

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Mark R. Vickery, P.G., *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

August 18, 2008

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

The Honorable Roy G. Scudday  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711

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;  
Michael Eugene French  
SOAH Docket No. 582-08-0669; TCEQ Docket No. 2006-2022-MSW-E

To The Honorable Judge Scudday:

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 dated on July 29, 2008. If you have any questions or comments, please call me at (512) 239-0974.

Sincerely,

A handwritten signature in cursive script, appearing to read "Anna Cox".

Anna M. Cox  
Attorney  
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105  
Mr. Michael French, 17 Wimbledon Court, Rockwall, Texas 75032

SOAH DOCKET NO. 582-08-0669  
TCEQ DOCKET NO. 2006-2022-MSW-E

2008 AUG 18 PM 4:14

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER**

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**BEFORE THE**

**VS.**

**STATE OFFICE OF**

**MICHAEL EUGENE FRENCH,  
RESPONDENT**

**ADMINISTRATIVE HEARINGS**

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

TO THE HONORABLE JUDGE SCUDDAY:

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:

**INTRODUCTION**

The Executive Director respectfully requests that the reference to the Executive Director Petition in the introductory sentence be revised to add a missing word. Currently, the sentence reads, "...considered the Executive Director's Report and Petition (EDPRP)." The sentence should be changed and revised to read, "...considered the Executive Director's Preliminary Report and Petition (EDPRP)."

### **FINDINGS OF FACT NO. 1**

The Executive Director respectfully requests that the Respondent's property be changed from farm animal operation to unauthorized municipal solid waste site. This change is requested because the property bound by an adjacent land owner's farm animal operation, the Respondent's property is not a farm animal operation but an unoccupied piece of rural property.

### **FINDINGS OF FACT NO. 2**

The Executive Director respectfully request that the TCEQ Notice of Violation be changed to TCEQ Notice of Enforcement. The Respondent was sent a Notice of Enforcement letter on November 2, 2006.

### **CONCLUSION OF LAW NO. 9**

The Executive Director respectfully requests that Conclusion of Law No. 9 be revised to correct the citation. Conclusion of Law No. 9 currently reads, "Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE § 330.15(c)." Conclusion of Law No.9 should read, "Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c)."

### **ORDERING PROVISION NO. 1**

The Executive Director respectfully requests that Ordering Provision No. 1 be revised to correct the citation. Ordering Provision No. 1 currently reads, "... violation of TEX. WATER CODE § 330.15(c)." Ordering Provision No.1 should read, "...violation of 30 TEX. ADMIN. CODE § 330.15(c)."

### **ORDERING PROVISION NO. 4**

The Executive Director respectfully requests that a number is address to correct the zip code. The zip code for Fort Worth, Texas currently reads "6118-6951." It should read "76118-6951."

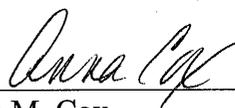
Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division

By:   
\_\_\_\_\_  
Anna M. Cox  
State Bar of Texas No. 24053154  
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 August 18, 2008, the original and eleven (11) copies of the foregoing "Exceptions to Administrative Law Judge's Proposal for Decision" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

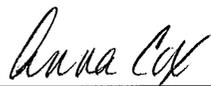
I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (Article No. 91 7108 2133 3935 1892 5792), to:

Michael Eugene French  
17 Wimbledon Court  
Rockwall, Texas 75032

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 Roy G. Scudday  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Suite 502  
P.O. Box 13025  
Austin, Texas 78711-3025

  
\_\_\_\_\_  
Anna M. Cox  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 AUG 18 PM 4:14  
CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against  
and Requiring Corrective Action By  
MICHAEL EUGENE FRENCH  
TCEQ DOCKET NO. 2006-2022-MSW-E  
SOAH DOCKET NO. 582-08-0669**

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 and requiring corrective action by Michael Eugene French (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 July 24, 2008, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED), represented by Mary E. Coleman, 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. On September 22, 2006, an Environmental Investigator for TCEQ conducted an investigation of Respondent's unauthorized municipal solid waste site located east of FM 148 and south of IH 20 near Terrell, Kaufman County, Texas. The investigator observed that approximately 14 cubic yards of putrescible waste and 1500 cubic yards of wood mulch, brush, root balls, and wood boards had been disposed of at the site.
2. On November 7, 2006, Respondent received the TCEQ Notice of Enforcement.
3. On July 17, 2007, the ED issued the Executive Director's Preliminary Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c) by failing to prevent the disposal of municipal solid waste at an unauthorized site. The ED recommended the imposition of an administrative penalty in the amount of \$1,000.00, and corrective action to bring the site into compliance.
4. The proposed penalty of \$1,000.00 is the base penalty for each day of violation.
5. An administrative penalty of \$1,000.00 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.
6. On August 6, 2007, Respondent requested a contested case hearing on the allegations in the EDPRP.
7. On October 26, 2007, the case was referred to SOAH for a hearing.

8. On November 13, 2007, the Commission's Chief Clerk issued notice of the preliminary 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.
9. At the preliminary hearing that was held on December 13, 2007, the ED established jurisdiction to proceed.
10. The hearing on the merits was conducted on July 24, 2008, in Austin, Texas, by ALJ Roy G. Scudday.
11. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default judgment against Respondent in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director seeks would be assessed against Respondent, and Respondent would be ordered to take corrective action recommended by the Executive Director. The ALJ granted the motion.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.

3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE § 155.55, that if Respondent failed to appear at the hearing, a default could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.
7. 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.
8. Based on the above Findings of Fact and Conclusions of Law:
  - a. A default judgment should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d); and
  - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are deemed admitted as true.

9. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 330.15(c).
10. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
  - Its impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
11. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
12. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$1,000.00 is justified and should be assessed against Respondent.
13. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Michael Eugene French is assessed an administrative penalty in the amount of \$1,000.00 for violation of 30 TEX. ADMIN. CODE § 330.15(c). The assessment of this administrative penalty and Mr. French's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Michael Eugene French; Docket No. 2006-2022-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. Immediately upon the effective date of the Commission Order, Mr. French shall cease accepting additional waste at the site.
3. Within 60 days after the effective date of the Commission Order, Mr. French shall remove all municipal solid waste, including putrescible waste, wood mulch, brush, root balls, and wood boards, and dispose of the wastes at an authorized facility.

4. Within 75 days after the effective date of the Commission Order, Mr. French shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 2 and 3. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

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

with a copy to:

Sam Barrett, Waste Section Manager  
Texas Commission on Environmental Quality  
Dallas/Fort Worth Regional Office  
2309 Gravel Drive  
Fort Worth, Texas 76118-6951

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.

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 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
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 ENVIRONMENTAL QUALITY

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Buddy Garcia, Chairman  
For the Commission