the ED's penalty calculation worksheet, that showed how the penalty was calculated for the alleged violations.
14. On October 12, 2006, the ED and Respondent appeared for the preliminary hearing, agreed to a scheduling order setting the hearing on the merits for March 13, 2007. The ALJ adopted the agreed scheduling order and admitted the jurisdictional exhibits.
15. On December 13, 2006, the ED filed his second Amend Petition and Report, that alleged the above-described violations, sought an administrative penalty of \$24,300, and proposed corrective action. The ED served the EDSARP on Respondent.

16. The ED sent discovery requests to Respondent that Respondent received but did not answer.
17. On January 29, 2007, the ALJ considered the ED's motion for sanctions. Respondent asked for, and was granted by the ALJ, an additional ten days to respond to Staff's discovery.
18. Despite being given additional time to respond to the ED's discovery request, Respondent did not answer the discovery.
19. On February 16, 2007, the ALJ found that Respondent had not complied with the order directing Respondent to answer the ED's discovery request and issued the following sanctions against Respondent:
 - a. Respondent was deemed to have waived all objections and claims of privilege in responding to the ED's discovery requests of November 8, 2006;
 - b. Respondent was deemed to have admitted to all of the ED's requests for admissions of November 8, 2006;
 - c. Respondent was not allowed to introduce at the hearing any information that either contradicted the deemed admissions or that was not produced in response to the ED's discovery requests of November 8, 2006; and
 - d. Respondent was not allowed to introduce any evidence at the hearing in support of his defense.
20. On March 13, 2007, ALJ Catherine C. Egan convened the hearing on the merits. Attorney Kathleen Decker appeared on behalf of the ED. Although properly notified of the hearing date, Respondent failed to appear either in person or through a representative.
21. Based on the Respondent's failure to appear at the hearing, the ED moved for a default against Respondent in which all of the ED's allegations in the EDSARP would be deemed

admitted as true, the penalties the ED sought therein would be assessed against Respondent, and the corrective actions proposed therein would be ordered.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE (Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or the Health & Safety Code within the Commission's jurisdiction, or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 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 Water Code § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent was notified of the EDFARP and EDSARP and of the opportunity to request a hearing on the violations alleged and the penalties and corrective actions proposed therein.
4. As required by TEX. GOV'T CODE (Gov't Code) § 2001.052; Water Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing. Additionally, Respondent was notified that if Respondent failed to appear at the hearing, a default could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.
5. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law pursuant to Gov't Code ch. 2003.

6. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default should be entered against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106(b); and
 - b. The allegations contained in the EDSARP are admitted as true.
7. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC §§ 327.5(a) and (c), 330.5(a), and 335.504; Water Code § 26.121(a); and 40 CFR § 262.11.
8. In determining the amount of an administrative penalty, Water Code § 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.
9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on the above Findings of Fact, the factors set out in Water Code § 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for each of the

alleged violations and a total administrative penalty of \$24,300 is justified and should be assessed against the Respondent for the violations described in the Findings of Fact:

11. Based on the above Findings of Fact and Conclusions of Law, Respondent should be required to take the corrective action measures recommended by the EDSARP.

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 Order, the Respondent shall:
 - a. Pay an administrative penalty in the amount of \$24,300 for the violations described above and all outstanding fees, including any associated penalties and interest, with the notation "Gilbert Carrillo.; TCEQ Account No. _____" to:

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

2. Immediately upon the effective date of this Order, Respondent shall cease all unauthorized discharges and begin efforts to prevent additional discharges at the Site by repairing and maintaining all berms around the Site and by replacing the covering over the sanitary sewer inlet.
3. Within 15 days after the effective date of this Order, Respondent shall:

- a. Submit written certification as described below, and include detailed support documentation including photographs, receipts, or other records to demonstrate compliance with Ordering Provision 2.

The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

With a copy to:

Mr. Henry Karnei, Jr., Waste Section Manager
San Antonio Regional Office
Texas Commission on Environmental Quality
14250 Judson Road
San Antonio, Texas 78233-4480

- b. Begin to neutralize the effects of the spill incidents and resulting contamination, including removing the discharged or spilled substances, initiating efforts to stop

discharges from the drums, and managing the wastes, in accordance with 30 TAC § 327.5(a).

- c. Submit written documentation to TCEQ's Regional Office that describes the details of the discharge or spill and supports the adequacy of the response action.
 - d. Perform a hazardous waste determination on the contents of the drums at the Site, in accordance with 30 TAC § 335.504 and CFR § 262.11.
4. Within 30 days after the effective date of this Order, Respondent shall submit written documentation demonstrating compliance with Ordering Provisions 3(b) and (d).
 5. Within 60 days after the effective date of this Order, Respondent shall submit a Release Investigation Report (RIR) for review and approval. The RIR shall document the results of a site investigation which shall include analysis of all areas of the Site which were included in the emergency spill response conducted on February 19, 2003, as well as all areas of contamination noted in all subsequent investigations of the Site. The purpose of the RIR is to determine whether the release from the corroded drums trigger the Texas Risk Reduction Program (TRR), 30 TAC ch. 350. The release investigation shall be performed in accordance with the TCEQ Remediation Division Guidance Document entitled *Determining Which Releases are Subject to TRRP*, revised October 21, 2003, or equivalent guidance approved by the Commission. Specifically, the RIR shall include an evaluation of Chemicals of Concern (COC) from the site including, but not limited to, n-Propylbenzene, 1,2,4-Trimethylbenzene, 1,3,5-Trimethylbenzene, 2-Butoxyethanol, p-Benzoquinone, Undecane, Triethylene glycol, and Hydroquinone. Information required in the report may include the

collection and analyses of additional samples or the completion of a Tier 1 Ecological Exclusion Criteria Checklist.

6. Within 120 days after the effective date of this Order, Respondent shall submit for approval an Affected Property Assessment Report (APAR) in accordance with 30 TAC § 350.91 if it is determined that releases at the Site are subject to the TRRP rules based on the results of the RIR. If response actions are necessary, Respondent shall comply with all applicable requirements of the TRRP found in 30 TAC ch. 350, that may include plans, reports, and notices under subchapter E (30 TAC §§ 350.92 to 350.96); financial assurance [30 TAC § 350.33(1)]; and Institutional Controls under subchapter F.
7. Respond shall notify TCEQ's San Antonio Regional Office in writing at least 10 working days prior to conducting any investigative, remedial, or monitoring activities to allow the TCEQ personnel the opportunity to observe the activities and to split any soil, sediment, groundwater, or surface water sample that may be collected.
8. Within 135 days after the effective date of this Order, Respondent shall submit written certification as described below and include detailed supporting documentation, including photographs, receipts related to the removal and proper disposal of contaminated soils, or other records to demonstrate compliance with all requirements of this Order. There certification shall be notarized by a State of Texas Notary Public and include the following certification language:

I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there

are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Mr. Henry Karnei, Jr., Waste Section Manager
San Antonio Regional Office
Texas Commission on Environmental Quality
14250 Judson Road
San Antonio, Texas 78233-4480

9. The payment of the administrative penalties and the performance of all corrective actions ordered herein will completely resolve 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.
10. 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 Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Order.
11. 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.
12. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.

13. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
14. 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