

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

May 1, 2009

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 MAY -4 PM 3: 52
CHIEF CLERKS OFFICE

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

Re: SOAH Docket No. 582-08-3669; TCEQ Docket No. 2007-0382-MLM-E; In Re:
Paul LaVoie, RN 105029672

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 original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 21, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than June 1, 2009.

This matter has been designated **TCEQ Docket No. 2007-0382-MLM-E ; SOAH Docket No. 582-08-3669**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and seven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Kerrie Jo Qualtrough".

Kerrie Jo Qualtrough
Administrative Law Judge

KJQ/ds
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: PAUL LAVOUIE

SOAH DOCKET NUMBER: 582-08-3669

REFERRING AGENCY CASE: 2007-0382-MLM,E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ KERRIE QUALTROUGH**

REPRESENTATIVE / ADDRESS

PARTIES

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PAUL LAVOIE

2009 MAY -4 PM 3: 52

SOAH DOCKET NO. 582-08-3669
TCEQ DOCKET NO. 2007-0382-MLM-E

CHIEF CLERKS OFFICE

IN THE MATTER OF AN § BEFORE THE STATE OFFICE
ENFORCEMENT ACTION AGAINST §
PAUL LAVOIE, RN105029672, § OF
Respondent § ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that Paul LaVoie (the Respondent) violated sections 111.201 and 330.15(a), title 30 of the Texas Administrative Code (30 TAC). When the Respondent failed to attend the preliminary hearing, the ED asked for a default order assessing an administrative penalty against the Respondent in the amount of \$2,100 for these violations. The ED also recommended that the Commission order the Respondent to take corrective action. The Administrative Law Judge (ALJ) agrees with the ED and recommends that the Commission issue the proposed default order requiring the Respondent to pay administrative penalties and perform the requested corrective action.

II. BACKGROUND

On April 24, 2008, the ED filed his Executive Director's Preliminary Report and Petition (EDPRP) with the Chief Clerk of the TCEQ.¹ On that same day, the ED mailed the EDPRP to the Respondent by both first class and certified mail.² The Respondent filed a

¹ ED Exh. A.

² ED Exh. A.

response to the EDPRP on May 16, 2008.³ On June 24, 2008, the ED sent a letter to the Chief Clerk of the TCEQ requesting that this case be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing.⁴ The case was referred to SOAH and on February 10, 2009, a Notice of Hearing of the March 12, 2009, preliminary hearing was mailed to the Respondent by both first class and certified mail.⁵

A preliminary hearing was held on March 12, 2009. Although the required Notice of Hearing was sent to him, neither the Respondent nor anyone on his behalf appeared at the hearing or sought a continuance. Kari L. Gilbreth, staff attorney, appeared at the hearing on behalf of the ED. Due to concerns that the Respondent was refusing to accept the mailed Notice of Hearing, the ED offered to provide additional exhibits to demonstrate that the required notice had been properly sent to the Respondent.

On March 17, 2009, the ED submitted ED Exhibits E and F to the ALJ and sent a copy to the Respondent. The Respondent had until April 3, 2009 to object to the additional exhibits. No objections were received and the ALJ now admits ED Exhibits E and F into evidence.

The additional exhibits show that as of March 11, 2009, the certified mailing of the February 10, 2009 Notice of Hearing remained unclaimed.⁶ Also, an affidavit from the Chief Clerk of the TCEQ dated March 12, 2009, supports the proposition that the first class mailing of the notice was not returned to her office.⁷

³ ED Exh. B.

⁴ ED Exh. C.

⁵ ED Exh. D.

⁶ ED Exh. E.

⁷ ED Exh. F.

III. NOTICE

The ED requested that the ALJ find that proper notice was given to the Respondent pursuant to 1 TAC § 155.501(c). Section 155.501(c) provides for alternative notice when it is not possible to prove actual receipt of the notice of hearing. This section states:

(c) Alternative showing of notice. In the alternative, when it is not possible to prove actual receipt of notice, a hearing may proceed on a default basis if:

(1) the referring agency's statute or rules authorize service of the notice of hearing by sending it to the party's last known address as shown by the referring agency's records; and

(2) there is credible evidence that the notice of hearing was sent by first class or certified mail to such address.⁸

The ALJ agrees with the ED that notice was proper in this matter. The TCEQ's rules authorize service to a party's last known address.⁹ The evidence shows that the ED mailed the EDPRP to the Respondent at P.O. Box 260435, Corpus Christi, Texas 78426¹⁰ and the Respondent responded to the EDPRP by filing an answer.¹¹ There is credible evidence in the record that the February 10, 2009 Notice of Hearing was sent to this same P.O. Box by both certified and first class mail. While the certified mailing has not been claimed, there is no indication that the first class mailing was returned to the Chief Clerk of the TCEQ. Therefore, the ALJ agrees with the ED that the criteria for alternative notice in 1 TAC § 155.501(c) have been met.

⁸ 1 TAC § 155.501(c).

⁹ 30 TAC § 1.11(c).

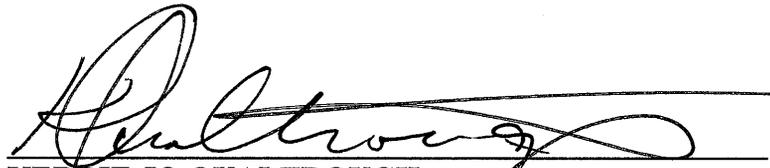
¹⁰ ED's Exh. A.

¹¹ ED's Exh. B.

IV. RECOMMENDATION

The ED requested that the ALJ issue a proposal for decision and default order containing all of the corrective action and assessing the full amount of the administrative penalty. The ALJ agrees with the ED and recommends that the Commission issue the attached default order deeming as true the facts that were alleged in the EDPRP, imposing the proposed penalty, and ordering the Respondent to take the proposed corrective action.

SIGNED May 1, 2009



KERRIE JO QUALTROUGH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**DEFAULT ORDER: Assessing Administrative Penalties Against and Ordering Corrective Action by PAUL LaVOIE
TCEQ Docket No. 2007-0382-MLM-E; SOAH Docket No. 582-08-3669**

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 and requiring corrective action by Paul LaVoie (Respondent). A Proposal for Decision (PFD) was presented by Kerrie Jo Qualtrough, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on March 12, 2009, in Austin, Texas.

The Executive Director, represented by Kari L. Gilbreth, appeared at the hearing. The Respondent was not present at the hearing or represented by counsel and did not file for a continuance. The Executive Director requested that a default order be entered against the 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. The Respondent owns and operates an unauthorized municipal solid waste site located at 108 2nd Street, Lake City, San Patricio County, Texas (the Site). The Site consists of one or more sources as defined in TEX. HEALTH & SAFETY CODE ANN. § 382.003(12), and the Site involves the management and the disposal of municipal solid waste as defined in TEX. HEALTH & SAFETY CODE ANN. ch. 361.
2. Two smoking pits containing construction and demolition debris, including an aluminum gutter, sheetrock, galvanized pipe, and corrugated roofing were located on property owned by the Respondent. Therefore, the Respondent failed to prevent an unauthorized outdoor burning.
3. The Respondent disposed of approximately 103.7 cubic yards of construction and demolition debris at the Site. Therefore, the Respondent failed to properly dispose of construction debris.
4. The Respondent received notice of the violations on or about October 21, 2006.
5. On April 24, 2008, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. § 7.054. The Executive Director alleged that the Respondent violated 30 TEX. ADMIN. CODE (TAC) §§ 111.201 and 330.15(a) and recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$2,100. against the Respondent. The Executive Director also recommended that the Commission order the Respondent to take certain corrective action.
6. On April 24, 2008, the Executive Director sent a copy of the EDPRP to the Respondent's last address known to the TCEQ by certified and first class mail. On the same date, the ED filed the EDPRP with the Chief Clerk of the TCEQ.
7. On May 16, 2008, the Respondent filed a response to the EDPRP and the matter was referred to SOAH for hearing.

8. On February 10, 2009, the TCEQ Chief Clerk sent the notice of the March 12, 2009 preliminary hearing to the Respondent by certified and first class mail.
9. The Notice of Hearing:
 - a. Indicated the time, date, place and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the Executive Director alleged the Respondent violated;
 - d. Referred to the EDPRP, a copy of which was attached, which indicated the matters asserted by the Executive Director;
 - e. Advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by 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
 - f. Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
10. The copy of the Notice of Hearing sent by certified mail was not claimed as of March 11, 2009.
11. The copy of the Notice of Hearing sent by first class mail was not returned to the TCEQ as of March 12, 2009.
12. On March 12, 2009, the ALJ convened the preliminary hearing and jurisdiction was established. The Respondent did not appear at the preliminary hearing.
13. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
14. The total administrative penalty sought in the EDPRP is an accumulation of the different penalties assessed for each different violation.

15. The Executive Director seeks a penalty of \$1,050, adjusted for limits, for Respondent's alleged violation of 30 TAC §§ 111.201, based on one single event and an estimated economic benefit of \$650.
16. The Executive Director seeks a penalty of \$1,050., adjusted for limits, for Respondent's alleged violation of 30 TAC § 330.05(a), based on one quarterly event and an estimated economic benefit of \$49.
17. Based on the Respondent's failure to appear at the March 12, 2009 preliminary hearing, the Executive Director moved for a default order against the 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 the Respondent, and the Respondent would be ordered to take the corrective action recommended by the Executive Director.

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 and 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 alleged in this case.
3. Under TEX. WATER CODE ANN. § 7.073, the Commission may order the violator to take corrective action.
4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TAC §§ 1.11 and 70.104, the 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.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TAC § 155.401; and 30 TAC §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b), the Respondent was notified of the hearing on the alleged violations and the proposed penalties. Additionally, the Respondent was notified, in accordance with 1 TAC §155.501, and 30 TAC §§ 70.106(b) and 80.113(d) that if the Respondent failed to appear at the hearing, a default judgment could be rendered against the Respondent in which all the allegations contained in the notice of hearing would be deemed admitted as true.
6. An alternative showing of notice was made under 1 TAC § 155.501(c).
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 Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against the Respondent in accordance with 1 TAC § 155.55 and 30 TAC §§ 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, should be admitted as true.
9. Section 111.201(a) of 30 TAC states: "No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. . . ."
10. Section 330.15(a) of 30 TAC states:

A person may not cause, suffer, allow, or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract materials under Texas Health and Safety Code, § 361.092, in violation of the Texas Health and Safety Code, or any regulations, rules, permit, license, order of the commission, or in such a manner that causes:

- (a) the discharge or imminent threat of discharge of MSW into or adjacent to the waters in the state without obtaining specific authorization for the discharge from the commission;
 - (b) the creation and maintenance of a nuisance; or
 - (c) the endangerment of the human health and welfare or the environment.
11. Based on the above Findings of Fact and Conclusions of Law, the Respondent violated 30 TAC §§ 111.201 and 330.15(a).
12. In determining the amount of an administrative penalty, TEX. WATER CODE ANN. § 7.053 requires the Commission to consider several factors including:
- a. the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
 - b. the impact of the violation on:
 - i. air quality in the region;
 - ii. a receiving stream or underground water reservoir;
 - iii. instream uses, water quality, aquatic and wildlife habitat, or beneficial freshwater inflows to bays and estuaries; or
 - iv. affected persons;
 - c. with respect to the alleged violator:
 - i. the history and extent of previous violations;
 - ii. 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;
 - iii. the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - iv. economic benefit gained through the violation; and
 - v. the amount necessary to deter future violations; and
 - d. any other matters that justice may require.

13. Based on consideration of these Findings of Fact and Conclusions of Law, 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 violations, and a total administrative penalty of \$2,100 is justified and should be assessed against the Respondent.
14. Based on these Findings of Fact and Conclusions of Law, the Respondent should be required to take the corrective action that the Executive Director recommends.

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 Order, Paul LaVoie shall pay an administrative penalty in the amount of \$2,100 for his violation of 30 TAC §§ 111.201 and 330.15(c) with the notation "Paul LaVoie, RN105029672, TCEQ DOCKET NO. 2007-0385-MLM-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, TX 78711-3088
2. Immediately upon the effective date of the Commission Order, Paul LaVoie shall:
 - a. Cease the unauthorized outdoor burning of all municipal solid waste at the Site; and
 - b. Cease the unauthorized disposal of municipal solid waste at the Site.
3. Within 30 days after the effective date of the Commission Order, Paul LaVoie shall dispose of all municipal solid waste at the Site at an authorized municipal solid waste facility.
4. Within 45 days after the effective date of the Commission Order, Paul LaVoie shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with

Ordering Provision Nos. 2. and 3. with the notation “Re: Paul LaVoie, Docket No. 2007-0382-MLM-E.” 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

and a copy to:

David Turner, Air Section Manager
Texas Commission on Environmental Quality
Corpus Christi Regional Office
NRC Bldg., Ste. 1200
6300 Ocean Dr., Unit 5839
Corpus Christi, Texas 78412-5839

5. The payment of the administrative penalty and compliance with all the terms and conditions set forth in 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.
6. 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 the Respondent if the Executive Director determines that the Respondent has not complied with one or more of the terms or conditions in this Commission Order.

7. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
8. 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.
9. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
10. 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