

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE
Protecting Texas by Reducing and Preventing Pollution

October 31, 2007

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

Re: Executive Director's Exceptions to the ALJ's Proposal for Decision
Tommy Joe Thomas dba Deer Trail Mobile Home Park
Enforcement ID No. 31132; RN101237923; TCEQ Docket No. 2006-1654-PWS-E

Dear Ms. Castañuela:

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

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the letter to the Respondent. Please file stamp these documents and return them to Dinniah M. Chahin, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0617.

Sincerely,

A handwritten signature in cursive script that reads "Dinniah M. Chahin".

Dinniah M. Chahin
Attorney
Litigation Division

Enclosures

cc: Mr. Tommy Joe Thomas, Owner, 9813 Deer Trail Drive, Houston, Texas 77038
Cathy Albrecht, Enforcement Division, TCEQ, MC R-12
Stephen Smith, Water Section Manager, TCEQ, MC R-12
Blas Coy, Public Interest Counsel, TCEQ, MC 103

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 31, 2007

Via Interagency Mail

Via Facsimile (512) 475-4994

The Honorable Kerry D. Sullivan
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision;
Tommy Joe Thomas dba Deer Trail Mobile Home Park; Enforcement ID No. 31132
RN101237923; SOAH Docket No. 582-07-3175; TCEQ Docket No. 2006-1654-PWS-E

To The Honorable Judge Sullivan:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision signed on October 12, 2007. If you have any questions or comments, please call me at (512) 239-0617.

Sincerely,

A handwritten signature in cursive script that reads "Dinniah M. Chahin".

Dinniah M. Chahin
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. Tommy Joe Thomas, Owner, 9813 Deer Trail Drive, Houston, Texas 77038

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CHIEF CLERKS OFFICE

SOAH DOCKET NO. 582-07-3175
TCEQ DOCKET NO. 2006-1654-PWS-E

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

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BEFORE THE

VS.

STATE OFFICE OF

TOMMY JOE THOMAS D/B/A DEER
TRAIL MOBILE HOME PARK,
RESPONDENT

ADMINISTRATIVE HEARINGS

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

TO THE HONORABLE JUDGE SULLIVAN:

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

I. PROPOSED ORDER

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

FINDINGS OF FACT NO. 4

The Executive Director respectfully requests that Findings of Fact No. 4 be revised to change the statutory citation in the first sentence from TEX. WATER CODE ANN. § 7.054 to TEX. HEALTH & SAFETY CODE ANN. ch. 341. Currently the sentence reads, "On January 10, 2007, the Executive Director filed the EDPRP, in accordance with TEX. WATER CODE ANN. (WATER CODE) § 7.054, alleging that, based on findings made during the inspection, Respondent violated certain Commission rules and regulations." The sentence should be changed and revised to reflect the underlined statutory citation, "On January 10, 2007, the Executive Director filed the EDPRP, in accordance with TEX. HEALTH & SAFETY CODE ANN. ch. 341, alleging that, based on findings made during the inspection, Respondent violated certain Commission rules and regulations."

FINDINGS OF FACT NO. 8

The Executive Director respectfully requests that Findings of Fact No. 8 be revised to add that the penalty should be assessed for a single violation. Currently the sentence reads, "Based on the penalty calculation worksheet, the Executive Director alleged that a base penalty of \$50 should be assessed for Respondent's failure to use maintenance and housekeeping practices to ensure the good working condition and general appearance of the Facility's equipment." The sentence should be changed and revised to reflect the underlined phrase, "Based on the penalty calculation worksheet, the Executive Director alleged that a base penalty of \$50 should be assessed for a single violation pertaining to Respondent's failure to use maintenance and housekeeping practices to ensure the good working condition and general appearance of the Facility's equipment."

FINDINGS OF FACT NO. 13

The Executive Director respectfully requests that Findings of Fact No. 13 be revised to change the date the Chief Clerk mailed notice of the hearing to Respondent. Currently the sentence reads, "On June 25, 2007, the Chief Clerk mailed notice of the scheduled hearing to Respondent by certified and first class mail at Respondent's last known address." The sentence should be changed and revised to reflect the underlined date, "On June 20, 2007, the Chief Clerk mailed notice of the scheduled hearing to Respondent by certified and first class mail at Respondent's last known address."

CONCLUSIONS OF LAW NO. 7.a.

The Executive Director respectfully requests that Conclusions of Law No. 7.a. be revised to reflect additional authority to enter a Default Order in the Texas Administrative Code. Currently, the sentence reads, "A default order should be issued against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC § 70.106(b); and". The sentence should be changed to include the following underlined provisions, "A default order should be issued against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC §§ 70.106(b) and 80.113(d); and".

Respectfully submitted,

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Mary R. Risner, Division Director
Litigation Division

By:



Dinniah M. Chahin
State Bar of Texas No. 24050400
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-3400
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2007, the original and eleven (11) copies of the foregoing Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (Article No. 7004 2510 0003 9117 9171), to:

Mr. Tommy Joe Thomas dba Deer Trail Mobile Home Park
9813 Deer Trail Drive
Houston, Texas 77038

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

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

The Honorable Kerry D. Sullivan
Administrative Law Judge
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701



Dinniah M. Chahin
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER
Assessing Administrative Penalties Against and
Ordering Corrective Action by
Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park
TCEQ Docket No. 2006-1654-PWS-E
SOAH Docket No. 582-07-3175

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP or Petition) recommending that the Commission issue an order assessing administrative penalties against and requiring corrective action by Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park (Respondent). A Proposal for Decision was presented by Kerry D. Sullivan, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 12, 2007, in Austin, Texas.

The Executive Director, represented by Dinniah M. Chahin, Staff Attorney, appeared at the hearing. Respondent was not present at the hearing nor represented by counsel and did not request a continuance. The Executive Director requested that a default order be issued against Respondent. The ALJ agreed with the Executive Director's request.

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

I. FINDINGS OF FACT

1. Respondent operates a public water supply system (the Facility) that provides treated well water to at least 25 people per day for at least 60 days per year. The Facility has approximately 30 service connections.
2. The Facility is located at 9903 Deer Trail Drive, Houston, Harris County, Texas.
3. On July 11, 2006, a TCEQ Houston Regional Office Investigator conducted an inspection of the Facility.
4. On January 10, 2007, the Executive Director filed the EDPRP, in accordance with TEX. HEALTH & SAFETY CODE ANN. ch. 341, alleging that, based on findings made during the inspections, Respondent violated certain Commission rules and regulations. The Petition recommended that the Commission issue an enforcement order assessing a total administrative penalty of \$1,494 against Respondent and recommending certain corrective actions.
5. The Executive Director sent, by certified mail, return receipt requested, and by regular mail, a copy of the EDPRP to Respondent at Respondent's last address known to the TCEQ.
6. The Executive Director alleged the following violations in the Petition, pursuant to the inspections conducted at the Facility:
 - a. Respondent failed to provide a pressure tank capacity of fifty gallons per connection, as required by 30 TEX. ADMIN. CODE (TAC) § 290.45(b)(1)(A)(ii) and TEX. HEALTH & SAFETY CODE ANN § 341.0315(c). The facility requires 1,500 gallons of elevated storage capacity for 30 connections but provides only 315 gallons of pressure tank capacity.

- b. Respondent failed to use maintenance and housekeeping practices to ensure the good working condition and general appearance of the Facility's equipment, as required by 30 TAC § 290.46(m). Specifically, Respondent has failed to repair a hole caused by corrosion on the top plate of the well header and failed to cut the tall grass surrounding the well house and pressure tank.
 - c. Respondent failed to provide the fence gate or the well house with a lock to exclude possible contamination or damage to the Facility by trespassers, as required by 30 TAC § 290.41(c)(3)(O).
7. Based on the penalty calculation worksheet, the Executive Director alleged that a base penalty of \$250 should be assessed for each of three monthly violation events pertaining to the failure to provide pressure tank capacity of fifty gallons per connection. The Executive Director asserted the violation posed a major threat as assessed pursuant to the Commission's Environmental, Property, and Human Health Matrix (Matrix), in that the failure to provide adequate pressure tank capacity could compromise the system's ability to provide an adequate water supply.
8. Based on the penalty calculation worksheet, the Executive Director alleged that a base penalty of \$50 should be assessed for a single violation pertaining to Respondent's failure to use maintenance and housekeeping practices to ensure the good working condition and general appearance of the Facility's equipment. The Executive Director asserted the violations posed a minor threat as assessed pursuant to the Commission's Matrix.
9. Based on the penalty calculation worksheet, the Executive Director alleged that a base penalty of \$100 should be assessed for a single violation pertaining to Respondent's

failure to provide the fence gate or the well house with a lock. The Executive Director asserted that this violation posed a moderate threat as assessed pursuant to the Commission's Matrix in that it could allow a significant amount of pollutants to be introduced into the water supply, although they would not be expected to exceed levels protective of human health.

10. Based on the penalty calculation worksheet, a 66-percent enhancement of all base penalties is appropriate in light of Respondent's compliance history. Respondent has received two previous notices of violation for the same or similar violations, 18 previous notices of violation for dissimilar violations, and one previous agreed final enforcement order containing a denial of liability.
11. Respondent timely requested a hearing to address the Executive Director's allegations.
12. On or about June 11, 2007, the Commission's Chief Clerk, on the request of the Executive Director, referred this case to SOAH for hearing.
13. On June 20, 2007, the Chief Clerk mailed notice of the scheduled hearing to Respondent by certified and first class mail at Respondent's last known address. Respondent received the notice as evidenced by his signature on the return receipt.
14. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes and rules that the Executive Director alleged that the Respondent had violated;

- Referred to the Petition, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - Advised Respondent, in at least 12-point bold-faced type, that failure to appear at the public hearing in person or by legal representative would result in the factual allegations contained in the notice and Petition being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which alleged how the Commission should calculate a penalty for the alleged violations.
15. On July 12, 2007, the ALJ convened the hearing. Respondent did not appear at the hearing.
16. On that same date, the Executive Director moved that a default order be recommended against Respondent, in which all of the Executive Director's allegations would be deemed admitted as true and the penalties the Executive Director seeks would be assessed against Respondent.

II. CONCLUSIONS OF LAW

1. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the Commission may assess an administrative penalty against any person who violates Chapter 341 of the TEX. HEALTH & SAFETY CODE ANN. or any rule or order adopted or issued thereunder.
2. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the penalty may not be less than \$50 nor more than \$1,000 for each violation of TEX. HEALTH & SAFETY CODE ANN., Subchapter C, or a rule or order adopted or issued thereunder.

3. The Commission may order the violator to take corrective action to ensure that public drinking water systems supply safe drinking water and are technically sound, in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
4. Based on the above Findings of Fact and as required by TEX. HEALTH & SAFETY CODE ANN. § 341.049 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, the proposed penalties, and the corrective actions proposed therein.
5. Based on the above Findings of Fact, Respondent was appropriately notified of the hearing on the alleged violations, the proposed penalties, and corrective actions, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. HEALTH & SAFETY CODE ANN. § 341.049, 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6. Additionally, Respondent was notified, in accordance with 1 TAC § 155.55, that if Respondent failed to appear at the hearing, a default determination could be rendered against Respondent by which all the allegations contained in the notice of hearing would be deemed admitted as true.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default order should be issued against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC §§ 70.106(b) and 80.113(d); and
 - b. The allegations that were contained in the notice of the hearing, including those in the Petition attached thereto, should be admitted as true.

8. Based on the above Findings of Fact and Conclusions of Law, the Respondent has violated the following provisions: TEX. HEALTH & SAFETY CODE ANN. § 341.0315(c), and 30 TAC §§ 290.41(c)(3)(O), 290.45(b)(1)(A)(ii), and 290.46(m).
9. In determining the amount of an administrative penalty, TEX. HEALTH & SAFETY CODE ANN. § 341.049(b) requires the Commission to consider several factors, including:
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. HEALTH & SAFETY CODE ANN. § 341.049(b) and the Commission's Penalty Policy, the recommended penalties for each of the alleged violations and a total administrative penalty of \$1,494 are justified and should be assessed against Respondent.
12. The corrective action sought by the Executive Director in the EDPRP and set out below in the ordering provisions is authorized by TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
13. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommended in the Petition.

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, Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park shall pay an administrative penalty in the amount of \$1,494 for the violations specified in this order. The payment of this administrative penalty and Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. Checks rendered to pay penalties shall be sent with the notation: "Re: Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park, TCEQ Docket No. 2006-1654-PWS-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 30 days of the effective date of this Commission Order, Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park shall:
 - a. initiate maintenance and housekeeping practices that shall ensure the good working condition and general appearance of the system's facilities and equipment, in accordance with 30 TAC § 290.46, including but not limited to repairing or

replacing the top plate of the well header and cutting the grass surrounding the well house and pressure tank; and

- b. install locks or other safeguards on the fence gate and the well house sufficient to prevent possible contamination of the water or damage by trespassers, in accordance with 30 TAC § 290.41.
3. Within 45 days after the effective date of the Commission Order, Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park shall submit written documentation as detailed in Ordering Provision 6, below, to demonstrate compliance with Ordering Provision 2.
4. Within 60 days after the effective date of this Commission Order, Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park shall provide a pressure tank capacity of 50 gallons per connection, as required by 30 TAC § 290.45 and TEX. HEALTH & SAFETY CODE § 341.0315.
5. Within 75 days after the effective date of this Commission Order, Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park shall submit written documentation as detailed in Ordering Provision 6 below, to demonstrate compliance with Ordering Provision 4.
6. The documentation provided pursuant to Ordering Provisions 3 and 5 shall be sufficient to demonstrate compliance with the ordering provisions and shall be sent to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

and

Stephen Smith, Water Section Manager
Texas Commission on Environmental Quality
Houston Regional Office
5425 Polk Avenue, Suite H
Houston, Texas 77023-1486

Each submittal of documentation shall also be notarized by a State of Texas Notary Public and shall contain a certificate that includes the following language:

I certify under penalty of law that I 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.

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 for want of merit.
9. 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 ANN. § 2001.144.
10. As required by WATER CODE § 7.059, the Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to Tommy Joe Thomas d/b/a Deer Trail Mobile Home Park .

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