

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

May 29, 2007

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 MAY 29 PM 4:53
CHIEF CLERKS OFFICE

Re: **SOAH Docket No. 582-07-1759; TCEQ Docket No.2006-0774-LII-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Nick Nikah**

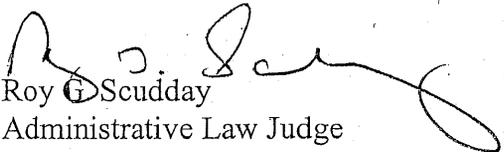
Dear Mr. Seal:

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 18, 2007**, Any replies to exceptions or briefs must be filed in the same manner no later than **June 28, 2007**.

This matter has been designated **TCEQ Docket No. 2006-0774-LII-E; SOAH Docket No. 582-07-1759**. 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,


Roy G. Scudday
Administrative Law Judge

RGS/sb
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: NICK NIKAH

SOAH DOCKET NUMBER: 582-07-1759

REFERRING AGENCY CASE: 2006-0774-LII-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROY SCUDDAY**

REPRESENTATIVE / ADDRESS

PARTIES

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

NICK NIKAH
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NICK NIKAH

xc: Docket Clerk, State Office of Administrative Hearings

TEXAS
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SOAH DOCKET NO. 582-07-1759
TCEQ DOCKET NO. 2006-0774-LII-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner

§
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§

BEFORE THE STATE OFFICE

OF

v.

NICK NIKAH
Respondent

ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2007 MAY 29 PM 4:53
CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) brought this enforcement action, asserting that Nick Nikah, (Respondent) violated provisions of the rules of the TCEQ, related to landscape irrigation. The ED sought assessment of a total administrative penalty of \$2,500.00.

The ALJ concluded that the ED established that Respondent violated provisions of the rules. The Commission should find the violations occurred and assess Respondent an administrative penalty of \$2,500.00.

II. PROCEDURAL HISTORY, JURISDICTION, AND NOTICE

The hearing convened May 17, 2007, before Administrative Law Judge (ALJ) Roy G. Scudday in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. ED was represented by Lena Roberts, Attorney, Litigation Division. Respondent represented himself telephonically. The record was closed May 24, 2007.

Jurisdiction was established at the preliminary hearing held March 22, 2007. Undisputed procedural facts are set out in findings in the Proposed Order.

III. DISCUSSION

A. Violations

On April 25 and 26, 2006, Mike Hecks, Cross Connection Inspector for the City of Richardson, conducted an investigation of Respondent's installation of a backflow prevention device, specifically a double check valve assembly backflow preventer, as part of the installation of a lawn sprinkler system at 1903 Deep Valley Dr., Richardson, Dallas County, Texas. During the investigation on April 26, Mr. Hecks noticed that the device had not been installed. However, Respondent had signed a Backflow Prevention Assembly Test and Maintenance Report stating that the device had been installed and had passed the necessary tests, which cannot be done unless the device is connected to the water supply. On April 26, 2006, Mr. Hecks filed a Landscape Irrigation General Complaint regarding the incident with TCEQ.

Richard Allen, a program specialist in the Landscape Irrigation Program of the TCEQ, conducted an investigation of the complaint. On June 5, 2006, TCEQ issued a Notice of Enforcement to Respondent that stated that Respondent's actions regarding the backflow prevention device were a violation of 30 TEX. ADMIN. CODE (TAC) § 344.73(3). On June 9, 2006, Mr. Allen referred the matter to the Enforcement Division of the TCEQ (Staff).

The Staff determined that Respondent failed to properly connect the irrigation system to the public water supply through the use of a double check valve assembly backflow preventer in violation of 30 TAC § 344.73(3). On October 19, 2006, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) that cited Respondent for the violation.¹

Respondent did not dispute that he committed the violation.

¹ The EDPRP originally cited two violations, but the other one has been subsequently dropped. ED Exh. A.

B. Penalties

The total administrative penalty sought for the violation was \$2,500.00. There were no adjustments upward for culpability or downward for good faith efforts to comply. The proposed penalty was assessed under terms of the Commission's 2002 Penalty Policy.² No corrective action was sought by the ED. Respondent did not dispute the overall accuracy of the ED's calculation of the penalty.

Based on the evidence presented, the ALJ agrees that a fine of \$2,500 should be assessed. Respondent's failure to properly install the backwater flow prevention device and the falsification of the testing report were a clear violation of TCEQ rules and City of Richardson ordinances.

Based on the above analysis, the ALJ concludes that a penalty of \$2,500.00 is consistent with the factors in TEX. WATER CODE ANN. § 7.053, which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy.³ The penalty recommended by the ALJ is commensurate with the severity of the violation found to have occurred and is reasonable.

² ED Exh.2, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

³ Under Water Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.

IV. SUMMARY

Based on the preponderance of evidence showing that the violation occurred and the factors supporting the computation of the proposed administrative penalty, the ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law appearing in the Proposed Order and impose a \$2,500.00 administrative penalty against Respondent.

SIGNED May 29, 2007.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER Assessing Administrative Penalties Against
NICK NIKAH
SOAH DOCKET NO. 582-07-1759
TCEQ DOCKET NO. 2006-0774-LII-E

TEXAS
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On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Nick Nikah (Respondent). Roy G. Scudday, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on May 17, 2007, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent who represented himself, and the Commission's Executive Director (ED), represented by Lena Roberts, an attorney in TCEQ's Litigation Division.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. In 2006, Nick Nikah, (Respondent) owned and operated a landscape irrigation business in Dallas, Texas, and held Licensed Irrigator License No. L10002932, issued by TCEQ, and Backflow Prevention Assembly Tester License No. BP0005789 issued by TCEQ.
2. On April 25 and 26, 2006, Mike Hecks, Cross Connection Inspector for the City of Richardson, conducted an investigation of Respondent's installation of a backflow prevention device, specifically a double check valve assembly backflow preventer, as part of the installation of a lawn sprinkler system at 1903 Deep Valley Dr., Richardson, Dallas, County, Texas.
3. During the investigation on April 26, Mr. Hecks noticed that the backflow prevention device had still not been installed, and that Respondent had signed a Backflow Prevention Assembly Test and Maintenance Report stating not only that the device had been installed, but that it had passed the necessary tests.
4. On April 26, 2006, Mr. Hecks filed a Landscape Irrigation General Complaint regarding the incident with TCEQ, which complaint was investigated by Richard Allen, a program specialist in the Landscape Irrigation Program of the TCEQ.
5. On June 5, 2006, TCEQ issued a Notice of Enforcement to Respondent that stated that Respondent's actions regarding the backflow prevention device were a violation of 30 TEX. ADMIN. CODE (TAC) § 344.73(3).
6. On October 19, 2006, the ED served the original EDPRP on Respondent, alleging that he failed to properly connect the irrigation system to the public water supply through the use of a double check valve assembly backflow preventer.

7. The proposed penalty of \$2,500.00 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's 2002 Penalty Policy.
8. On November 1, 2006, Respondent requested a contested case hearing on allegations in the EDPRP.
9. On February 2, 2007, the case was referred to SOAH for a hearing.
10. On February 27, 2007, the Commission's Chief Clerk issued notice of the hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
11. At the preliminary hearing that was held on March 22, 2007, the ED established jurisdiction to proceed.
12. The hearing on the merits was conducted on May 17, 2007, in Austin, Texas, by ALJ Roy G. Scudday and the record closed on May 24, 2007.
13. Respondent represented himself telephonically at the hearing on the merits.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
2. Respondent was notified of its alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

3. Respondent was notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 39.25 and 80.6.
4. 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.
5. Respondent violated TAC § 344.73(3) by failing failed to properly connect the irrigation system to the public water supply through the use of a double check valve assembly backflow preventer.
6. Based on the above Findings of Fact and Conclusions of Law, an administrative penalty of \$2,500.00 is a reasonable exercise of the Commission's authority under TEX. WATER CODE ANN. §§ 7.051 and 7.052 and takes account of all factors set out in TEX. WATER CODE ANN. § 7.053.
7. Based on the above Findings of Facts and Conclusions of Law, the Commission should assess Respondent an administrative penalty of \$2,500.00.

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, Respondent shall pay an administrative penalty in the amount of \$2,500.00 for violation of rules of the TCEQ.

Payment shall be made payable to "TCEQ" and shall be sent with the notation "Re Nick Nikah, Docket No. 2006-0774-LII-E" 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

3. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines Respondent has not complied with one or more of the terms or conditions of this Order.
4. The Chief Clerk shall provide a copy of this Order to all of the parties.
5. The effective date of this Order is the date the order is final, as provided by TEX. GOV'T. CODE ANN § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.
6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
7. 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Kathleen Hartnett White, Chairman
For the Commission**