State Office of Administrative Hearings

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2009 FEB 27 PM 4:01

CHIEF CLERKS OFFICE

Cathleen Parsley
Chief Administrative Law Judge

February 26, 2009

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-1895; TCEQ Docket No. 2006-0571-MWD-E; In Re: Assessing Administrative Penalties Against and Ordering Corrective Action by the City of Thornton

Dear Mr. Trobman:

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 March 20, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than March 30, 2009.

This matter has been designated **TCEQ Docket No. 2006-0571-MWD-E; SOAH Docket No. 582-08-1895**. 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 seven 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,

KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

KJQ/ds
Enclosures
cc: Mailing List

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STYLE/CASE: CITY OF THORNTON

SOAH DOCKET NUMBER: 582-08-1895

REFERRING AGENCY CASE: 2006-0571-MWD-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH

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xc: Docket Clerk, State Office of Administrative Hearings

TEXAS
COMMISSION
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QUALITY

2009 FEB 27 PM 4: 01

CHIEF CLERKS OFFICE

SOAH DOCKET NO. 582-08-1895
DOCKET NO. 2006-0571-MWD-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
THE CITY OF THORNTON, Respondent	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

In this enforcement action, the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) asserts that the City of Thornton (Respondent) violated the Texas Water Code and the TCEQ's regulations by an unauthorized discharge and violations of its effluent limits in its permit. The Administrative Law Judge (ALJ) concludes that the Respondent committed the violations and that the penalty was calculated correctly. Accordingly, the Respondent should pay a total penalty of $48,480 and take the corrective actions sought by the ED.

II. BACKGROUND

The Respondent is a small city in Limestone County that is authorized to discharge 0.041 million gallons per day (MGD) of domestic wastewater under Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010824001. The discharge route is to an unnamed tributary of Steele Creek; thence to Steele Creek; thence to the Navasota River below Lake Limestone in Segment 1209 of the Brazos River Basin.[1] The wastewater treatment plant (WWTP) serves approximately 500 people.

[1] ED Exh. 12, p. 01, 02. All references to the page numbers in an exhibit refer to the Bates stamp numbers of the exhibit and not the page numbers of the actual document.

In 2006, the ED conducted investigations of the Respondent's WWTP, reviewed the Respondent's Discharge Monitoring Reports (DMRs), and performed a record review. This enforcement matter is based on the ED's conclusions that resulted from those activities.

III. PROCEDURAL HISTORY, JURISDICTION, & NOTICE

On August 21, 2007, the ED mailed the "Executive Director's Preliminary Report and Petition" (EDPRP) to the Respondent.[2] The Respondent filed its answer on January 16, 2008.[3] The notice of hearing was mailed to the Respondent on February 26, 2008, notifying the Respondent that a preliminary hearing was scheduled.[4]

On March 27, 2008, the State Office of Administrative Hearings (SOAH) held the preliminary hearing as scheduled, established jurisdiction, and named the ED and the Respondent as parties. The ALJ granted a series of motions for continuance to allow the parties to negotiate toward a settlement. When settlement negotiations failed, the ALJ presided over the hearing on the merits on January 22, 2009. The ED's exhibits 1 through 28 were admitted into evidence. During the hearing on the merits, the ED amended the EDPRP. The amended EDPRP is Exhibit ED-29.

IV. ALLEGED VIOLATIONS, RECOMMENDED PENALTIES, AND CORRECTIVE ACTION

At the hearing on the merits, the ED alleged that the Respondent committed the following violations:

> **Violation No. 1:** Texas Water Code § 26.121(a); 30 Texas Administrative Code (TAC) §§ 305.125(1), (4), & (5) and 305.535(c)(1); TPDES Permit Condition No. 2.d, by failing to prevent or mitigate the unauthorized discharge of excess solids or sludge.

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[2] ED Exh. A.

[3] ED Exh. B.

[4] ED Exh. D.

Violation No. 2: Texas Water Code § 26.121(a), 30 TAC § 305.125(1), and TPDES Permit Effluent Limitations and Monitoring Requirements Nos. 1, 2, and 6, by failing to comply with permitted effluent limits.

Violation No. 3: 30 TAC §§ 305.125(1) and (17), 319.7(d); and TPDES Permit Monitoring and Reporting Requirement No. 1 by failing to submit monitoring results at the intervals specified in the permit.

The ED alleged that, according to the September 2002 "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy), the proper penalty based on the number of violations and the Respondent's compliance history is $48,480. The Respondent stipulated that the penalty was properly calculated pursuant to the Penalty Policy. The ED also requested that the Respondent be required to perform certain technical requirements to address its compliance issues.

A. Violation No. 1 (Unauthorized Discharge of Excess Solids and Sludge)

1. Legal Requirements

The ED has alleged that the Respondent violated the following laws and requirements:

Texas Water Code § 26.121(a): Except as authorized by the commission, no person may . . . discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state . . . .

30 TAC §§ 305.125(1), (4), (5): Conditions applicable to all permits issued under this chapter, and which shall be incorporated into each permit expressly or by reference to this chapter are as follows.

> (1) The permittee has a duty to comply with all permit conditions. Failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action, for permit amendment, revocation or suspension, or for denial of a permit renewal application or an application for a permit for another facility.
>
> * * * *
>
> (4) The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation which has

> a reasonable likelihood of adversely affecting human health or the environment.
>
> (5) The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) installed or used by the permittee to achieve compliance with the permit conditions. . . .

30 TAC § 305.535(c)(1):

> (c) Prohibition of bypass. (1) Bypass of untreated or partially treated wastewater is prohibited from a TPDES permitted facility, and the commission may take enforcement action against the permittee for bypass, unless all of the following conditions are met:
>
> > (A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
> >
> > (B) [T]here were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance;
> >
> > (C) [T]he permittee submitted notices as required under subsection (b) of this section.

TPDES Permit No. WQ0010824001, Permit Condition No. 2.d: The permittee shall take reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.[5]

2. The ED's position

In response to a request from the TCEQ Enforcement Division for further evaluation, on January 23, 2006, a TCEQ investigator inspected the Respondent's WWTP and found evidence of accumulations of solids in the unnamed tributary and Steele Creek.[6] The investigator

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[5] ED Exh.12, pg. 07.

[6] ED Exh.4, pg. 02.

collected solid samples at four locations on the discharge route, including upstream of the discharge point. The investigator also collected water samples along the discharge route but could not sample upstream of the discharge point due to a lack of flow.

The ED alleged that the receiving stream was severely impacted by the unauthorized discharge of sludge and solids. It is the ED's position that this impact is demonstrated by the presence of bloodworms and substantially elevated levels of *E. coli*, ammonia-nitrogen (NH3-N), total Kjeldahl nitrogen (TKN), and other pollutants at and downstream of the discharge point, as indicated by water and solid sampling and other documentation from the January 23, 2006 investigation.[7]

The ED took samples of solids at various points along the discharge route and one point upstream of the discharge point and compared the results. According to the ED, solids samples taken downstream compared to samples taken upstream demonstrate a detrimental impact to the receiving stream.[8]

	NH3-N	**Orthophosphate**	**% Solids**	**Phosphorus**	**TKN**
100 feet upstream of discharge point	0.24 mg/L	0.06 mg/L	65.17 %	0.09 mg/L	0.86 mg/L
At the discharge point	39.4 mg/L	15.6 mg/L	6.99 %	17.5 mg/L	42.7 mg/L
100 feet downstream of discharge point	34.4 mg/L	13.2 mg/L	36.12 %	13.3 mg/L	37.5 mg/L
Steele Creek, 300 feet downstream of the discharge point	12.0 mg/L	16.2 mg/L	9.8 %	18.1 mg/L	12.8 mg/L

[7] ED Exh. 4, pg. 02.

[8] ED Exh. 4

The ED also collected water samples to determine the levels of *E. coli*. The sampling results for *E. coli* are as follows: > 241,920 MPN[9] at the point of discharge, 54,500 MPN 100 feet downstream of the point of discharge, and 5,200 MPN in Steele Creek 300 feet downstream of the discharge point.[10]

The ED also alleged that the Respondent did not properly mitigate or remove the sludge discharged to the stream. The TCEQ investigator attached photographs to his January 23, 2006 investigation report. The ED alleges that one photo shows "[e]arth moving equipment filling in receiving stream with topsoil."[11]

3. The Respondent's position

The Respondent did not present evidence that disputed the allegations in the EDPRP or the January 23, 2006 investigation report. In fact, the Respondent conceded that the unauthorized discharge did occur but did not know why it occurred. However, the Respondent presented testimony that the text for the photograph showing the earth moving equipment was inaccurate. Joe Neeson, the Respondent's mayor pro tem, testified that the earth moving equipment in the photograph was removing trees so that the Respondent could access the receiving stream. Once the Respondent had access to the stream, the sludge was then removed and placed on plastic on the WWTP property. The sludge was allowed to dry out to reduce costs for transportation and disposal. Mr. Neeson testified that approximately two years after the sludge was removed from the receiving stream, the sludge was disposed appropriately in a landfill.

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[9] The ED does not provide a meaning for the acronym MPN. The ALJ assumes MPN stands for "most probable number."

[10] ED Exh. 4, pg. 02.

[11] ED Exh. 4, pg. 08.

4. ALJ's recommendation

The ALJ has reviewed the testimony and exhibits and recommends that the Commission find that there has been an unauthorized discharge in violation of section 26.121(a) of the Texas Water Code. The ED also presented sufficient evidence to prove violations of 30 TAC §§ 305.125(1), (4), (5) and 305.535(c)(1), and TPDES Permit No. WQ0010824001, Permit Condition No. 2.d. In fact, the Respondent did not dispute that there was sludge in the receiving stream or that an unauthorized discharge had occurred.

The Respondent did dispute the ED's evidence that the Respondent failed to mitigate the effects of the unauthorized discharge by filling in the receiving stream with topsoil instead of removing the sludge from the creek bed. The ALJ finds that Mr. Neeson's testimony was credible. Mr. Neeson testified that the earth moving equipment was used to remove trees so that the Respondent could access the creek to remove the sludge. However, the ED alleged violations of legal requirements regarding unauthorized discharges, not the violation of a requirement to mitigate an unauthorized discharge. Since the ED did not plead that the Respondent violated a requirement to mitigate an unauthorized discharge, the fact that the Respondent did attempt to mitigate does not affect the determination that the Respondent violated the specified legal requirements.

B. Violation No. 2 (Failure to Comply with Permitted Effluent Limits)

1. Legal Requirements

In addition to Texas Water Code § 26.121(a) and 30 TAC § 305.121(1) as set out above for Violation No. 1, the ED also alleged that the Respondent violated the effluent limits and monitoring requirements found in its TPDES permit.

2. The ED's position

The Respondent is required to submit DMRs pursuant to the requirements in its TPDES permit.[12] The ED introduced into evidence the Respondent's DMRs for November and December of 2004, and for January, July, and August of 2005.[13] The DMRs show the following violations of the Respondent's permitted effluent limits:[14]

Mo./Year, with violations	BOD_5, daily average limits (for conc.), max., 20 mg/L	BOD_5, daily average limits (for loading), max., 6.8 lbs/day	BOD_5, grab sample limit, max., 65 mg/L	TSS, daily average limits (for conc.), max. 20 mg/L	TSS, daily average limits (for loading), max., 6.8 lbs/day	TSS, grab sample limit, max., 65 mg/L	Flow, daily average limit, 0.041 MGD	DO, grab sample concentration limit, min., 2.0 mg/L
Nov-04	28.25	c	c	33.25	7.31	c	c	c
Dec-04	28.2	13.44	c	45.8	19.85	126	0.0453	c
Jan-05	c	c	c	22.25	c	c	c	c
Jul-05	c	c	c	29.75	c	c	c	c
Aug-05	26.0	c	84.0	27.8	c	c	c	0.50

c=compliant (one and/or both) *max.*=maximum *min.*=minimum *mg/L*=milligrams/liter *lbs/day*=pounds/day
conc.=concentration *MGD*=million gallons per day *DO*=Dissolved Oxygen
BOD_5=Five-day Biochemical Oxygen Demand *TSS*=Total Suspended Solids

The ED asserts that the Respondent violated its effluent limits 15 times from November 2004 to August 2005.

3. The Respondent's position

The Respondent did not introduce any evidence or seek to dispute the ED's witness or evidence regarding noncompliance with its effluent limitations.

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[12] *See* Violation No. 3, below.

[13] ED Exh. 13 through 17.

[14] ED Exh. A, pg. 021.

4. The ALJ's recommendation

The ALJ recommends that the Commission find that the Respondent violated Texas Water Code § 26.121(a) and 30 TAC § 305.121(1), as well as TPDES Permit No. WQ0010824001, Effluent Limitations and Monitoring Requirements Nos. 1, 2, and 6. The DMRs submitted by the Respondent demonstrate the noncompliance with its effluent limits, and there is no evidence in the record that contradicts these alleged violations.

C. Violation No. 3 (Failure to Submit Monitoring Results)

1. Legal Requirements

In addition to 30 TAC § 305.125(1) as set out above, the ED alleged that by failing to submit DMRs, the Respondent also violated:

> **30 TAC § 305.125(17):** Monitoring results shall be provided at the intervals specified in the permit.
>
> **30 TAC § 319.7(d):** Unless otherwise specified in the permit, a monthly effluent report must be submitted each month by the 20th day of the following month for each discharge which is described in the permit whether or not a discharge is made for that month.
>
> **TPDES Permit Monitoring and Reporting Requirement No. 1**: Monitoring results shall be provided at the intervals specified in the permit. Unless otherwise specified in this permit or otherwise ordered by the Commission, the permittee shall conduct effluent sampling and reporting in accordance with 30 TAC §§ 319.4-319.12. Unless otherwise specified, a monthly effluent report shall be submitted each month to the Enforcement Division (MC 224), by the 20th day of the following month for each discharge which is described by this permit whether or not a discharge is made for that month. Monitoring results must be reported on an approved self-report form that is signed and certified as required by Monitoring and Reporting Requirement No. 10.

2. The ED's position

Specifically, the ED alleged that the Respondent failed to submit DMRs for the months of February and March 2005. On May 1, 2006, the ED performed a record review of the Respondent's DMR submissions.[15] This record review showed that the Respondent had not submitted DMRs for the months of February and March of 2005. In response to a letter of enforcement from the ED, the Respondent submitted the missing DMRs in July of 2006.[16]

3. The Respondent's position

The Respondent did not dispute that it had failed to submit DMRs for the months of February and March of 2005.

4. The ALJ's recommendation

The ALJ recommends that the Commission find that the Respondent violated 30 TAC §§ 305.125(1), (17), 319.7(d), as well as TPDES Permit No. WQ0010824001, Effluent Limitations and Monitoring Requirement No. 1. Although the Respondent did submit the missing the DMRs, these reports were over a year late.

D. Penalty Calculation and Technical Requirements

In the EDPRP, the ED recommended a penalty of $48,480 for three violations. Specifically, the ED recommended a $40,400 penalty for Violation No. 1, a $4,040 penalty for Violation No. 2, and a $4,040 penalty for Violation No. 3.

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[15] ED Exh. 20.

[16] ED Exh. 21.

Regarding the Technical Requirements, at the hearing and without objection, the ED amended paragraphs 14.c.i. and ii. of the EDPRP to read:

> c. Within 90 days after the effective date of the Commission Order, the City shall submit to TCEQ:
>
> i. An engineering study, prepared by a Texas registered professional engineer, identifying any causes of noncompliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code, and
>
> ii. A plan, prepared by a Texas registered professional engineer, to ensure compliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code.[17]

1. Legal Requirements

Under Texas Water Code § 7.052, an administrative penalty may not exceed $10,000 per violation, per day. The Commission may also order a violator to take corrective action under Texas Water Code § 7.073. In determining the amount of an administrative penalty, Texas Water Code § 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;

d. 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.

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[17] ED Exh. 29.

2. The ED's position

The ED presented exhibits and testimony demonstrating that he followed the September 2002 "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy) in calculating the appropriate penalty for the alleged violations.[18] The ED presented evidence that showed that the Respondent's WWTP struggles with compliance, including unauthorized discharges of solids into the receiving stream; has operational and maintenance issues; and has inflow and infiltration concerns.

The ED introduced into evidence a June 6, 2001 Agreed Order concerning unauthorized discharges and effluent limit violations.[19] In the 2001 Agreed Order, the TCEQ ordered the Respondent to pay $8,000 in administrative penalties and undertake technical requirements to address the inflow and infiltration issues. These issues are similar to the alleged violations in this proceeding. In addition to the 2001 Agreed Order, the ED also introduced the results of other investigations.

Date of Investigation	Exhibit	Alleged Violations
March 15, 2005	ED-6	Various operation and maintenance issues; failure to prevent the discharge and accumulation of sludge in the receiving stream.
February 8, 2007	ED-1	Failure to prevent the discharge and accumulation of sludge in the receiving stream.
July 15, 2008	ED-8	Failure to employ or contract with a licensed individual to operate the WWTP.
November 13, 2008	ED-3	Failure to prevent the discharge and accumulation of sludge in the receiving stream.

[18] ED Exh. 19.

[19] ED Exh. 5.

3. The Respondent's position

The Respondent stipulated that the ED correctly calculated the penalty under the Penalty Policy. In its closing argument, the Respondent stated that the ED was recommending a big penalty for a small town. However, the Respondent did not introduce evidence of an inability to pay.

By its own description, the Respondent is a small city. Mr. Neeson testified that he did not know why the spills occurred but that the Respondent had attempted to clean up the solids that had entered the receiving stream. Mr. Neeson stated that after removing trees to allow access to the creek, the Respondent removed the sludge and placed it on plastic to allow the sludge to dry out. According to Mr. Neeson, the Respondent installed a second paddlewheel in the oxidation ditch at the request of the investigators. He stated that the Respondent had done everything that it knew to do and that the Respondent had cleaned up and modernized the WWTP.

Regarding the operator issues, the Respondent conceded that the WWTP had been operated by an unlicensed individual. The mayor, James W. Jackson, Jr., testified that the Respondent had a licensed operator but he became sick with cancer and could not work regularly. Mr. Neeson testified that the TCEQ had given the Respondent a list of licensed operators in the area with the correct class of license needed to operate the Respondent's WWTP. According to Mr. Neeson, the Respondent had contacted each operator on the list but none of the operators would agree to operate the Respondent's WWTP. Mr. Neeson alleged that there is a shortage of licensed operators. The Respondent had an individual operating the WWTP while he was attempting to obtain his license from the TCEQ. He has since been licensed and is operating under supervision for one year as required.

The Respondent agreed to the Technical Requirements in the amended EDPRP, as set out above. According to Mr. Neeson, the Respondent agreed to hire an engineer to fix the problems with the WWTP. The Respondent wants the problems stopped just as much as the ED.

4. The ALJ's recommendation

The parties stipulated that the ED had properly calculated the penalty under the Penalty Policy. The Respondent has a 2001 Agreed Order for similar violations and continues to have compliance issues. The WWTP continues to have unauthorized discharges of sludge in the receiving stream that can have a potential impact on public health and safety, natural resources and their uses, and other persons.

While the Respondent is a small city, it presented no evidence of an inability to pay. However, the Respondent has shown good faith in attempting to remedy its problems by modernizing and cleaning up the WWTP and has attempted to mitigate the unauthorized discharge of sludge and solids into the receiving stream. Nevertheless, the parties stipulated that the penalty was correctly calculated according to the Penalty Policy. Therefore, the ALJ recommends that the Commission assess a $48,480 administrative penalty against the Respondent. The ALJ also recommends that the Commission require the Respondent to perform the Technical Requirements in the EDPRP, as amended at the hearing on the merits.

Signed February 26, 2009.

KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ORDER
Assessing Administrative Penalties Against and Ordering Corrective Action by The City of Thornton
TCEQ Docket No. 2006-0571-MWD-E
SOAH Docket No. 582-08-1895

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by the City of Thornton (Respondent or The City). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted the hearing on the merits on January 22, 2009, in Austin, Texas.

The Executive Director, represented by Tracy Chandler, appeared at the hearing on the merits. The Respondent also appeared at the hearing on the merits and was represented by the mayor, James W. Jackson, Jr. and by Joe Neeson, the mayor pro tem.

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

FINDINGS OF FACT

1. The Respondent is a city in Limestone County that is authorized to discharge 0.041 million gallons per day (MGD) of domestic wastewater under Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010824001. The discharge route is to an unnamed tributary of Steele Creek; thence to Steele Creek; thence to the Navasota River below Lake Limestone in Segment 1209 of the Brazos River Basin. The wastewater treatment plant (WWTP) serves approximately 500 people.

2. On August 21, 2007, the ED mailed his EDPRP to the Honorable James Jackson, Jr., Mayor, City of Thornton, P.O. Box 396, Thornton, Texas 76687. The ED alleged that the Respondent committed three violations:

> **Violation No. 1:** Texas Water Code § 26.121(a); 30 Texas Administrative Code (TAC) §§ 305.125(1), (4), & (5) and 305.535(c)(1); TPDES Permit Condition No. 2.d., by failing to prevent or mitigate the unauthorized discharge of excess solids or sludge.
>
> **Violation No. 2:** Texas Water Code § 26.121(a), 30 TAC § 305.125(1), and TPDES Permit Effluent Limitations and Monitoring Requirements Nos. 1, 2, and 6, by failing to comply with permitted effluent limits.
>
> **Violation No. 3:** 30 TAC §§ 305.125(1) and (17), 319.7(d); and TPDES Permit Monitoring and Reporting Requirement No. 1 by failing to submit monitoring results at the intervals specified in the permit.

3. The Respondent filed its answer on January 16, 2008.

4. The ED referred this matter to SOAH on February 11, 2008.

5. The notice of the preliminary hearing was mailed to the Respondent on February 26, 2008, notifying the Respondent that a preliminary hearing was scheduled for March 27, 2008. The notice of hearing for the March 27, 2008 preliminary 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 Executive Director alleged Respondent violated;

d. referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;

e. advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by 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

f. included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations

6. SOAH held the preliminary hearing on March 27, 2008. The ED and the Respondent appeared. The ED's exhibits A through E were admitted into evidence.

7. The ALJ presided over the hearing on the merits on January 22, 2009. The ED's exhibits 1 through 28 were admitted into evidence.

8. During the hearing on the merits, the ED amended the EDPRP to change the technical requirements. The City did not object to the amendment. The amended EDPRP is ED Exhibit 29 and this exhibit was admitted into evidence.

9. On January 23, 2006, a TCEQ investigator inspected the Respondent's WWTP and documented evidence of an unauthorized discharge. The investigator documented solids and sludge in the receiving stream. The investigator took solids samples at the discharge point and upstream and downstream of the discharge point. These samples showed an increase in pollutants at the discharge point and downstream when compared with the upstream sample, as noted in the chart below:

	NH3-N	Orthophosphate	% Solids	Phosphorus	TKN
100 feet upstream of discharge point	0.24 mg/L	0.06 mg/L	65.17 %	0.09 mg/L	0.86 mg/L
At the discharge point	39.4 mg/L	15.6 mg/L	6.99 %	17.5 mg/L	42.7 mg/L
100 feet downstream of discharge point	34.4 mg/L	13.2 mg/L	36.12 %	13.3 mg/L	37.5 mg/L
Steele Creek, 300 feet downstream of the discharge point	12.0 mg/L	16.2 mg/L	9.8 %	18.1 mg/L	12.8 mg/L

10. The ED also collected water samples to determine the levels of *E. coli*. The sampling results for *E. coli* are as follows: > 241,920 Most Probable Number (MPN) at the point of discharge, 54,500 MPN 100 feet downstream of the point of discharge, and 5,200 MPN in Steele Creek 300 feet downstream of the discharge point.

11. The ED reviewed the Respondent's discharge monitoring reports and found 15 violations of the Respondent's effluent limits as set out in its TPDES permit.

Mo./Year, with violations	**BOD_5, daily average limits (for conc.), max., 20 mg/L**	**BOD_5, daily average limits (for loading), max., 6.8 lbs/day**	**BOD_5, grab sample limit, max., 65 mg/L**	**TSS, daily average limits (for conc.), max. 20 mg/L**	**TSS, daily average limits (for loading), max., 6.8 lbs/day**	**TSS, grab sample limit, max., 65 mg/L**	**Flow, daily average limit, 0.041 MGD**	**DO, grab sample concentration limit, min., 2.0 mg/L**
Nov-04	28.25	c	c	33.25	7.31	c	c	c
Dec-04	28.2	13.44	c	45.8	19.85	126	0.0453	c
Jan-05	c	c	c	22.25	c	c	c	c
Jul-05	c	c	c	29.75	c	c	c	c
Aug-05	26.0	c	84.0	27.8	c	c	c	0.50

c=compliant (one and/or both) *max.*=maximum *min.*=minimum *mg/L*=milligrams/liter *lbs/day*=pounds/day
conc.=concentration *MGD*=million gallons per day *DO*=Dissolved Oxygen *BOD_5*=Five-day Biochemical Oxygen Demand
TSS=Total Suspended Solids

12. The Respondent failed to file Discharge Monitoring Reports (DMRs) for the months of February and March in 2005.

13. The Commission has adopted a "Penalty Policy of the Texas Commission on Environmental Quality" (Penalty Policy), setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

14. Under the September 2002 Penalty Policy, the proper penalty based on the number of violations and the Respondent's compliance history is $48,480. The total administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each different violation. The Respondent stipulated that the penalties were correctly calculated under the Penalty Policy.

15. The ED recommended a $40,400 penalty for Violation No. 1.

16. The ED recommended a $4,040 penalty for Violation No. 2.

17. The ED recommended a $4,040 penalty for Violation No. 3.

18. Regarding the Technical Requirements, at the hearing and without objection, the ED amended the EDPRP's paragraphs 14.c.i. and ii. to read:

> c. Within 90 days after the effective date of the Commission Order, the City shall submit to TCEQ:
>
> i. An engineering study, prepared by a Texas registered professional engineer, identifying any causes of noncompliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code, and
>
> ii. A plan, prepared by a Texas registered professional engineer, to ensure compliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code.

II. CONCLUSIONS OF LAW

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under Texas Water Code § 7.052, a penalty may not exceed $10,000 per violation, per day.

3. Under Texas Water Code § 7.073, the Commission may order the violator to take corrective action.

4. As required by Texas 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. 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 Texas Government Code, chapter 2003.

6. Texas Water Code § 26.121(a) states: "Except as authorized by the commission, no person may . . . discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state . . . ."

7. The TCEQ's regulations, 30 TAC §§ 305.125(1), (4), (5), state:

> Conditions applicable to all permits issued under this chapter, and which shall be incorporated into each permit expressly or by reference to this chapter are as follows.

(1) The permittee has a duty to comply with all permit conditions. Failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action, for permit amendment, revocation or suspension, or for denial of a permit renewal application or an application for a permit for another facility.

* * * *

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.

(5) The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) installed or used by the permittee to achieve compliance with the permit conditions. . . .

8. The TCEQ's regulation, 30 TAC § 305.535(c)(1), states:

(c) Prohibition of bypass. (1) Bypass of untreated or partially treated wastewater is prohibited from a TPDES permitted facility, and the commission may take enforcement action against the permittee for bypass, unless all of the following conditions are met:

(A) Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(B) [T]here were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance;

(C) [T]he permittee submitted notices as required under subsection (b) of this section.

9. TPDES Permit No. WQ0010824001, Permit Condition No. 2.d states: "The permittee shall take reasonable steps to minimize or prevent any discharge or sludge use or disposal or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment."

10. Based on the above Findings of Fact, the Respondent had an unauthorized discharge of sludge and solids in violation of Texas Water Code § 26.121(a), 30 TAC §§ 305.125(1), (4), (5), 305.535(c)(1), and its TPDES Permit Condition No. 2.d.

11. Based on the above Findings of Fact, the Respondent has violated Texas Water Code § 26.121(a) and 30 TAC § 305.125(1) and its effluent limits and monitoring requirements by failing to discharge effluent that complies with the effluent limits and monitoring requirements in its TPDES permit.

12. The TCEQ's regulation, 30 TAC § 305.125(17), states: "Monitoring results shall be provided at the intervals specified in the permit."

13. The TCEQ's regulation, 30 TAC § 319.7(d), states: "Unless otherwise specified in the permit, a monthly effluent report must be submitted each month by the 20th day of the following month for each discharge which is described in the permit whether or not a discharge is made for that month."

14. TPDES Permit Monitoring and Reporting Requirement No. 1 states:

> Monitoring results shall be provided at the intervals specified in the permit. Unless otherwise specified in this permit or otherwise ordered by the Commission, the permittee shall conduct effluent sampling and reporting in accordance with 30 TAC §§ 319.4-319.12. Unless otherwise specified, a monthly effluent report shall be submitted each month to the Enforcement Division (MC 224), by the 20th day of the following month for each discharge which is described by this permit whether or not a discharge is made for that month. Monitoring results must be reported on an approved self-report form that is signed and certified as required by Monitoring and Reporting Requirement No. 10.

15. Based on the above Findings of Fact, the Respondent has violated 30 TAC §§ 305.125(1), (17), 319.7(d), and TPDES Permit Monitoring and Reporting

Requirement No. 1 by failing to submit Discharge Monitoring Reports for the months of February and March 2005.

16. In determining the amount of an administrative penalty, Texas Water Code § 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;
    d. 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.

17. Based on consideration of the above Findings of Fact, the factors set out in Texas Water Code § 7.053, the Commission's Penalty Policy, and the parties' stipulation, the Executive Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of $48,480 is justified and should be assessed against Respondent.

18. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

III. ORDERING PROVISIONS

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 45 days after the effective date of the Commission Order, the City shall complete remediation of the receiving stream by removing and disposing of all sludge and related materials ("removed materials") from all of the impacted portions of the receiving stream. Disposal of any removed materials shall be carried out in accordance with all applicable rules of the TCEQ and in a manner that prevents contamination of surface or groundwater. The City shall maintain written records of the location, nature and amount of each type of sludge or other deposits removed, the technique used for removal and transport, and the ultimate disposal site.

2. Within 60 days after the effective date of the Commission Order, the City shall submit a copy of the written records described in Ordering Provision 1., above, along with written certification in accordance with Ordering Provision 6., that all removal and disposal activities have been completed in accordance with Ordering Provision 1.

3. Within 90 days after the effective date of the Commission Order, the City shall submit to TCEQ:

    a. An engineering study, prepared by a Texas registered professional engineer, identifying any causes of noncompliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code, and

    b. A plan, prepared by a Texas registered professional engineer, to ensure compliance with the TPDES Permit and the laws of the State of Texas, including the Texas Water Code and the Texas Administrative Code.

4. Within 270 days of the effective date of the Commission Order, the City shall complete all phases of the plan identified in Ordering Provision 3.b.

5. Within 365 days after the effective date of the Commission Order, the City shall submit written certification to demonstrate compliance with Ordering Provision 4.

6. Written certification to demonstrate compliance with these Ordering Provisions must be accompanied by detailed supporting documentation, including but not limited to photographs, receipts, plans, contracts, and other records, the sufficiency of which shall be determined by the Executive Director upon receipt. 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 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 City shall submit the written certification and copies of documentation necessary to demonstrate compliance with these Ordering Provisions 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:

Frank Burleson, Water Section Manager
Texas Commission on Environmental Quality
Waco Regional Office
6801 Sanger Avenue, Ste. 2500
Waco, Texas 76710-7826

7. 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 Commission Order.

8. 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.

9. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Texas Government Code § 2001.144.

10. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

11. 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

_____

Buddy Garcia, Chairman
For the Commission