

Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*  
Glenn Shankle, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 7, 2007

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 105  
Austin, Texas 78711-3087

Re: Executive Director's Proposed Modifications to Proposal for Decision  
Boraas Properties, Inc.  
TCEQ Docket No. 2005-1336-MWD-E  
SOAH Docket No. 582-1336-MWD-E

Dear Ms. Castañuela:

Enclosed for filing is the original and eleven copies of the "Executive Director's Proposed Modifications to Proposal for Decision" ("Proposed Modifications") and a Proposed Order in the case against Boraas Properties, Inc

If you have any questions or comments, please call me at (512) 239-0078.

Sincerely,

A handwritten signature in cursive script that reads "Rachael Gaines".

Rachael Gaines  
Attorney  
Litigation Division

Enclosures

cc: Ruben Soto, Enforcement Division, TCEQ, MC 169  
Blas Coy, Public Interest Counsel, TCEQ, MC 103  
TCEQ Central Records, MC 212

2007 MAY -7 PM 4:13  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

SOAH DOCKET NO. 582-06-2363  
TCEQ DOCKET NO. 2005-1336-MWD-E

2007 MAY -7 PM 4: 13

CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,

Petitioner

v.

BORAAS PROPERTIES, INC.

Respondent

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BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S PROPOSED MODIFICATIONS  
TO PROPOSAL FOR DECISION**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Proposed Modifications to the Honorable Administrative Law Judge Stephen J. Pacey's Proposal for Decision ("PFD"), pursuant to 30 TEX. ADMIN. CODE § 80.257.

**I. Introduction**

During all times relevant to this case, Boraas Properties, Inc. (the "Respondent") owned and operated a wastewater treatment facility located approximately 1,000 feet west and 1,800 feet north of the intersection of Farm-to-Market Road 1417 and Farm-to-Market Road 691, Dallas, Grayson County, Texas (the "Facility"). Based on the evidence gathered by the TCEQ, the Executive Director (the "ED") brought an enforcement action against the Respondent, seeking an administrative penalty of \$11,385.00, for the violations alleged in the Executive Director's Preliminary Report and Petition ("EDPRP"). The alleged violations were that the Respondent violated:

- 30 Tex. Admin. Code § 305.125(1), Tex. Water Code § 26.121(a) and TPDES Permit No. 13325001, Effluent Limitations and Monitoring Requirements Nos. 1, 3 and 6 by failing comply with permitted effluent limits during February, March, April, May, June, July, August, and September of 2004;
- 30 Tex. Admin. Code § 305.125(1), Texas Water Code § 26.121(a) and TPDES Permit No. 13325001, Effluent Limitations and Monitoring Requirements No. 1 by failing to comply with permitted effluent limits during November and December 2004; and

- 30 Tex. Admin. Code § 21.4 and Texas Water Code § 5.702 by failing to pay consolidated water quality assessment fees for fiscal years 2003, 2004 and 2005 for TCEQ Financial Administration Account No. 23003882.

The State Office of Administrative hearings conducted an evidentiary hearing on November 14, 2006. At that hearing, the Respondent, represented by its President, Mr. Brian Boraas, stipulated and agreed to the allegations in the EDRP; therefore, the only issue was the amount of the penalty and corrective actions.

On January 4, 2007, the Administrative Law Judge ("ALJ") reopened the administrative record to obtain information from the parties concerning the amount of the penalty enhancement; a response was filed to the ALJ's request on January 18, 2007 by TCEQ Staff Attorney, Shana Horton.

In his PFD issued on April 16, 2007, the ALJ concluded that the Respondent had admitted to the violations and that the ED had proved that the proposed penalty was properly calculated under the Commission's Penalty Policy.

## II. Proposed Modifications

The ED agrees with and supports the adoption of the ALJ's findings and conclusions. Specifically, the ED agrees with the ALJ's determinations that the Respondent admitted that the violations occurred, and that the ED has proven that the proposed penalty was properly calculated under the Commission's Penalty Policy.

The Executive Director respectfully requests that the following changes be made to the ALJ's PFD and Order:

1. Add references to the Texas Water Code in the introductory paragraph of the PFD. Currently, line 4 only addresses Title 30 of the Texas Administrative Code and the last two lines only reference the Respondent's permit and 30 TEX. ADMIN. CODE §§ 305.125(1) and 21.4.
2. Change the location of the wastewater treatment facility from "100 feet west" to "1,000 feet west" on page 1 of the PFD and page 1 of the Order.

3. In the first full paragraph on page 2 of the PFD, please include the Texas Water Code violations that the Executive Director alleged; specifically, TEX. WATER CODE §§ 5.702 and 26.121(a).
4. In the first full paragraph on page 3 of the PFD, please include a citation to Texas Water Code § 26.121(a) in the third sentence. Specifically, please change the sentence to read, "This nonconformity with TEX. ADMIN. CODE (TAC) § 305.125(1) and Texas Water Code 26.121(a) was treated reasonably by the ED."
5. Change the TCEQ Enforcement Coordinator's name from Ruben "Sota" to Ruben "Soto" in the PFD.
6. In the second full paragraph on page 3 of the PFD, please change the parenthetical from (a "potential minor" violation) to (an "actual minor" violation). Since Mr. Soto testified that there was a discharge, albeit the levels were insignificant and did not exceed protective levels, the discharge was "actual."
7. In the last paragraph on page 3 of the PFD, please include citations to Texas Water Code § 26.121(a) and TPDES Permit No. 13325001 in the first sentence. Specifically, please change the sentence to read, "The second violation Respondent admitted to was its failure to comply with the permitted effluent limits during November and December 2004 violating 30 TAC § 305.125(1), Texas Water Code § 26.121(a) and TPDES Permit No. 13325001."
8. In the first line on page 4 of the PFD, please change the parenthetical from (a "potential moderate" violation) to (an "actual moderate" violation). Mr. Soto testified that even though they did not exceed protective levels, the amounts discharged at the time of the violations were significant. Since an actual discharge existed, please change the word "potential" to "actual."
9. In the third line on page 4 of the PFD, please delete the word "as" at the end of the first full sentence.
10. In the first paragraph on page 6 of the PFD, please change "proposeOrder" to read "proposed Order" in line 2.
11. In Conclusion of Law No. 6, on page 4 of the Order, please include the month of February in the list of months in which the Respondent failed to comply with permitted effluent limits.

12. On page 6 of the order, in paragraph 1, please change the TCEQ docket number from "2005-1336768-MWD-E" to "2005-1336-MWD-E."
13. On page 6, please delete the semi-colon at the end of paragraph 2 on page 6 of the Order.

### III. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the proposed modifications requested by the Executive Director.

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:   
Rachael R. Gaines  
Attorney  
State Bar of Texas No. 24046758  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-0078  
(512) 239-3434 (fax)

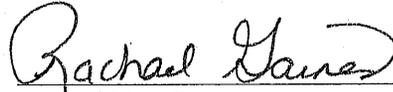
CERTIFICATE OF DELIVERY

I hereby certify on this 7th day of May, 2007, the original and 11 copies of the foregoing "Executive Director's Proposed Modification to the Proposal for Decision" ("Proposed Modifications") were filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that a copy of the Proposed Modifications were sent via facsimile to ALJ Stephen Pacey with the State Office of Administrative Hearings at (512) 475-4993.

I further certify that on this day, a true and correct copy of the foregoing Proposed Modifications were sent via first class mail and certified mail, return receipt requested, to Mr. Brian Boraas, President, Boraas Properties, Inc., 3712 Palm Drive, Keller, Texas 76248. (Article No. 70042510000391230292.)

I further certify that on this day a true and correct copy of the foregoing Exceptions were hand delivered to Blas Coy, Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



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Rachael R. Gaines  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER** Requiring Payment of Administrative Penalties  
and Requiring Corrective Action  
by Boraas Properties, Inc  
TCEQ Docket No. 2005-1336-MWD-E  
SOAH Docket No. 582-06-2363

On \_\_\_\_\_, 2007, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Boraas Properties, Inc (Respondent). A Proposal for Decision (PFD) was presented by Stephen J. Pacey, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on November 14, 2006, in Austin, Texas.

The Executive Director, represented by Shana Horton, appeared at the hearing. Respondent appeared *pro se*. After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. At the time of the violations alleged in the EDPRP, Respondent owned and operated a wastewater treatment facility (the Facility) located approximately 1,000 feet west and 1,800

feet north of the intersection of Farm-to-Market Road 1417 and Farm-to-Market Road 691, Dallas, Grayson County, Texas.

2. On January 20, 2006, the Executive Director (“ED”) filed with the Commission a Preliminary Report and Petition (“EDPRP”), seeking assessment of administrative penalties against Respondent.
3. The EDPRP included a statement of the allegations and applicable laws and rules, recommendations for a penalty and technical corrective actions, and a statement of Respondent’s right to a hearing on the occurrence of the violations, appropriate penalties, and proposed remedial actions.
4. On January 20, 2006, notice and a copy of the EDPRP were mailed to Respondent by certified mail, return receipt requested, and by first class mail at Respondent’s last known address.
5. On February 14, 2006, an answer on behalf of Respondent was filed with the Commission, requesting a hearing on the matter.
6. On May 25, 2006, the Chief Clerk of the Commission provided notice by certified mail to Respondent concerning the preliminary hearing scheduled in this docket before SOAH.
7. The parties waived the preliminary hearing and submitted to SOAH a proposed scheduling order that included a request for an evidentiary hearing on September 14, 2006.
8. The parties proposed scheduling order was adopted in the ALJ’s Order No. 1, dated July 5, 2006, and sent to the parties in this case.
9. Respondent’s attorney, who withdrew from the case, supplied Respondent’s address with an incorrect zip code; consequently, Respondent did not receive Order No 1.
10. On September 25, 2006, the ALJ issued Order No. 2 that set the hearing for

November 14, 2006, and was received by all parties

11. On September 25, 2006, the ED filed with SOAH the EDPRP, recommending that an administrative penalty be assessed against Respondent and corrective action be taken.
12. The evidentiary hearing was conducted on November 14, 2006, in Austin, Texas. The ED and Respondent appeared and presented evidence and argument.
13. During a record review conducted on May 13, 2005, a member of the TCEQ Central Office staff documented that Respondent violated the following:
  - a. 30 TEX. ADMIN. CODE § 305.125(1), TEX. WATER CODE § 26.121(a) and Permit No. 0013325001, Effluent Limitations and Monitoring Requirements Nos. 1, 3, and 6, by failing to comply with permitted effluent limits during February, March, April, May, June, July, August, September, November and December 2004; and
  - b. 30 TEX. ADMIN. CODE § 21.4 and TEX. WATER CODE § 5.702, by failing to pay consolidated water quality assessment fees for fiscal years 2003, 2004, and 2005 for TCEQ Financial Administration Account No. 23003882.
14. During the hearing, Respondent stipulated and acknowledged that the violations identified in Finding of Fact No. 13 had occurred, as alleged.

## II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE. § 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 & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE. § 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. § 7.073.
4. As required by TEX. WATER CODE. § 7.055 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondent 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.
5. As required by TEX. GOV'T CODE. § 2001.052; TEX. 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 on the alleged violations and the proposed penalties. 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. ch. 2003.
6. Based upon the above Findings of Fact, Respondent violated 30 TAC § 305.125(1), and TEX. WATER CODE § 26.121(a), as well as TPDES Permit No. 0013325001, Effluent Limitations and monitoring Requirements 1, 3, and 6, by failing to comply with permitted effluent limits during February, March, April, May, June, July, August, and September 2004 (violation No. 1).
7. Based upon the above Findings of Fact, Respondent violated 30 TAC § 305.125(1), and TEX. WATER CODE § 26.121(a), as well as TPDES Permit No. 0013325001, Effluent Limitations and monitoring Requirement 1, by failing to comply with permitted effluent limits during November and December 2004 (violation No. 2).
8. In calculating Respondent's penalty for violation No.1, the ED appropriately applied the Commission's previously established Penalty Policy (dated September 1, 2002) and correctly classified Respondent's violation under that policy's Environmental/Property and Human

Health Matrix as a "actual release" threatening "minor harm," thus entailing a base penalty of \$1,000.00.

9. The ED appropriately applied the 2002 Penalty Policy to determine that Respondent's violation No. 1 recurred on a quarterly basis in 2004, thus constituting three separate instances of such violation, resulting in a \$3,000.00 base penalty for this violation.
10. In calculating the Respondent's penalty for violation No.2, the ED appropriately applied the Commission's previously established Penalty Policy (dated September 1, 2002) and correctly classified Respondent's violation under that policy's Environmental/Property and Human Health Matrix as a "actual release" threatening "moderate harm," thus entailing a base penalty of \$2,500.00, resulting in a total base penalty for both violations is \$5,500.00.
11. The ED appropriately applied the Penalty Policy to adjust base penalties upward by 132 percent on the basis of Respondent's past compliance history.
12. Based upon the above Findings of Fact and Conclusions of Law, Respondent should be assessed an administrative penalty in the amount of \$11,385.00.
13. Based on the above Findings of Fact, Respondent should be required to take the following corrective action measure that the Executive Director recommended: pay consolidated water quality assessment fees for fiscal years 2003, 2004 and 2005, including any associated penalties and interest.

**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, Borraas Properties, Inc. (Respondent) shall pay an administrative penalty in the amount of \$11,385.00 for violation of the Permit and 30 TEX. ADMIN. CODE §§ 305.125(1) and 21.4 and TEX. WATER CODE §§ 5.702 and 26.121(a). 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: Borraas Properties, Inc; TCEQ Docket No. 2005-1336-MWD-E; Enforcement ID No. 26386" 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. Within 30 days of the effective date of the Commission Order, Respondent shall pay to the address noted above all consolidated water quality assessment fees, including any associated penalties and interest, with the notation, Borraas Properties, Inc- Financial Administration Account No. 2300882.
3. Within 30 days after the effective date of the Commission Order, Respondent shall submit written certification of compliance with Ordering Provision No. 2.
4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent 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. § 2001.144.
7. As required by TEX. WATER CODE § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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