

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



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

*Protecting Texas by Reducing and Preventing Pollution*

December 21, 2006

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

Re: Executive Director's Exceptions to the ALJ's Proposal for Decision  
Joe Boy Johnson; Enforcement ID No. 26818; RN104674262  
TCEQ Docket No. 2005-1582-IHW-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of the 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision.

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the letter to the Respondent. Please file stamp these documents and return them to Mark Curnutt, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0624.

Sincerely,

A handwritten signature in cursive script that reads "Mark A. Curnutt".

Mark A. Curnutt  
Attorney  
Litigation Division

Enclosures

cc: Mr. Joe Boy Johnson, Owner, Route 1, Box 34, Brady, Texas 76825  
Michael Meyer, Enforcement Division, TCEQ, MC 128  
Mark Newman, Waste Section Manager, TCEQ, MC R-8  
Blas Coy, Public Interest Counsel, TCEQ, MC 103

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



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 21, 2006

**Via Interagency mail, and  
Via Facsimile Transmission to: (512) 475-4994**

The Honorable Thomas H. Walston  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision;  
Joe Boy Johnson; Enforcement ID No. 26818; RN104674262;  
SOAH Docket No. 582-06-2407; TCEQ Docket No. 2005-1582-IHW-E

To The Honorable Judge Walston:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision signed on December 1, 2006. If you have any questions or comments, please call me at (512) 239-0624.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Curnutt".

Mark A. Curnutt  
Attorney  
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105  
TCEQ Central Records, MC 212  
Mr. Joe Boy Johnson, Owner, Route 1, Box 34, Brady, Texas 76825

SOAH DOCKET NO. 582-06-2407  
TCEQ DOCKET NO. 2005-1582-IHW-E

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CHIEF CLERKS OFFICE

EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER

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BEFORE THE

VS.

STATE OFFICE OF

JOE BOY JOHNSON,  
RESPONDENT

ADMINISTRATIVE HEARINGS

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

TO THE HONORABLE JUDGE WALSTON:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), represented by the Litigation Division, and files these Exceptions to the Administrative Law Judge's Proposal for Decision. In support thereof, the Executive Director would show the following:

**I. PROPOSED ORDER**

The Executive Director ("ED") respectfully requests that the ALJ make the following revisions to the Proposed Order:

**CONCLUSION OF LAW NO. 2**

The Executive Director respectfully requests Conclusion of Law No. 2 be revised to change the statutory citation for the authority of the Commission to assess an administrative penalty and order corrective actions. Currently, the sentence reads, "Pursuant to Water Code §§ 7.051 and 7.073, the Commission may assess an administrative penalty and order corrective action 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." The sentence should be changed and revised to reflect the underlined citation, "Pursuant to Water Code §§ 7.051 and 7.053, the Commission may assess an administrative penalty and order corrective action against any person who violates a provision of the Water Code or of the Texas Health &

The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision  
SOAH Docket No. 582-06-2407  
TCEQ Docket No. 2005-1582-IHW-E  
page 2

Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder."

**ORDERING PROVISION NO. 1**

The Executive Director respectfully requests that Ordering Provision No. 1 be revised to maintain consistency with Commission Orders. Ordering Provision 1, second sentence reads, "The imposition of this administrative penalty completely resolves the violations set forth by this Order." The sentence should be changed to read, "The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action."

Respectfully submitted,

Texas Commission on Environmental Quality

Glenn Shankle  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Mary R. Risner, Division Director  
Litigation Division

By: 

Mark A. Curnutt  
State Bar of Texas No. 24051615  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
Telephone: (512) 239-3400  
Fax: (512) 239-3434

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CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on December 21<sup>st</sup>, 2006, the original and eleven (11) copies of the foregoing "Exceptions to Administrative Law Judge's Proposal for Decision" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (Article No. 7002 0860 0004 6476 6963), to:

Mr. Joe Boy Johnson, Owner  
Route 1, Box 34  
Brady, Texas 76825

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

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via fax to 512/475-4994 and mailed via inter agency mail, to:

The Honorable Thomas H. Walston  
Administrative Law Judge  
State Office of Administrative Hearings  
PO Box 13087  
Austin, Texas 78711-3087



Mark A. Curnutt  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER:** assessing an administrative penalty against and requiring corrective action by Joe Boy Johnson; TCEQ Docket No. 2005-1582-IHW-E; SOAH Docket No. 582-06-2407

On \_\_\_\_\_, 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 Joe Boy Johnson (Respondent). A Proposal for Decision (PFD) was presented by Thomas H. Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on October 12, 2006, in Austin, Texas. The Executive Director, represented by Staff Attorney Mark Curnett, appeared at the hearing. The 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. Respondent owns land approximately 1.5 miles north of the intersection of County Road 128 and County Road 148, near Melvin, McCulloch County, Texas.
2. Around 1986, Respondent leased a small portion of his land to Mr. Ronnie Bailey, who operated Bailey Metal Processors, Inc.

3. For about seven to nine months in 1986, Bailey Metal Processors, Inc. operated an incinerator on Respondent's property to burn insulation off scrap wire in order to recover the copper inside.
4. During 1986, Respondent allowed Bailey Metal Processors, Inc. to dispose of industrial solid waste on Respondent's property without a permit authorizing such activity.
5. In 2005, the TCEQ San Angelo Office received an anonymous complaint about the wire burning operations on Respondent's property.
6. On June 3, 2005, a TCEQ investigator from San Angelo conducted an investigation of Respondent's property in response to the anonymous complaint. The investigator observed that ash and burn areas remained, along with small metal and plastic pieces, and that the burn location was devoid of vegetation.
7. The TCEQ investigator took five soil samples from the burn site on Respondent's property for testing: four from the area without vegetation and one about fifty feet south, in a vegetated area that was once a road to the site. For those samples, total lead levels and lead levels using the EPA Toxicity Characteristic Leachate Procedure (TCLP) were:

Sample	Total Lead Level	TCLP
No. 1	71,800 mg/kg	8.8 mg/l
No. 2	38,400 mg/kg	716.0 mg/l
No. 3	67,800 mg/kg	302.0 mg/l
No. 4	6,110 mg/kg	92.0 mg/l
No. 5	5,720 mg/kg	27.2 mg/l
EPA Hazardous Level	NA	≥ 5.0 mg/l

8. The TCLP levels for all five samples exceeded the EPA Hazardous Level for lead.
9. The ED offered no evidence that the industrial solid waste on Respondent's property caused a discharge or imminent threat of discharge into the waters of the state.
10. The ED offered no evidence concerning any nearby surface waters or underlying groundwater or the ability of the solid waste on Respondent's property to enter any state waters.
11. The ED offered no evidence that the waste on Respondent's property created a nuisance.
12. The burn site on Respondent's property is at a remote location, on private property, inaccessible to the public, and not within five miles of any underground water source.
13. The ED did not establish by a preponderance of the evidence that the disposal of industrial solid waste on Respondent's property caused a discharge or imminent threat of discharge into the waters of the state, created a nuisance, or created a danger to the public health and welfare.
14. On March 13, 2006, the Executive Director issued the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, 30 TEX. ADMIN. CODE (TAC) chs. 70 and 335, and TEX. HEALTH & SAFETY CODE ch. 361.
15. The EDPRP alleged that Respondent violated 30 TAC §§ 335.2(a) and 335.4 and 40 CODE OF FEDERAL REGULATIONS (CFR) § 270.1 by failing to dispose of hazardous waste in an authorized manner protective of human health and the environment.
16. The EDPRP recommended that the Commission enter an enforcement order assessing an administrative penalty of \$2,500.00 against Respondent.

17. The EDPRP also recommended corrective action to require Respondent to submit for approval an Affected Property Assessment Report pursuant to 30 TAC § 350.91 for soils affected by elevated lead levels and to take response actions as necessary.
18. The Executive Director mailed a copy of the EDPRP to Respondent.
19. Respondent filed an answer to the EDPRP and requested a hearing, so the matter was referred to SOAH for a contested case hearing.
20. On June 1, 2006, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondent.
21. 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 Executive Director alleged Respondent violated;
  - Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
  - 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 EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
  - Included a copy of the Executive Director's penalty calculation worksheet, which shows how the penalty was calculated for the alleged violations.
22. On June 2, 2006, the parties jointly waived appearance at the preliminary hearing, stipulated to the jurisdictional exhibits, and submitted an agreed procedural schedule. Based on the agreement of the parties, the ALJ adopted the agreed procedural schedule and ordered that the evidentiary hearing on the merits convene on October 12, 2006.

23. On October 12, 2006, the ALJ convened the evidentiary hearing. Staff and Respondent appeared and fully participated in the hearing, and the record closed the same day.

## II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. WATER CODE ANN. (Water Code) §§ 5.013 and 7.002.
2. Pursuant to Water Code §§ 7.051 and 7.053, the Commission may assess an administrative penalty and order corrective action 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.
3. Under Water Code § 7.052(c), the amount of a penalty in this case may not exceed \$10,000 per day for each violation.
4. As required by Water Code § 7.055 and 30 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 ANN. § 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 on the alleged violations and the proposed penalties and corrective action.
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, Respondent violated 30 TAC § 335.2(a) by allowing the disposal of industrial solid waste on his property without a permit.
8. The ED failed to prove by a preponderance of the evidence that Respondent violated 30 TAC § 335.4.
9. In determining the amount of an administrative penalty, the 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.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in the Code § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for Respondent's violation. An administrative penalty of \$2,500.00 is justified and should be assessed against Respondent.
12. Respondent should be required to obtain an Affected Property Assessment Report and take corrective action as necessary.

**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, Joe Boy Johnson shall pay an administrative penalty in the amount of \$2,500.00 for violating 30 TAC § 335.2(a). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. 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: Joe Boy Johnson; TCEQ Docket No. 2005-1582-IHW-E; Enforcement ID NO. 26818 " 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 120 days after the effective date of this Order, Respondent shall submit for approval an Affected Property Assessment Report pursuant to 30 TEX. ADMIN. CODE § 350.91, for soils affected by elevated lead levels. If response actions are necessary, Respondent shall comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TEX. ADMIN. CODE ch. 350, which may include: Submitting plans, reports, and notices under Subchapter E (30 TEX. ADMIN. CODE §§ 350.92 to 350.96); financial assurance (30

TEX. ADMIN. CODE § 350.33(1)); and Institutional Controls under Subchapter F (30 TEX. ADMIN. CODE § 350.111) to:

Ata ur Rahman, Manager  
Corrective Actions Section  
Remediation Division, MC 127  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

with a copy to:

Work Leader  
Team 7, Section IV  
Enforcement Division, MC 128  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

and a copy to:

Waste Section Manager  
San Angelo Regional Office  
Texas Commission on Environmental Quality  
622 South Oakes, Suite K  
San Angelo, TX 76903-7013

3. The Executive Director may grant an extension of any deadline in this Order or in any plan, report, or other document submitted pursuant to this Order, upon a written and substantiated showing of good cause. All requests for extensions by Respondent shall be made in writing to the Executive Director. Extensions are not effective until Respondent receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.
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 Respondent if the

Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this 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 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**