

SOAH DOCKET NO. 582-07-4078
TCEQ DOCKET NO. 2006-2025-MWD-E

2008 MAR 17 PM 3: 21

EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner
v.
PALO GAUCHO, INC.
Respondent

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BEFORE THE CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S EXCEPTIONS AND PROPOSED MODIFICATIONS TO
PROPOSAL FOR DECISION**

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's Proposal for Decision, pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. Introduction

At the time of the violations, Palo Gaucho, Inc. owned and operated a wastewater treatment facility located at on the east side of Farm-to-Market Road 3121, approximately 2.5 miles north of the intersection of Farm-to-Market Road 3121 and Farm-to-Market Road 83 in Sabine County, Texas ("Palo" or the "Facility"). The alleged violations were that Palo failed to comply with permitted effluent limits at Outfall 001 for Dissolved Oxygen, Biochemical Oxygen Demand (five day), and Total Suspended Solids based on discharge monitoring reports submitted by Palo and that Palo failed to submit the annual sludge report for the monitoring period ending July 31, 2005 by the September 1, 2005 deadline. Based on a record review conducted by TCEQ staff spanning July 2005 through June 2006, the Executive Director brought an enforcement action against Palo Gaucho, Inc., seeking administrative penalties and corrective action.

The State Office of Administrative hearings conducted an evidentiary hearing on February 14, 2008. In his Proposal For Decision, the Administrative Law Judge ("ALJ") recommended that the Commission enter a default judgment against Palo, deem as true the facts alleged by the Executive Director, assess a penalty of \$9,200, and take the corrective action sought by the Executive Director, since Palo failed to appear at the hearing on the merits.

II. Exceptions

The Executive Director agrees with and supports the adoption of the substance of the Administrative Law Judge's ("ALJs") findings and conclusions with the exception of the ordering provision in regards to submitting written certification of compliance with the effluents limits of TPDES Permit No. 11432001. Prior to the evidentiary hearing, the Executive Director received a letter dated November 8, 2007 from Respondent stating that Respondent no longer owns or operates the Facility. On January 25, 2008, Respondent submitted supporting documentation of the ownership change while responding to requests for financial documents for consideration of ability to pay the administrative penalty. At the February 14, 2008 evidentiary hearing, the Executive Director informed the ALJ about the change in ownership and requested that the ALJ insert an Ordering Provision requiring Respondent to submit written certification of proof that TPDES Permit No. 11432001 has been transferred to the new owner. Therefore, the Executive Director requests that the Order Provision require Respondent to submit written certification regarding permit transfer in lieu of submitting written certification of compliance with the effluent limits of TPDES Permit No. 11432001.

The Executive Director also requests that the ALJ insert language regarding Respondent's recent bankruptcy filing. On or about February 22, 2008, Respondent filed a petition for bankruptcy relief pursuant to Chapter 11 of the United States Code. The automatic stay imposed by the Bankruptcy Code (specifically, 11 USC § 362(a)) does not apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power, by virtue of the exception set out at 11 USC § 362(b)(4). Accordingly, TCEQ (a governmental unit as defined under 11 USC § 101(27)) is expressly excepted from the automatic stay when pursuing enforcement of the State's environmental protection laws and in seeking to liquidate its damages for such violations. So long as Respondent's bankruptcy proceeding are pending and/or until relief from the automatic stay is granted, the TCEQ will not, however, seek to execute upon any monetary judgment obtained without first approaching the United States Bankruptcy Court where Respondent's bankruptcy case is pending as necessary, after consultation with the Attorney General's Office. As a result, the Executive Director requests that the ALJ insert an Ordering Provision regarding Respondent's recent bankruptcy filing.

III. Other Suggested Modifications

The Executive Director also suggests the following changes be made to the ALJ's Order:

1. On Page 2 of the ALJ's proposed Default Order, Section I, Findings of Fact No. 3.a., insert the word "by" between "26.121(a)" and "exceeding."
2. On Page 4 of the ALJ's proposed Default Order, Section I, Findings of Fact No. 11, change "September 7, 2007" to "September 10, 2007" for the date Ms. Galen received notice.
3. On Page 4 of the ALJ's proposed Default Order, Section I, Findings of Fact No. 13, add two sentences that read "On January 7, 2008, the ALJ issued Order No. 2 that revised Order No. 1, issued on October 1, 2007, to remove erroneous references in Section VII to two preliminary conferences. A copy of Order No. 2 was faxed by SOAH to each of the party representatives."
4. On Page 5 of the ALJ's proposed Default Order, Section II, Conclusions of Law No. 2, add a second space before the Texas Water Code reference.
5. On Page 5 of the ALJ's proposed Default Order, Section II, Conclusions of Law No. 4, change the comma to a period at the end of the sentence.
6. On Page 5 of the ALJ's proposed Default Order, Section II, Conclusions of Law No. 5, add citation 30 TEX. ADMIN. CODE § 1.12 and modify citation to 30 TEX. ADMIN. CODE § 80.6 to read 30 TEX. ADMIN. CODE § 80.6(b)(3).
7. On Page 6 of the ALJ's proposed Default Order, Section II, Conclusions of Law No. 6, add a space after 1 TEX. ADMIN. CODE § 155.55.
8. On Page 6 of the ALJ's proposed Default Order, Section II, Conclusions of Law No. 10, change the first bullet from "its impact or potential impact on public health and safety, natural resources and their uses, and other persons" to "the impact of the violation on air quality in the region; a receiving stream or underground water reservoir; instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or affected persons."
9. On Page 8 of the ALJ's proposed Default Order, add a new Ordering Paragraph to include bankruptcy language. This Ordering Paragraph should be labeled as Ordering Paragraph No. 2. The language should read "On or about February 22, 2008, Respondent filed a petition for bankruptcy relief pursuant to Chapter 11 of the United States Code. The automatic stay imposed by the Bankruptcy Code (specifically, 11 USC § 362(a)) does not apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power, by virtue of the exception set out at 11 USC § 362(b)(4). Accordingly, TCEQ (a governmental unit as defined under 11 USC §

101(27)) is expressly excepted from the automatic stay when pursuing enforcement of the State's environmental protection laws and in seeking to liquidate its damages for such violations. So long as Respondent's bankruptcy proceeding are pending and/or until relief from the automatic stay is granted, the TCEQ will not, however, seek to execute upon any monetary judgment obtained without first approaching the United States Bankruptcy Court where Respondent's bankruptcy case is pending as necessary, after consultation with the Attorney General's Office."

10. On Pages 8 and 9 of the ALJ's proposed Default Order, change the Ordering Paragraph numbering sequence to accommodate the newly added Ordering Paragraph No. 2.
11. On Page 8 of the ALJ's proposed Default Order, Ordering Paragraph No. 2 (now Ordering Paragraph No. 3), change the formatting of the addresses for Order Compliance Team and Beaumont Regional Office to address blocks.
12. On Page 8 of the ALJ's proposed Default Order, Ordering Paragraph No. 2 (now Ordering Paragraph No. 3), add "Beaumont, Texas" before the 77703-1830 zip code.
13. On Page 9 of the ALJ's proposed Default Order, Ordering Paragraph No. 6 (now Ordering Paragraph No. 7), add a period to the end of the sentence.

IV. Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

Respectfully Submitted,

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Mary R. Risner, Director
Litigation Division



By: _____

Mary E. Coleman
State Bar of Texas No. 24053148
Litigation Division, MC R-4
2309 Gravel Drive
Fort Worth, TX 76118
(817) 588-5917
(817) 588-5705 (FAX)

CERTIFICATE OF DELIVERY

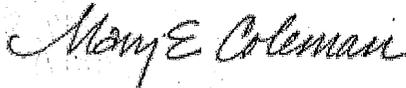
I hereby certify on this 17th day of March, 2008; the original and 12 copies of the foregoing "Executive Director's Exceptions and Proposed Modification to the Proposal for Decision" ("Exceptions") were filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that a copy of the Exceptions was sent via facsimile to ALJ Paul D. Keeper with the State Office of Administrative Hearings at (512) 475-4994.

I further certify that on this day, a true and correct copy of the foregoing Exceptions was sent via facsimile to Claudette Galen, President, Palo Gaucho, Inc., (903) 786-4440. A copy was mailed via first class mail to Claudette Galen, President, Palo Gaucho, Inc., 4025 Lamar Avenue, Paris, Texas 75460.

I further certify that on this day, a true and correct copy of the foregoing Exceptions was sent via facsimile to Rodney D. Tow, Trustee, Tow & Koenig PLLC, (281) 681-1441. A copy was mailed via first class mail to Rodney D. Tow, Trustee, Tow & Koenig PLLC, 26219 Oak Ridge Drive, The Woodlands, Texas 77380.

I further certify that on this day a true and correct copy of the foregoing Exceptions were hand delivered to Blas Coy, Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Mary E. Coleman
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER Assessing Administrative Penalties Against Palo Gaucho, Inc.; TCEQ Docket No. 2006-2025-MWD-E; SOAH Docket No. 582-07-4078

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against Palo Gaucho, Inc. (Respondent). A Proposal for Decision (PFD) was presented by Paul D. Keeper, Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a preliminary hearing concerning the EDPRP on September 27, 2007, in Austin, Texas.

The Executive Director, represented by Mary Coleman, appeared at the preliminary hearing. Claudette Galen, president of Respondent, made an appearance. A hearing on the merits was held at SOAH on February 14, 2008. Respondent was not present at the hearing on the merits nor represented by counsel and did not request a continuance. The Executive Director requested that a default judgment be entered against Respondent. The ALJ agreed with the Executive Director's request.

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

I. FINDINGS OF FACT

1. At the time of the alleged violations, Respondent owned and operated a wastewater treatment facility located at on the east side of Farm-to-Market Road 3121, approximately 2.5 miles north of the intersection of Farm-to-Market Road 3121 and Farm-to-Market Road 83 in Sabine County, Texas (Facility).
2. The Facility has discharged waste into or adjacent to water in the state or has committed another act that has caused or will cause pollution of any water in the state under the Texas Water Code.
3. During a record review conducted on November 7, 2006, TCEQ staff documented that Respondent violated the following requirements:
 - a. 30 TEX. ADMIN. CODE § 305.125(1); TPDES Permit No. 11432001, Effluent Limitations and Monitoring Requirements Nos. 1 and 6; and TEX. WATER CODE § 26.121(a) by exceeding the permitted effluent limits at Outfall 001, as shown below:

	DO Monthly Minimum Concentration	BOD Daily Average Concentration	BOD Single Grab Concentration	TSS Daily Average Concentration	TSS Single Grab Concentration
<i>Month/Year</i>	4.0 mg/L	10.0 mg/L	35.0 mg/L	15.0 mg/L	60.0 mg/L
October 2005	c	c	c	15.3	c
November 2005	c	c	c	21.0	c
December 2005	c	14.2	c	41.5	72.0
January 2006	c	19.9	37.2	61.5	124.0
February 2006	c	29.6	90.0	108.8	364.0
March 2006	c	17.3	c	61.5	78.0
April 2006	3.7	16.8	c	39.7	62.0
May 2006	0.6	162.8	432.0	1500.3	4440.0
June 2006	c	13.3	c	36.3	80.0

Term	Abbreviation
dissolved oxygen	DO
milligrams per liter	mg/L
total suspended solids	TSS
biochemical oxygen demand, five-day	BOD
Compliant	c

- b. 30 TEX. ADMIN. CODE § 305.125(17) and TPDES Permit No. 11432001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2005 by September 1, 2005.
4. Respondent received notice of the violations on or about November 25, 2006.
 5. On June 20, 2007, the Executive Director sent a copy of the EDPRP to Claudette Galen, President of Respondent, 3855 Lamar Avenue, Suite A, Paris, Texas 75460, and to Darwin MacAlister, Registered Agent of Respondent, at 3001 East Broadway, Pearland, Texas 77581.
 6. In the EDPRP, the Executive Director alleged that the Respondent committed the violations discovered during the November 7, 2006, record review and proposed an administrative penalty of \$9,200.00 for those violations and that the Respondent be required to take corrective actions described below in this Order.
 7. In a letter dated June 23, 2007, Ms. Galen responded to the EDPRP and denied that Respondent held a permit for the wastewater plant.
 8. On August 16, 2007, the Executive Director requested that the matter be referred to SOAH for SOAH's acquisition of jurisdiction and the filing of a Request to Docket Case form.

9. On September 5, 2007, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Ms. Galen and Mr. MacAlister on behalf of Respondent.
10. 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 the Executive Director alleged Respondent violated;
 - Referred to the EDPRP, 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 preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
11. Ms. Galen received notice on September 10, 2007, and Mr. MacAlister received notice on September 7, 2007.
12. On September 27, 2007, the ALJ convened a preliminary hearing at SOAH. Counsel appearing for the Executive Director was Mary Coleman. Ms. Galen appeared without counsel for Respondent.
13. On October 1, 2007, the ALJ issued Order No. 1 that adopted a prehearing schedule and set the hearing on the merits at 9:00 a.m., February 14, 2008. A copy of Order No. 1 was faxed by SOAH to each of the party representatives. On January 7, 2008, the ALJ issued Order No. 2 that revised Order No. 1, issued on October 1, 2007, to remove erroneous references in

Section VII to two preliminary conferences. A copy of Order No. 2 was faxed by SOAH to each of the party representatives.

14. On February 14, 2008, the ALJ convened the hearing on the merits. Counsel appearing for the Executive Director was Mary Coleman. No representative made an appearance for Respondent, and neither the Executive Director nor the ALJ received a request for a continuance from Respondent.
15. Based on Respondent's failure to appear at the hearing, the Executive Director moved for a default judgment against Respondent. The Executive Director moved that all of the allegations be deemed admitted as true, the penalties sought be assessed against Respondent, and Respondent be ordered to take corrective action recommended by the Executive Director.

II. CONCLUSIONS OF LAW

1. The Commission has authority to impose an administrative penalty. TEX. WATER CODE ANN. § 7.051.
2. The Commission has the authority to assess an administrative penalty of up to \$10,000 for each day of each violation. TEX. WATER CODE § 7.052.
3. If a person violates any statute or rule within the Commission's jurisdiction, the Commission may order the person to take corrective action. TEX. WATER CODE § 7.073.
4. 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. TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

5. Respondent was notified of the hearing on the alleged violations and the proposed penalties. TEX. GOV'T CODE ANN. § 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 70.104, and 80.6(b)(3).
6. Respondent was notified that if Respondent failed to appear at the hearing, a default judgment could be rendered against Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true. 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d).
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. 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
 - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are admitted as true.
9. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE § 305.125(1) and (17); TPDES Permit No. 11432001, Effluent Limitations and Monitoring Requirements Nos. 1 and 6 and Sludge Provisions; and TEX. WATER CODE ANN. § 26.121(a).
10. In determining the amount of an administrative penalty, the Commission is to consider:
 - The impact of the violation on air quality in the region; a receiving stream or underground water reservoir; instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or affected 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. TEX. WATER CODE ANN. § 7.053
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. The Executive Director correctly calculated the penalties for each of the alleged violations. TEX. WATER CODE ANN. § 7.053; the Commission's Penalty Policy.
 13. A total administrative penalty of \$9,200.00 is justified and should be assessed against Respondent.

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, Palo Gaucho, Inc., shall pay an administrative penalty in the amount of \$9,200.00 for violations of 30 TEX. ADMIN. CODE § 305.125(1) and (17); TPDES Permit No. 11432001, Effluent Limitations and Monitoring Requirements Nos. 1 and 6 and Sludge Provisions; and TEX. WATER CODE ANN. § 26.121(a). The payment of this administrative penalty and compliance with this Order will completely resolve the violations 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 out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Palo Gaucho, Inc., TCEQ Docket No. 2006-2025-MWD-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. On or about February 22, 2008, Respondent filed a petition for bankruptcy relief pursuant to Chapter 11 of the United States Code. The automatic stay imposed by the Bankruptcy Code (specifically, 11 USC § 362(a)) does not apply to the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power, by virtue of the exception set out at 11 USC § 362(b)(4). Accordingly, TCEQ (a governmental unit as defined under 11 USC § 101(27)) is expressly excepted from the automatic stay when pursuing enforcement of the State's environmental protection laws and in seeking to liquidate its damages for such violations. So long as Respondent's bankruptcy proceeding is pending and/or until relief from the automatic stay is granted, the TCEQ will not seek to execute upon any monetary judgment obtained without first approaching the United States Bankruptcy Court where Respondent's bankruptcy case is pending as necessary, after consultation with the Attorney General's Office.
3. Within 60 days after the effective date of the Commission Order, Respondent shall submit written certification of proof that TPDES Permit No. 11432001 has been transferred to the

new owner. The certification shall include detailed supporting documentation including receipts, and/or other records to demonstrate compliance, be notarized by a State of Texas

Notary Public, and include the following 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:

Ronald Hebert, Water Section Manager
Texas Commission on Environmental Quality
Beaumont Regional Office
3870 Eastex Freeway
Beaumont, Texas 77703-1830

4. 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.
5. 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.

6. The effective date of this Order is the date the Order is final. 30 TEX. ADMIN. CODE § 80.273

and TEX. GOV'T CODE ANN. § 2001.144.

7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent, as required by TEX. WATER CODE ANN. § 7.059.

8. 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