State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

January 24, 2011

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

Re: SOAH Docket No. 582-09-2078; TCEQ Docket No. 2006-1140-MSW-E; In Re: DORAY HILL AND DIANE HILL

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 documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than Monday, February 14, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than Thursday, February 24, 2011.

This matter has been designated **TCEQ Docket No. 2006-1140-MSW-E; SOAH Docket No. 582-09-2078.** All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Paul D Keeper

Paul D. Keeper
Administrative Law Judge

PDK:cm
Enclosures
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STYLE/CASE: DORAY HILL AND DIANE HILL

SOAH DOCKET NUMBER: 582-09-2078

REFERRING AGENCY CASE: 2006-1140-MSW-E

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE
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DORAY & DIANE HILL

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xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-2078
TCEQ DOCKET NO. 2006-1140-MSW-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,	§	**BEFORE THE STATE OFFICE**
Petitioner	§	
V.	§	**OF**
DIANE HILL, DORAY HILL, DONALD A. HILL, DEBORAH HILL-THOMPSON, LAWRENCE A. HILL, CANDIS A. HILL MCKELVY, KERMIT A. HILL, DORRIS JEAN HILL, AURELIA HARRIS, GRADY GOODLEY, DELMARIS ROBY, LAWADA HILL, KEVIN HILL, NOKOMIS HILL, CORA TURNER HOUSTON, COLINE KNOX, JAMES W. CARTER, LEE OTIS CARTER, JOE I. ROLAND, GETTRELL A. CARTER, GERALD E. CARTER, KATHERINE W. CARTER, MERILEE CRAWFORD, GAYNELL CARTER-JENKINS, AND JOE CARTER,	§	
Respondents	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that Respondents[1] violated the Texas Solid Waste Disposal Act (SWDA)[2] by failing to: (1) register a scrap tire storage site,[3] and (2) prevent the unauthorized disposal of municipal solid waste.[4] The TCEQ should order: (1) all Respondents to remove the tires or

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[1] Respondents are the persons identified in the style of the case except Doray Hill and Katherine W. Carter. These two persons were dismissed as parties by the ED during the hearing on the merits. Also, a Judy Carter was also identified as a Respondent at one time and was dismissed as a Respondent by the ED.

[2] TEX. HEALTH & SAFETY CODE ch. 361.

[3] A "scrap tire" is a tire that can no longer be used for its original intended purpose. A scrap tire storage site is required to be registered with the TCEQ. TEX. HEALTH & SAFETY CODE § 361.112(l) and 30 TEX. ADMIN. CODE (TAC) § 328.60(a).

[4] Scrap and used tires are considered to be municipal solid waste. 30 TAC § 330.15(a) and (c).

bring their property into compliance as a tire storage facility and (2) certain of the Respondents to pay an administrative penalty of $23,250.

I. INTRODUCTION

In 1913, G.W. Carter purchased 89.5 acres of undeveloped land in Caldwell County, Texas, located near the present-day intersection of FM 672 and CR 169 ("the Property"). Mr. Carter died in 1949, leaving no will, no surviving spouse, and 23 children. Following his death, neither his children nor their descendants applied for probate of the estate. For the next sixty years, ownership of the Property passed among the generations of the Carter family. The Carter descendants now live in Alabama, Arizona, California, Minnesota, Mississippi, Oregon, and Texas.

On July 14, 2005, the ED's investigators conducted a compliance investigation of the Property based on its identification by the Caldwell County health department as an unpermitted tire dump. For reasons unknown to the ED, TCEQ had never placed the Property on the Priority Enforcement List,[5] an action that might have resulted in its being cleared of tires years before. When the ED's investigators visited the site, they took photographs of what they estimated to be hundreds of thousands of scrap tires. The investigators concluded that the site violated TCEQ's municipal solid waste storage rules. The investigators recommended that the ED contact the owner listed on the county's tax rolls, the G.W. Carter Estate, and notify its representative of the statutory obligation to register as a scrap tire storage facility or to remove the tires.[6]

On August 16, 2005, the ED's staff sent notice of violation letters to Doray and Diane Hill, names listed on the appraisal district's 2004 and 2005 tax payment records as the

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[5] The TCEQ program was briefly funded through a legislative appropriation to clear abandoned scrap tire sites. The program was terminated in 1998, and the TCEQ rule governing the program, 30 TAC § 328.68, was repealed effective October 7, 2010.

[6] ED. Ex. 23.

estate's contact persons.[7] The notice informed Mr. and Ms. Hill about the alleged violation, advised them of their need to come into compliance with the law, and invited them to provide the ED with additional information or contest the allegation. Mr. and Ms. Hill did not respond.

Eleven months later, on July 18, 2006, the ED's investigators repeated the investigation. When Mr. and Ms. Hill did not respond to a second letter, the ED's investigators sent them a third notice, again without a response. On January 15, 2009, the ED referred the case to SOAH, naming Mr. and Ms. Hill as respondents in his Preliminary Report and Petition. On March 31, 2009, Ms. Hill provided the ED's investigators with a list of Carter family members. Ms. Hill asserted that, although she ran cattle on property near the Property, she had no knowledge of the dumping of tires nor had she permitted the dumping of tires on the Property. On May 19, 2009, the ED amended his petition to add the rest of the Respondents as parties.[8]

Over the next several months, some of the Respondents filed written answers to the petition.[9] They asserted that they had no knowledge of or role in the dumping of the tires by unknown persons. Their responses ranged from general denials to outrage. The response of Delmaris Roby, a grandchild of G.W. Carter, is an example of this second category: "In fact, I have no knowledge of anything that happens on this property. I am eighty-six years old and have not set foot on this property in seventy years."[10]

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[7] ED-23. Caldwell County tax records for 2004 through 2009 show that these persons paid taxes on property owned by the G.W. Carter Estate: Theodore Carter (1997), Doray Hill (2004), Diane and Doray Hill (2005, 2006, 2007), and James Carter (2008 and 2009). ED-26 and -47.

[8] ED-1.

[9] ED-5 through 13.

[10] ED-12.

II. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

A. Notice

Respondents challenged the timeliness of the ED's notice. Five days before the October 20, 2010, hearing on the merits, the ED filed a Third Amended Petition without seeking a change in the hearing date.[11] An amended pleading must be filed no later than seven days before the hearing on the merits, after which the pleading may be filed only at the discretion of the administrative law judge (ALJ).[12] Respondents asserted that the pleading was filed too late to give Respondents proper notice. At the hearing, the ALJ rejected that argument and allowed the Second Amended Petition to remain a live pleading. The ALJ readopts that ruling in this proposal for decision for the reasons that follow.

The ED's amended petition made two changes to the pleadings: (1) the proposed penalty was increased five-fold, from $7,750 to $38,750, and (2) the estimated number of scrap tires on the Property was decreased three-fold, from 1,000,000 to 300,000. Then, during the hearing, the ED presented evidence decreasing the proposed penalty to $23,250 and further decreasing the estimated number of tires to 76,666.

A non-timely pleading may be rejected, or the opposing party may be granted a continuance to conduct discovery relating to the changes in the amended pleading.[13] The ALJ found that neither alternative was appropriate. First, the amendments did not add a new alleged violation against Respondents. The allegation that scrap tires were illegally placed on the Property was included in the previous two pleadings, as was the request for an administrative penalty. The changes made by the amendment were evidentiary matters, and their accuracy or inaccuracy were subject to challenge on cross-examination.

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[11] ED-2.

[12] 30 TAC § 80.29(a).

[13] *Id.*

Second, Respondents did not show that their surprise, if any, at the changed figures caused them any procedural disadvantage. Respondents cross-examined the ED's witness, Clinton Sims, about his recalculation of the proposed penalty amounts[14] and cross-examined Chance Goodin, the Department of Public Safety pilot who provided the most current photographs of the Property and estimated the number of tires.[15] If Respondents had been granted a continuance to depose these witnesses, the information produced would have been the same as that developed in the hearing on cross-examination. The witnesses testified on cross-examination. No limit was placed on the amount of time that Respondents had for cross-examination or on their scope of the questions that they were permitted to ask the witnesses.

Third, on October 20, 2010, the date of the hearing, this case had been pending at SOAH for almost two years. The hearing had been rescheduled four times. The parties' evidence included no deposition testimony, and Respondents did not make a convincing argument that a deposition would be required to address the changes in the amended pleading.

Taken as a whole, Respondents' motion for a continuance held little merit. Respondents did not show that the ALJ's refusal to grant a continuance or refusal to exclude the Third Amended Petition would constitute an abuse of discretion. The procedural challenge to notice was rejected.

B. Jurisdiction

Respondents challenged jurisdiction on the basis that the ED failed to join G.W. Carter's estate or his unknown heirs as indispensable parties to this administrative action. At the hearing, the ALJ overruled the challenge and reaffirms that ruling in this proposal for decision.

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[14] ED-35

[15] ED-21 and -30.

First, the ED correctly asserted that an estate of a decedent is not a legal entity and may not properly sue or be sued as such.[16] Claims against an estate should be instituted against the decedent's personal representative or, under appropriate circumstances, against the heirs or beneficiaries.[17] In sixty years, no one sought the appointment of an administrator for the G.W. Carter estate, and none exists today. The proper parties to this proceeding are the individual heirs of G.W. Carter, many of whom were named as Respondents in this proceeding.

Second, the concept of an "indispensable party" is not part of the procedural rules under which this proceeding is conducted.[18] Instead, the rules provide that the parties to a contested enforcement case include the named respondents and any other parties authorized by statute.[19] Within some limits, the ED could choose to bring additional administrative actions against other named parties in future administrative proceedings based on these same allegations, if the ED were to prevail.

Third, Respondents complained that the ED should have served the unknown heirs by publication, an action that the Respondents asserted would not be an undue burden on the ED. Whether the burden is undue is not at issue. Respondents failed to cite any procedural rule, statute, or judicial holding that would have required the ED to notify the unknown heirs of G.W. Carter by publication or otherwise.

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[16] *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975).

[17] *Id.*

[18] 30 TAC ch. 80. Even the Texas Rules of Civil Procedure have abandoned the use of the term "indispensable party." TEX. R. CIV. P. 39. A recent court of appeals opinion observes, "Moreover, Rule 39 focuses not so much upon whether the court has jurisdiction, but upon whether the court ought to proceed with the parties before it." *Sabre Oil & Gas Corp. v. Gibson*, 72 S.W.3d 812, 815-16 (Tex. App.—Eastland 2002, pet. denied).

[19] 30 TAC § 80.109(b)(8).

Other than the jurisdictional matter addressed later in this document, the balance of matters related to notice and jurisdiction were not contested and are addressed in the attached order.

C. Procedural History

On October 20, 2010, the ALJ convened a hearing on the merits at SOAH's Austin office. Counsel for the ED were James Salans and Jennifer Cook. Counsel for Respondents was Darwin McKee. At the conclusion of the hearing, the parties agreed to a briefing schedule. The administrative record closed on December 10, 2010.

III. GOVERNING LAW

The TCEQ has the authority to regulate the storage of used or scrap tires.[20] A person may not store more than 500 used or scrap tires for any period on any privately owned property unless the person registers the storage site with the TCEQ.[21] A person is prohibited from disposing used or scrap tires " . . . in a facility that is not permitted by the [TCEQ] for that purpose."[22] A person may be held responsible for solid waste if he or she: (1) is an owner or operator of a solid waste facility, or (2) has owned or operated a solid waste facility at the time of storage or disposal of any solid waste.[23]

A "solid waste facility" means " . . . all contiguous land . . . used for . . . storing . . . solid waste."[24] "Storage" means " . . . the temporary holding of solid waste, after which the solid

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[20] TEX. HEALTH & SAFETY CODE § 361.112.

[21] TEX. HEALTH & SAFETY CODE § 361.112(a).

[22] TEX. HEALTH & SAFETY CODE § 361.112(c).

[23] TEX. HEALTH & SAFETY CODE § 361.271(a)(1) and (2).

[24] TEX. HEALTH & SAFETY CODE § 361.003(36).

waste is processed, disposed of, or stored elsewhere."[25] "Disposal" of solid waste includes the dumping or placing of solid waste ". . . on land . . . so that the solid waste . . . . may be . . . introduced into the environment . . . ."[26]

The TCEQ has adopted rules about the storage and disposal of used and scrap tires.[27] Among them is a rule requiring that persons who store more than 500 used or scrap tires on the ground must obtain a permit before storage activities begin.[28] In addition, the TCEQ's rules provide that a person may not " . . . cause, suffer, allow, or permit the . . . storage . . . or disposal of municipal solid waste . . . or the use or operation of a solid waste facility to store . . . or dispose of solid waste . . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the [TCEQ], or in such a manner that causes: . . . (2) the creation and maintenance of a nuisance; or (3) the endangerment of the human health and welfare or the environment."[29] A person may " . . . not cause, suffer, allow, or permit the dumping or disposal of [municipal solid waste, including used and scrap tires] without the written authorization of the [TCEQ].[30]

The TCEQ has authority over a person who violates any statute or rule within the TCEQ's jurisdiction.[31] The TCEQ may assess against a violator an administrative penalty and may order the person to take corrective action.[32] The maximum administrative penalty that the TCEQ may impose for violations of the law is $10,000 per day.[33] In determining the amount of

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[25] TEX. HEALTH & SAFETY CODE § 361.003(38).

[26] TEX. HEALTH & SAFETY CODE § 361.003(7).

[27] 30 TAC ch. 328, subch. F ("Management of Used or Scrap Tires").

[28] 30 TAC § 328.60(a).

[29] 30 TAC § 330.15(a).

[30] 30 TAC § 330.15(c).

[31] TEX. WATER CODE § 7.073.

[32] TEX. WATER CODE §§ 7.051 and 7.073.

[33] TEX. WATER CODE § 7.052(c).

the penalty, the TCEQ is required to take into consideration as series of factors, including, with respect to an alleged violator: (1) the history and extent of previous violations; (2) 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; (3) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (4) economic benefit gained through the violation; (5) the amount necessary to deter future violations; and (6) any other matters that justice may require.[34]

IV. ALLEGATIONS AND DEFENSES

A. ED's Allegations

1. Liability by ownership

The ED alleged that Respondents are heirs at law of the intestate estate of G.W. Carter. In the absence of a valid will, the ED argued, the Texas laws of descent and distribution apply.[35] Relying on Texas' 1948 probate laws (which, in relevant part, are substantially the same as the current probate laws), the ED argued that G.W. Carter's estate passed by intestate succession to his children and their descendants.[36] Because the estate of a deceased defendant is not a legal entity and cannot be sued,[37]the ED asserted that Respondents, as G.W. Carter's heirs, are the proper parties to this enforcement action.[38]

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[34] TEX. WATER CODE § 7.053.

[35] *Jones v. LaFargue*, 758 S.W.2d 320, 325 (Tex. App.—Houston 1988, pet. denied).

[36] TEX. PROB. CODE § 38(a).

[37] *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987).

[38] *Miller v. Estate of Self*, 113 S.W.3d 554, 556 (Tex. App.—Texarkana 2003, no pet.).

2. Liability by action

Further, the ED asserted that Respondents have administrative liability in these facts because of their exercise of control over the Property by: (1) paying taxes, (2) entering into two oil and gas leases, one in 1989[39]and another in 1997,[40] and (3) "proclaiming ownership of the [P]roperty."[41]

B. Respondent's Defenses

1. Jurisdictional challenges.

Respondents alleged that SOAH lacks jurisdictional authority to make a determination of heirship. Respondents' other jurisdictional challenges have already been addressed.

2. Evidentiary challenges

Respondents claimed that the ED failed to prove that: (1) the Respondents participated in " . . . the activity that is the basis for the agency's action,"[42] or (2) the ED had a consistent method for calculating a penalty. In addition, Respondents objected to the testimony of the ED's witness about the calculation of the $38,750 penalty.

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[39] ED-49. On November 24, 1989, 33 descendants of G.W. Carter signed a lease for oil and gas development.

[40] ED-28. On May 12, 1997, Respondents Joe Carter, Gettrell A. Carter, Gerald E. Carter, and Lee Otis Carter, as "Heirs of George Alle Carter ET AL dealing with his seprate [sic] property" signed a second oil and gas lease. The evidence was never clear whether George Alle Carter was the same person as G.W. Carter, but the ALJ will make the assumption that the two are the same.

[41] *ED's Written Closing Including the Application of Intesticy [sic]and Owner Responsibility (IED's Closing)* at 5, citing ED-22, ED-23, ED-28, ED-31, ED-34, ED-46, ED-47, ED-49, and the testimony of Chance Goodin, relating a conversation with Respondent Joe Roland.

[42] *Respondent's Brief to the Court [sic] (Respondent's Brief)* at 3-4.

V. ANALYSIS

A. Does SOAH have the authority to recommend an administrative determination of ownership of the Property?

1. Governing law

SOAH has the authority to recommend that the TCEQ make a final administrative determination of Respondents' ownership of the Property. That authority exists because of SOAH's: (1) general statutory authority to issue proposals for decision that include findings of fact and conclusions of law,[43] (2) specific authority to hear any matter over which the TCEQ has jurisdiction,[44] and (3) receipt of TCEQ's referral of this dispute for a contested case hearing.

As described in previous paragraphs, the TCEQ has exclusive jurisdiction over the state's comprehensive statutory system to enforce environmental laws relating to the storage and disposal of scrap tires. As part of its authority, the TCEQ may order a violator to pay penalties and to take corrective measures. To determine whether a person is a violator, the TCEQ must first determine whether a person has ownership or control of property. To assist the TCEQ in making a final administrative decision, a SOAH ALJ conducts a hearing and issues a proposal for decision, including proposed findings of fact and conclusions of law that may relate to the ownership of real property.

Determining questions about ownership of real property and the status of intestate heirs are also within the jurisdiction of the state's district courts and probate courts. The doctrine of primary jurisdiction allocates power between the state's courts and administrative agencies when both have authority to make initial determinations in a dispute.[45] In those instances,

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[43] TEX. GOV'T CODE § 2003.042(a)(6).

[44] TEX. WATER CODE § 5.311(a); 30 TAC § 80.6.

[45] *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).

> . . . the statutory scheme may necessitate that an administrative agency with exclusive jurisdiction make certain findings before a trial court may finally adjudicate a claim. Under those circumstances, if a party files its claim in the trial court before the agency resolves the issue within its exclusive jurisdiction, but the jurisdictional impediment can be removed, "then the trial court may abate proceedings to allow a reasonable opportunity for the jurisdictional problem to be cured."[46]

2. Discussion

In the facts in this case, no jurisdictional impediment exists because no party has invoked the jurisdiction of a court. Although the ED or Respondents could have sought a judicial determination of the issue of the ownership of the Property, neither party filed a lawsuit before the convening of the administrative hearing in this case. Respondents' complaint was misplaced when they argued that the ED should have obtained a court ruling on the question of Respondents' ownership of the Property as part of this administrative action. As Professor Ron Beal writes in his treatise on Texas administrative practice:

> . . . the doctrine of primary jurisdiction has never stood for the proposition that a state district court and a state agency with concurrent jurisdiction may allow one of the parties to force the other to engage in duplicative legal proceedings simultaneously when they relate to the same controversy.[47]

If Respondents' contention is that a judicial court must rule on the question of ownership before the TCEQ could consider the violations that the ED has alleged against them, then Respondents could have sought that ruling from the appropriate court. They did not. In the absence of a court ruling, the TCEQ has the authority to make a determination of ownership, and the ALJ has the authority to issue a proposal for decision on that issue. Respondents may not

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[46] *Id.*, citing *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex. 2001).

[47] 1 Ronald L. Beal, *Texas Administrative Practice and Procedure* § 5.5.4 (Release No. 12, June 2009).

complain that the ED has failed to seek a court ruling when Respondents had the power to take that same action and did nothing. Respondents' argument is rejected.

B. Are Respondents owners of the Property?

1. Governing law

By law, title to an estate vests in the heirs immediately upon the death of the decedent. Texas appellate courts have held that there is never a time when title to real property is not vested in someone.[48] The vesting of title in the heirs upon death of the decedent is said to occur within " . . .an infinitely small period of time" and that " [t]here is no shorter interval of time than between the death of a decedent and the vesting of his estate in his heirs."[49]

2. Evidence

To determine the heirs in this case, the ED interviewed Respondent Diane Hill, a great-granddaughter of G.W. Carter. Ms. Hill gave the ED's investigators a list of family members, showing their relation to one another as siblings, aunts, uncles, spouses, and children.[50] Despite Ms. Hill's having given the information to the ED, at the hearing she disavowed the accuracy of the information. She explained that she had lost her memory following her treatment for meningitis after she gave the information to the ED and that she could not vouch for the source

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[48] *Zahn v. National Bank of Commerce of Dallas*, 328 S.W.2d 783 (Tex. Civ. App.—Dallas 1959, writ ref'd n. r. e.).

[49] *Welder v. Hitchcock*, 617 S.W.2d 294, 297 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) Beginning in 1971, the Texas Probate Code was amended to allow an heir to intestate estate to disclaim an inheritance but only if the heir executed a written memorandum within nine months of the death of the decedent. TEX. PROBATE CODE § 37A(h). That provision of law did not apply upon G.W. Carter's death in 1949.

[50] ED-29. It was not clear from the testimony whether Ms. Hill created the list from information that she was given or that she was given the list itself. Although the list is typed, the title is interlineated in someone's handwriting (in italics): "LIST OF *G.A. CARTER (PAPA CARTER)* FAMILY MEMBERS, MARCH 31, 2009." Ms. Hill testified that she did not know the identity of G.A. Carter and that she was unfamiliar with the name "Papa Carter."

or accuracy of any of the information on the list. Further, she explained that she had little contact with the extended Carter family and recognized almost none of the names on the list.

Of the persons on the list, Ms. Hill could trace only her own relation to G.W. Carter. She testified that she believed that James W. Carter, Lee Otis Carter, and Gerald Carter had some relation to her, but she was not sure what that relation might be. She also testified that Joe I. Roland was a first cousin and that his parents were Vera Roland and L.V. Roland, although she did not identify how the Roland family was related to the Carter family.

In addition to Ms. Hill's list, the ED obtained copies of: (1) the 1937 Texas death certificate of Sophronia Hill, one of G.W. Carter's daughters;[51] (2) the 2004 California death certificate of Lois Aubrey Hill, one of Sophronia Hill's sons;[52] (3) the 1949 Texas death certificate of G.W. Carter;[53] and the 2007 California death certificate of Bernice Carter Gordon, another of G.W. Carter's daughters.[54] These documents also provided the names and relations of some of the decedents' family members.

3. Discussion

The ALJ has summarized the Carter family genealogical evidence in Appendix A. The table discloses that on the death of G.W. Carter, his estate passed through intestacy to his children, of whom only four are part of the facts in this case: Bernice Carter Gordon, Ammie Carter, Sr., Sophronia Carter, and the unnamed parent of Vera Roland (Carter Children). The evidence established that these four were intestate heirs of their father.

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[51] ED-42.

[52] ED-43.

[53] ED-44.

[54] ED-45.

Not established by the evidence was whether any of the Carter Children similarly died intestate. If all four did, then their separate intestate interests in the Property would have passed separately through intestacy to their 13 listed children (Carter Grandchildren), of whom seven were named Respondents. And, if all thirteen of the Carter Grandchildren died intestate, then their separate intestate interests in the Property would have passed to their thirteen children (Carter Great-Grandchildren), of whom eleven were named Respondents.

The intestate line of succession could have been interrupted by a valid will written by any one of the Carter Children or Grandchildren. The probate records in the counties of their deaths would reveal whether any Carter family wills had been filed for probate. The provisions of the wills would reveal whether any of the decedents had made testamentary gifts of the Property to other heirs, including relatives, non-relatives, churches, or other charitable organizations. If they had, then that part of the ownership of the Property would have passed by will to persons or entities other than Respondents. The ED held the burden of proving that Respondents are the current heirs of the G.W. Carter estate and are proper parties to this proceeding.[55] The ED presented no proof that title to the Property passed by intestate succession to persons other than the Carter Children.

Despite this evidentiary gap, the ED nonetheless established that the Respondents are heirs of G.W. Carter (thus, partial owners of the Property) through the following three sets of evidence. First, the ED offered without objection a letter from Respondent Lawrence Hill in which Mr. Hill described himself as an heir of G.W. Carter.[56] Respondent's having made an appearance in this proceeding through counsel, coupled with his written admission, was sufficient to establish his status as an heir for the purposes of this proceeding.

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[55] 30 TAC § 80.17.

[56] ED-14.

Second, the ED offered without objection the ED's requests for admission sent to Respondents Judy Hill, Doris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Gaynell Carter-Jenkins, and Joe Carter. These Respondents failed to respond to the requests, and the ED asked to deem the Respondents' absence of answers as admissions. Again, the Respondents' appearance through counsel, coupled with their non-responses to the requests for admission and with their non-objection to the offer, was sufficient to establish these Respondents' status as heirs for the purposes of this proceeding.

Third, counsel for all of the other named Respondents (except for Doray Hill and Katherine W. Carter) stipulated on the record to their status as heirs. The stipulation was sufficient to establish their status as heirs for the purpose of this proceeding.

Based on this evidence and stipulations, the ED proved its allegation that Respondents are heirs of the estate of G.W. Carter and that each of them holds some fractional ownership interest in the Property.

C. Are Respondents strictly liable based on ownership alone?

An owner in the chain of title of real property in a SWDA case is " . . . strictly liable for the contaminated property as a matter of law."[57] Under the statute, ownership alone may suffice to create administrative liability without a showing of any causative action by an alleged

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[57] *Compton v. Texaco, Inc.*, 42 S.W.3d 354, 361 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The court went on to note that the only defense to strict liability is provided for those "innocent purchasers" who take title without knowledge of contamination, citing TEX. HEALTH & SAFETY CODE § 361.275. The exemption created by that status is limited to cases in which the ED seeks administrative or injunctive relief under sections of the SWDA not cited in this proceeding. In any case, Respondents did not raise TEX. HEALTH & SAFETY CODE § 361.275 as a defense.

violator.[58] Respondents argued that causation is a consideration because the language of the TCEQ rules state that a person may not ". . . cause, suffer, allow, or permit . . . ." the improper storage or disposal of municipal waste.[59]

Respondents relied exclusively on dictionary definitions of the terms to argue that "cause," "suffer," "allow," and "permit" include some element of volition. Respondents argued that their nearly complete lack of contact with the Property has insulated them from having caused, suffered, allowed, or permitted any action on the Property. Their argument would have some weight if in 2005, the Texas supreme court had not held that " . . . there is no causation requirement in the language of SWDA with regard to . . . proving that a defendant is a 'person responsible for solid waste.'"[60] Respondents' argument is rejected as a matter of settled law.

D. Was the proposed administrative penalty properly calculated?

The ED established that Respondents' status as heirs includes their legal obligation to keep the Property free of environmental violations. Similarly, the ED established that a penalty of $23,250 was appropriate and that the calculation of the amount was consistent with the TCEQ's 2002 Penalty Policy.[61] That proof was based on the testimony of the ED's witness, Clinton Sims, and his penalty calculation worksheet.[62] The penalty was based on the estimate of 76,666 tires, as given by Mr. Goodin, and was based on a $2 removal cost per tire, a measurement made to the Respondents' advantage at the lower end of the estimated cost spectrum.[63]

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[58] *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d 232, 251 (Tex. 2005).

[59] 30 TAC § 330.15(a) and (c).

[60] *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d at 251.

[61] ED-36.

[62] ED-35.

[63] *Id.*

Respondents objected to Mr. Sims' testimony because, they asserted, Mr. Sims was not the same person who calculated the $7,750 proposed penalty in the previous version of the complaint. The ED had the right to call any witness on this issue who had sufficient knowledge of the TCEQ penalty calculation system and the facts in the case. Mr. Sims satisfied those requirements. Respondents did not object to Mr. Sims' lack of expertise, only to his identity. The objection is overruled as without proper foundation.

E. Did the ED properly allocate the Respondents' respective administrative liabilities?

The ED did not ask to apportion among the Respondents their responsibility for paying the administrative penalty. Instead, the ED sought joint and several liability among all.[64] The law governing administrative penalties requires the TCEQ to take into account the history and actions of individual Respondents. Specifically, the law requires that " . . .with respect to the alleged violator . . . " certain factors must be considered in the TCEQ's determination of an administrative penalty. These include: (1) whether the violation could have been reasonably anticipated and avoided, (2) whether anyone gained any economic benefit by the violation, and (3) any other matters that justice may require.[65]

By paying the taxes on the Property, Ms. Hill and James Carter were aware of its existence as an asset of the individual heirs of the Carter family. Further, Ms. Hill testified that they paid property taxes subject to an agricultural exemption, demonstrating that she and James Carter were using the Property (or allowing others to use the Property) for beneficial purposes. If Ms. Hill and James Carter knew that the Property held benefit, then it is reasonable to conclude that they recognized that the Property should have been inspected to protect it from harm.

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[64] ED-2 at 62, item 11. The ED also did not ask that the TCEQ apportion among the Respondents the cost of eliminating the tires from the Property. The right to apportion remediation costs appears to be within the jurisdiction of a court of law, not the TCEQ. TEX. HEALTH & SAFETY CODE § 361.343(b).

[65] TEX. WATER CODE § 7.053.

Among the heirs who signed the two oil and gas leases, seven were Respondents in this proceeding: Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill. Their economic benefit was not quantified in the hearing, but these Respondents clearly sought to gain an economic benefit from the use of the Property. They also had an interest in protecting the Property from harm.

As to the other fourteen Respondents who neither paid taxes on the Property nor signed the oil and gas leases, the ED did not show that any of these Respondents had exercised control, made contact, or had more than the most elementary knowledge about the existence of the Property. These persons were:

Donald A. Hill (Haywood, California)
Deborah Hill-Thompson (Harvest, Alabama)
Lawrence A. Hill (Minneapolis, Minnesota)
Candis A. Hill McKelvy (Minneapolis, Minnesota)
Kermit A. Hill (Maplewood, Minnesota)
Dorris Jean Hill (Portland, Oregon)
Aurelia Harris (Los Angeles, California)
Delmaris Roby (Austin, Texas)
Lawada Hill (Long Beach, California)
Kevin Hill (Long Beach, California)
Cora Turner Houston (Corpus Christi, Texas)
James W. Carter (Austin, Texas)
Joe I. Roland (Lockhart, Texas)
Merilee Crawford (San Francisco, California)
Gaynell Carter-Jenkins (Leveen, Arizona)

Although these persons share administrative liability in this case, justice would not be served by imposing on these persons an obligation to share in the payment of an administrative

penalty. The ALJ recommends that the administrative penalty be imposed upon the other nine Respondents. Although the ED's petition does not propose a payment plan, the ALJ recommends that one be included in the final order. The proposed order suggests a schedule of payment of $100 per month for each of the nine Respondents upon whom the administrative penalty should be imposed.

VI. SUMMARY

The ALJ recommends that the TCEQ issue an order: (1) finding that the Respondents are liable for violations of the SWDA on the Property, (2) requiring the Respondents to remove the used and scrap tires or come into compliance as a tire storage facility, and (3) imposing an obligation to pay an administrative penalty of $23,250 at the rate of $100 per month on Respondents Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill.

SIGNED January 24, 2011.

PAUL D. KEEPER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

APPENDIX A
ALJ'S SUMMARY OF POSSIBLE GENEALOGY OF G.W. CARTER FAMILY

G.W. CARTER'S CHILDREN	G.W.CARTER'S GRANDCHILDREN	G.W. CARTER'S GREAT-GRANDCHILDREN
Bernice Carter Gordon (D)	**Merilee Crawford**	
Ammie Carter, Sr. (D)	Ammie Carter, Jr. (D)	**Diane Elaine Carter Hill (t)**
Sophronia Carter (D)	Grace Hill (D)	**Clyde E. Hill**
		Doris Jean Hill
	Aurelia Harris	
	Lois Hill (D)	**Donald A. Hill**
		Deborah Hill-Thompson
		Lawrence A. Hill
		Candis A. Hill McKelvy
		Kermit A. Hill
	Grady Goodley (o)	
	Delmaris Roby	
	Henry Lee Hill (D)	David Hill
		Marie Hill
	Fred Douglas Hill (D)	**Lawada Hill**
		Kevin Hill
	Nokomis Hill (o)	
	Cora Turner Houston	
	Coline Knox (o)	
Unknown (D)	Vera Roland (D)?	**Joe I. Roland**

Note: Respondents' names are listed in **bold.**
Deceased members of the family are shown with a (D).
Respondents who paid taxes on the Property are shown with a (t).
Respondents who signed oil and gas leases on the Property are shown with an (o).
Respondents not shown on this table are James Carter (t), Joe Carter (o), Getrell A. Carter (o), Gerald E. Carter (o), and Lee Otis Carter (o).

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST DIANE HILL, JAMES CARTER, JOE CARTER, GETRELL A. CARTER, GERALD E. CARTER, LEE OTIS CARTER, GRADY GOODLEY, COLINE KNOX, AND NOKOMIS HILL
AND
ORDERING CORRECTIVE ACTION BY
DIANE HILL, DONALD A. HILL, DEBORAH HILL-THOMPSON, LAWRENCE A. HILL, CANDIS A. HILL MCKELVY, KERMIT A. HILL, DORRIS JEAN HILL, AURELIA HARRIS, GRADY GOODLEY, DELMARIS ROBY, LAWADA HILL, KEVIN HILL, NOKOMIS HILL, CORA TURNER HOUSTON, COLINE KNOX, JAMES W. CARTER, LEE OTIS CARTER, JOE I. ROLAND, GETTRELL A. CARTER, GERALD E. CARTER, MERILEE CRAWFORD, GAYNELL CARTER-JENKINS, AND JOE CARTER,

TCEQ DOCKET NO. 2006-1140-MSW-E
SOAH DOCKET NO. 582-09-2078

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Third Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Respondents Diane Hill, Doray Hill, Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Katherine W. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter. A Proposal for Decision (PFD) was presented by Paul D. Keeper, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the Petition on October 20, 2010, in Austin, Texas.

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

I. FINDINGS OF FACT

1. In 1913, G.W. Carter purchased 89.5 acres in Caldwell County located near the present-day intersection of FM 672 and CR 169 (the Property).

2. In 1949, Mr. Carter died intestate in Texas, leaving 23 children as heirs.

3. For the next sixty years, ownership of the Property passed among the generations of the Carter family living in Alabama, Arizona, California, Minnesota, Mississippi, Oregon, and Texas.

4. On July 14, 2005, and July 18, 2006, the ED's investigators conducted compliance investigations of the Property.

5. The ED's investigators documented that thousands of scrap and used tires had been dumped on the Property.

6. On August 16, 2005, and July 18, 2006, the ED's investigators sent notices of violation to Respondents Diane and Doray Hill.

7. On January 15, 2009, the ED referred the case to SOAH.

8. In his original petition, the ED: (1) alleged that Respondents had violated TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TEX. ADMIN. CODE (TAC) § 330.15(a) by storing more than 500 scrap or used tires on the Property without a registering the site as a tire

storage facility, and (2) sought an order from the TCEQ that Respondents pay an administrative penalty for the violations and bring the Property into compliance with Texas' environmental laws governing the storage of scrap and used tires.

9. Diane Hill, a great-granddaughter of G.W. Carter, gave the ED's investigators a list of Carter family members.

10. On May 19, 2009, the ED filed an amended petition, adding as Respondents Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Katherine W. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter, and sent the amended petition to Respondents.

11. Respondent Diane Hill had no role in the dumping or allowing the dumping of used or scrap tires on the Property.

12. On April 7, 2010, and October 15, 2010, the ED filed second and third amended petitions and sent the amended petitions to Respondents.

13. On October 20, 2010, the ALJ convened a hearing on the merits at SOAH's Austin location, and on December 10, 2010, the administrative record closed.

14. Attorney Darwin McKee entered a general appearance for all Respondents, and James Salans and Jennifer Cook represented the ED.

15. Respondents who are heirs of G.W. Carter and who have an ownership interest in the Property are: Diane Hill, Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill,

Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Grady Goodley, Delmaris Roby, Lawada Hill, Kevin Hill, Nokomis Hill, Cora Turner Houston, Coline Knox, James W. Carter, Lee Otis Carter, Joe I. Roland, Gettrell A. Carter, Gerald E. Carter, Merilee Crawford, Gaynell Carter-Jenkins, and Joe Carter.

16. Respondents who paid taxes on the Property were Diane Hill and James Carter.

17. Respondents who signed oil and gas leases on the Property were Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill.

18. The TCEQ adopted in 2002 a Penalty Policy about the computation and assessment of administrative penalties.

19. Chance Goodin, a Department of Public Safety pilot, established by photographic evidence and by testimony that approximately 76,666 tires had been dumped on the Property.

20. Clinton Sims, a TCEQ employee, established that an administrative penalty of $23,250 was appropriate based on Mr. Goodin's estimate of the number of tires, the cost of removal, and the other factors listed in the Penalty Policy.

21. By paying taxes on the Property, Diane Hill and James Carter showed that they were aware of the existence of the Property and gained an economic benefit of ownership without tax liens.

22. By signing oil and gas leases on the Property, Respondents Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill

showed that they were aware of the existence of the Property and gained an economic benefit from the Property.

23. By examining the Property on a regular basis, Respondents Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill could have identified the violation and potentially could have taken steps to avoid further violations.

II. CONCLUSIONS OF LAW

1. The TCEQ has the authority to regulate the storage of used or scrap tires. TEX. HEALTH & SAFETY CODE § 361.112.

2. The TCEQ has authority over a person who violates any statute or rule within the TCEQ's jurisdiction. TEX. WATER CODE § 7.073.

3. The TCEQ may assess against a violator an administrative penalty and may order the person to take corrective action. TEX. WATER CODE §§ 7.051 and 7.073.

4. The maximum administrative penalty that the TCEQ may impose for violations of the law is $10,000 per day. TEX. WATER CODE § 7.052(c).

5. In determining the amount of the penalty, the TCEQ must take into consideration with respect to an alleged violator: (1) the history and extent of previous violations; (2) 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; (3) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons; (4) economic

benefit gained through the violation; (5) the amount necessary to deter future violations; and (6) any other matters that justice may require. TEX. WATER CODE § 7.053.

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. TEX. GOV'T CODE ch. 2003

7. SOAH has the authority to recommend that the TCEQ make a final administrative determination of Respondents' ownership of the Property because of SOAH's: (1) general statutory authority to issue proposals for decision that include findings of fact and conclusions of law, TEX. GOV'T CODE § 2003.042(a)(6); and (2) SOAH's specific authority to hear any matter over which the TCEQ has jurisdiction. TEX. WATER CODE § 5.311(a); 30 TAC § 80.6.

8. A person may not store more than 500 used or scrap tires for any period on any privately owned property unless the person registers the storage site with the TCEQ. TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TAC § 328.60(a).

9. "Solid waste facility" means " . . . all contiguous land . . . used for . . . storing . . . solid waste." TEX. HEALTH & SAFETY CODE § 361.003(36).

10. "Storage" means " . . . the temporary holding of solid waste, after which the solid waste is processed, disposed of, or stored elsewhere." TEX. HEALTH & SAFETY CODE § 361.003(38).

11. "Disposal"of solid waste includes the dumping or placing of solid waste ". . . on land . . . so that the solid waste . . . . may be . . . introduced into the environment . . . ." TEX. HEALTH & SAFETY CODE § 361.003(7).

12. A person may not " . . . cause, suffer, allow, or permit the . . . storage . . . or disposal of municipal solid waste . . . or the use or operation of a solid waste facility to store . . . or dispose of solid waste . . . in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the [TCEQ], or in such a manner that causes: . . . (2) the creation and maintenance of a nuisance; or (3) the endangerment of the human health and welfare or the environment." 30 TAC § 330.15(a).

13. A person may " . . . not cause, suffer, allow, or permit the dumping or disposal of [municipal solid waste, including used and scrap tires] without the written authorization of the [TCEQ]. 30 TAC § 330.15(c).

14. The ED held the burden of proving that Respondents are the current heirs of the G.W. Carter estate and are proper parties to this proceeding. 30 TAC § 80.17.

15. The ED properly brought this administrative action against the heirs of G.W. Carter because: (1) an estate of a decedent is not a legal entity and may not properly sue or be sued as such and (2) claims against an estate should be instituted against the decedent's personal representative or, under appropriate circumstances, against the heirs or beneficiaries. *Price v. Estate of Anderson*, 522 S.W.2d 690, 691 (Tex. 1975).

16. The TCEQ procedural rules under which this proceeding was conducted do not include the concept of an "indispensable party," notice to unknown heirs, or publication of notice to unknown heirs. 30 TAC ch. 80.

17. The proper parties to this proceeding are the individual heirs of G.W. Carter, many of whom were named as Respondents in this proceeding.

18. In the absence of a valid will, the Texas laws of descent and distribution apply to the ownership of a decedent's real property. *Jones v. LaFargue*, 758 S.W.2d 320, 325 (Tex. App.—Houston 1988, pet. denied).

19. G.W. Carter's estate passed by intestate succession to his children and their descendants. TEX. PROB. CODE § 38(a).

20. The estate of a deceased defendant is not a legal entity and cannot be sued. *Henson v. Estate of Crow*, 734 S.W.2d 648, 649 (Tex. 1987).

21. The heirs of an intestate estate are the proper parties to an enforcement action. *Miller v. Estate of Self*, 113 S.W.3d 554, 556 (Tex. App.—Texarkana 2003, no pet.).

22. The doctrine of primary jurisdiction allocates power between the state's courts and administrative agencies when both have authority to make initial determinations in a dispute. *Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 221 (Tex. 2002).

23. No jurisdictional impediment to the authority of the TCEQ or SOAH to consider this case exists because no party has invoked the jurisdiction of a court that preempts their jurisdiction.

24. An owner in the chain of title of real property in a Solid Waste Disposal Act (SWDA) case is strictly liable for the contaminated property as a matter of law. TEX. HEALTH & SAFETY CODE ch. 361; *Compton v. Texaco, Inc.*, 42 S.W.3d 354, 361 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

25. Under the SWDA, ownership alone may suffice to create administrative liability without a showing of any causative action by an alleged violator. *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d 232, 251 (Tex. 2005).

26. There is no causation requirement in the language of SWDA with regard to proving that a defendant is a person responsible for solid waste. *R.R. Street & Co. v. Pilgrim Enters.*, 166 S.W.3d at 251.

27. Based on the above Findings of Fact and Conclusions of Law, Respondents violated the TEX. HEALTH & SAFETY CODE § 361.112(a) and 30 TAC § 330.15(a) by failing to: (1) register a scrap tire storage site, and (2) prevent the unauthorized disposal of municipal solid waste.

28. The law governing administrative penalties requires the TCEQ to take into account the history and actions of individual Respondents, including: (1) whether the violation could have been reasonably anticipated and avoided, (2) whether anyone gained any economic benefit by the violation, and (3) any other matters that justice may require. TEX. WATER CODE § 7.053.

29. Because Respondents Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill were aware of the Property and of the economic benefits that they were deriving from the Property, the administrative penalty should be imposed on these persons.

30. Justice would not be served by imposing on these Respondents an obligation to share in the payment of an administrative penalty: Donald A. Hill, Deborah Hill-Thompson, Lawrence A. Hill, Candis A. Hill McKelvy, Kermit A. Hill, Dorris Jean Hill, Aurelia Harris, Delmaris Roby, Lawada Hill, Kevin Hill, Cora Turner Houston, Joe I. Roland, Merilee Crawford, Gaynell Carter-Jenkins.

31. The TCEQ should order: (1) all Respondents to remove the tires or bring their property into compliance as a tire storage facility and (2) these Respondents to pay an

administrative penalty of $23,250: Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill.

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. Beginning 30 days after the effective date of this Commission Order, Respondents Diane Hill, James Carter, Joe Carter, Getrell A. Carter, Gerald E. Carter, Lee Otis Carter, Grady Goodley, Coline Knox, and Nokomis Hill shall pay an administrative penalty in the amount of $23,250 at the rate of $100 each, each month consecutively until the administrative penalty is paid. The payment of this administrative penalty and the performance of all corrective action listed herein will completely resolve the violation set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made payable to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: [Name of Respondent]; SOAH Docket No. 582-09-2078, TCEQ Enforcement No. 2006-1140-MSW-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

2. Within 180 days of the effective date of this Order, unless extended, Respondents shall remove and dispose of all scrap tires on her Property at an authorized facility.

3. Within 180 days after the effective date of the Commission Order, Respondents shall submit written certification and detailed supporting documentation, including photographs, receipts, and other records, to demonstrate compliance with Ordering Provision No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

> "I certify under penalty of law that 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."

4. Respondents 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

5. 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 Respondents if the ED determines that Respondents have not complied with one or more of the terms or conditions in this Commission Order.

6. 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.

7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE § 2001.144.

8. The Commission's Chief Clerk shall forward a copy of this Order to each of the Respondents through their attorney.

9. 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 ENVIRONMENTALQUALITY

_____

Bryan W. Shaw, Ph.D., Chairman
For the Commission