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

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CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 2, 2008

The Honorable Richard R. Wilfong
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Re: Gwen Gordan and Wanda Percy dba Holiday Cafe
TCEQ Docket No. 2007-0741-PST-E
SOAH Docket No. 582-08-1691

Judge Wilfong,

Enclosed please find the Executive Director's exceptions regarding the Proposal for Decision and proposed Order issued by you in this case on February 9, 2009.

Sincerely,

Barham A. Richard, Attorney
Litigation Division

cc: Respondent
Kimberly Morales, Enforcement Division, TCEQ, MC R-12
Blas Coy, Public Interest Counsel, TCEQ, MC 103

SOAH DOCKET NO. 582-08-1691
TCEQ DOCKET NO. 2007-0741-PST-E

IN THE MATTER OF	§	BEFORE THE
AN ENFORCEMENT ACTION	§	
AGAINST	§	TEXAS COMMISSION ON
GWEN GORDAN AND WANDA	§	
PERCY DBA HOLIDAY CAFE	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully excepts to the ALJ reopening the record to admit Respondents offer of proof.

2. The Executive Director respectfully excepts to the ALJ denying the Executive Director his fundament Due Process right to cross-examine witnesses.

3. Based on the above two exceptions, the Executive Director respectfully requests that the ALJ reopen the record, order a financial review of Respondents for admission into evidence, and consider the financial review in making a proposal for decision ("PFD").

4. Should the ALJ opt to send the PFD before the Commission without changes, the Executive Director respectfully requests that the Commission remand this case to SOAH with instructions that the ALJ order a financial review of Respondents for admission into evidence and consider the financial review in making a PFD.

5. Alternatively, the Executive Director respectfully excepts to the ALJ's determination that no administrative penalty should be assessed against Respondents.

6. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that II. Conclusions of Law, statement 10 reads, "Based on consideration of the above Findings of Fact and Conclusions of Law, Gwen Gordan and Wanda Percy dba Holiday Café should be required to pay a total of $5,250 in administrative penalties for the violation at issue in this case."

7. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to add, following II. Conclusions of Law, statement 10, a header that reads, "III. Ordering Provisions".

8. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to add a new Statement 1. of the Ordering Provisions that reads, "Within 30 days after the effective date of this Commission Order, Gwen Gordan and Wanda Percy dba Holiday Café shall pay an administrative penalty in the amount of $5,250 for their violation of 30 TEX. ADMIN. CODE § 334.47(a)(2)."

9. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that old statements 1-5 of the Ordering Provisions are renumbered 2-6 respectively.

10. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that new Statement 2 (old Statement 1) of the Ordering Provisions reads, "The payment of this administrative penalty will completely resolve the violation that is the subject of the Order. The Commission shall not be constrained in any manner from requiring corrective action or penalties for violations that are not raised here."

PRAYER

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is a copy of the Executive Director's Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order. Attachment "B" is a redline/strikeout version which clearly delineates the recommended modifications. Attachment "C" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Director
Litigation Division

by _____

Barham A. Richard
State Bar of Texas No. 24056201
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-0107
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2009, the original and 7 copies of the foregoing "Executive Director's Proposed Modifications to the Administrative Law Judge's Proposed Order" ("Proposed Modifications") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

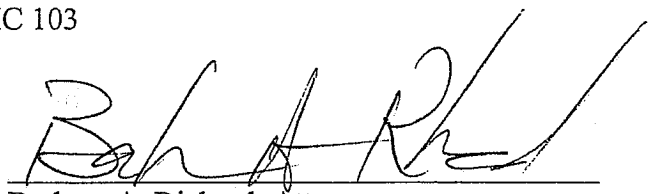
I further certify that on this day a true and correct copy of the foregoing Proposed Modifications were sent to the following:

Via Inter-Agency Mail
Via Facsimile to (512) 475-4994
The Honorable Richard R. Wilfong
State Office of Administrative Hearings
300 W. 15th Street, Suite 504
Austin, Texas 78701-1649

Via First Class Mail, Postage Prepaid
Via Certified Mail, Return Receipt Requested 7108 2133 3934 5603 2682
Mr. Jesse L. Nickerson, III, Attorney
39 North Main Street
Paris, Texas 75460

Via Electronic Mail
Les Trobman, TCEQ Office of the General Counsel, MC 101

Via Electronic Mail
Blas Coy, TCEQ Public Interest Counsel, MC 103



Barham A. Richard, Attorney
Office of Legal Services, Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

SOAH DOCKET NO. 582-08-1691
TCEQ DOCKET NO. 2007-0741-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMSSION ON ENVIRONMENTAL QUALITY, Petitioner	§	BEFORE THE STATE OFFICE
VS.	§	OF
GWEN GORDAN AND WANDA PERCY DBA HOLIDAY CAFE, Respondent	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S BRIEF SUPPORTING THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES the Executive Director, by and through his attorney, Barham A. Richard of the Litigation Division, and submits this brief in support of the Executive Director's exceptions to the Administrative Law Judge's Proposed Order. The Executive Director respectfully contends that the Administrative Law Judge denied the Executive Director his fundamental Due Process right to cross examine witnesses that presented evidence relied upon by the Administrative Law Judge in reaching his proposal for decision. Alternatively, the Executive Director respectfully contends that the Administrative Law Judge erred in reducing the administrative penalty assessed against the Respondents. As such, the Executive Director submits this Brief Supporting the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and Proposed Order pursuant to 30 TEX. ADMIN. CODE § 80.257.

I. INTRODUCTION

This enforcement action, brought by the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ") against Gwen Gordan and Wanda Percy dba Holiday Café ("Ms. Gordan" and "Ms. Percy", individually, and "Respondents", collectively), asserts a violation of 30 TEX. ADMIN. CODE § 334.47(a)(2) for the failure to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two underground storage tanks for which any applicable component of the system was not brought into timely compliance with the upgrade requirements. At hearing, the parties stipulated to the violation, leaving only the administrative penalty at issue.

II. BACKGROUND AND PROCEDURAL HISTORY

On December 18, 2008, the evidentiary hearing for this matter was convened at the State Office of Administrative Hearings ("SOAH"). The Executive Director was represented by Mr. Barham A. Richard and Ms. Tammy Mitchell, and Respondents were represented by Mr. Jesse L. Nickerson, III. During the hearing, testimony was given that the Executive Director offered a Financial Inability to Pay packet to Respondents, and that despite repeated requests for this information, Respondents refused to submit the information. Consequently, when Respondents attempted to admit, through testimony, evidence of Respondents' financial inability to pay the administrative penalty, the Executive Director objected to the admission of this evidence as untimely, citing 30 TEX. ADMIN. CODE § 70.8, which states:

> (a) If any respondent, in response to a contested enforcement case, asserts an inability to pay the penalty recommended in that pleading, or challenges the executive director's recommendation regarding the amount of penalty that is necessary to deter future violations, that party shall have the burden of establishing that a lesser penalty is justified under that party's financial circumstances.
>
> (b) A party asserting a claim under this section must produce all financial records that would be potentially relevant to that issue within 30 days of raising that claim, but no later than 30 days before the specified date for hearing without leave from the judge. The executive director is not required to make a discovery request for such financial records. The failure of the party raising such a claim to provide all potentially relevant financial records within the time discussed in this subsection shall constitute a waiver of the claim.

The Administrative Law Judge ("ALJ") sustained the objection, but allowed the testimony to proceed as an offer of proof. Since the testimony was allowed only as an offer of proof and was not evidence in the case, the Executive Director had no need or purpose for cross examining the witnesses. The hearing was concluded on the same day.

On December 30, 2008, the ALJ issued Order No. 6 which states, "Upon further consideration of the applicable statutes and regulations the ALJ has decided to reopen the record for the purpose of admitting into evidence the testimony that Respondents submitted as an offer of proof so that the ALJ may take the testimony into consideration in his proposal for decision as justice may require." The Order also set a post-hearing conference for January 15, 2009 for the purposes of discussing the admission of the additional evidence into the record.

At the post-hearing conference, the Executive Director reasserted his original objection, and added that the admission of the evidence was improper as the Executive Director has not had the opportunity to cross examine the two witnesses that testified in the offer of proof. The evidence was admitted over the Executive Director's objection and without providing the Executive Director the opportunity to cross examine the witnesses.

On February 9, 2009, the ALJ issued his proposal for decision which recommended that no monetary penalty be imposed against Respondents. The ALJ based this decision on three factors: 1) Respondents' lack of knowledge that the USTs existed when the property was purchased; 2) Respondents' loss of the property at foreclosure sale; and 3) Respondents' poor financial condition.

The Executive Director now files exceptions to the ALJ's PFD and this supporting brief.

III. DISCUSSION

A. The Executive Director respectfully asserts that the ALJ erred in reopening the record to admit the offer of proof, and in doing so, denied the Executive Director's Fundamental Due Process Right to cross-examine witnesses.

1. There is no conflict between TEX. WATER CODE § 7.053 and 30 TEX. ADMIN. CODE § 70.8.

In reopening the record so that the offer of proof could be admitted, the ALJ explained that there is a conflict between TEX. WATER CODE § 7.053, which allows the admission of financial information under the "other factors as justice may require" section, and 30 TEX. ADMIN. CODE § 70.8, which requires such information to be admitted 30 days prior to the hearing. The ALJ stated that TEX. WATER CODE § 7.053 as a statute, trumps the rule 30 TEX. ADMIN. CODE § 70.8. The Executive Director respectfully disagrees with the ALJ.

In determining whether there was an error in admitting evidence, an appeals court looks at three considerations: 1) Whether the trial court erroneously admitted evidence; 2) Whether there was similar evidence admitted; and 3) Whether the error probably caused the rendition of an improper judgment. *See* ***Nissan Motor Co. v. Armstrong,*** 145 S.W.3d 131, 144 (Tex.2004) and ***Texas Dept. of Human Servs. V. White,*** 817 S.W.2d 62,63 (Tex.1991).

The Executive Director respectfully contends that the admission of Respondents' financial evidence is erroneous because the statute and rule are not in conflict with one another, but rather that they should be read in conjunction with one another. There is no argument that a

Respondent's financial condition is a valid factor in determining whether an administrative penalty assessed under TEX. WATER CODE § 7.053 should be adjusted; however, the timing of such a claim is critical to the fair application of justice.

The Executive Director reads the statute so that it allows the consideration of financial information under "other factors as justice may require", and reads the rule as placing a deadline of 30 days prior to the date of the hearing for submitting such information. Should an ALJ determine after that 30-day deadline that such information should be considered regardless of the delay, the rule allows for the information to be submitted for a financial review with leave from the judge.

This reading of the statute and rule is consistent with 1 TEX. ADMIN. CODE § 155.3(b) which states that "[i]f there is any conflict between an agency's rule or prior decisions and statutory provisions applicable to the case, and the rules or decisions cannot be harmonized with the statute, the statute controls." Thus, the ALJ must first attempt to harmonize the statute and rule before determining that the statute controls. The Executive Director's reading of the statute and rule harmonizes the two, thereby not requiring that the statute trump the rule.

As such, the Executive Director respectfully asserts that the ALJ erred in admitting the Respondents' testimony regarding financial information. A review of the record shows that no other information regarding the Respondents' financial condition was admitted into evidence. Finally, the ALJ's PFD clearly states that the Respondents' poor financial condition is a primary factor is his determination to recommend that no administrative penalty be assessed against Respondents. As such, the error probably caused the rendition of an improper judgment.

2. <u>The Executive Director was not provided the opportunity to cross-examine Respondents.</u>

The issue of a person's Due Process right to cross-examine was discussed at length in ***Texas Department of Public Safety v. David Dayton Burrer***, 2005 WL 1105181 (Tex.App.-San Antonio). There the Court was confronted with the issue regarding the limiting of cross examination. Here the Executive Director's fundamental Due Process right to cross examine was fully denied. In Burrer, the Court states:

> The right to cross-examination is a fundamental due process right protected by both the United States Constitution and the Texas Constitution. *See* U.S. CONST. Amend. XIV, § 1; Tex. CONST. art. I, § 19. The right to cross-examine adverse witnesses and to examine and rebut all evidence is not confined to court trials, but applies also to administrative hearings. *See* ***Richardson v. City of Pasadena,*** 513 S.W.2d 1, 4 (Tex.1974). "Cross-examination is a safeguard essential to a fair trial and a cornerstone in the quest for truth... [T]he right to cross-examine a witness is

> a substantial one, and it is error to so restrict it as to prevent the cross-examining party from going fully into all matters connected with the examination in chief." ***Davidson v. Great Nat'l Life Ins. Co.***, 737 S.W.2d 312, 314 (Tex.1987).[1]

At the post-conference hearing, Respondents argued that the Executive Director was provided the opportunity to cross-examine the witnesses at the time the offer of proof was made; however, at that time, the testimony had not been admitted into evidence or entered into the record. The sole purpose of an offer of proof is to preserve the testimony for appeal. *See* Texas Rules of Evidence Rule 103(a)(2). Thus, any cross-examination of the witness in an offer of proof is for the purposes of preserving that information for appeal. The Executive Director was never provided the opportunity to cross-examine the witnesses for purposes of this hearing. Additionally, at the conclusion of Respondents' offer of proof the witnesses were never passed, and the ALJ immediately dismissed the witnesses without offering the Executive Director the opportunity to cross-examine. As such, even if a cross-examination were proper at the time the offer was made, the Executive Director was denied that opportunity.

The ALJ's PFD provides a good synopsis of Respondents' testimony. "Ms. Percy testified that she earns approximately $[9]00 per month[2] and that her husband works as a roofer and goes long periods without work. Ms. Gordon testified that she works at a drycleaner store and earns approximately $1000 per month." Proposal for Decision, page 3. There was no discussion as to how much Ms. Percy's husband makes per year, how many hours Ms. Percy works, whether Ms. Gordan is married or has a supplemental income, nor whether Respondents have any additional assets including property, savings, and investments. None of these questions were explored because the Executive Director was denied the opportunity to cross-examine the witnesses.

Finally, there is a lack of corroborating evidence to support Respondents' contentions. Respondents never introduced tax returns, bank statements, pay check stubs, or any other evidence to support their contention that they are unable to pay the administrative penalty. Despite the Executive Director's repeated requests to provide the information requested in the FIP packet, Respondents refused.

The Executive Director respectfully requests that the ALJ reopen the record, order a financial review of the Respondents for admission into evidence, and consider the financial review in making a proposal for decision. Should the ALJ opt to send the PFD before the Commission without changes, the Executive Director respectfully requests that the Commission remand this

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[1] The court further discusses the restrictions that can be placed on a cross-examination in regards to relevance, but since this case involves a total denial of the right to cross-examine, it does not provide additional guidance.

[2] The ALJ's PFD contains a clear typographical error in that it states that Ms. Percy earns approximately $800 per month. A review of the record shows that Ms. Percy testified that she earns approximately $900 per month.

case to SOAH with instructions that the ALJ order a financial review of the Respondents for admission into evidence and consider the financial review in making a proposal for decision.

B. The Executive Director respectfully contends that the ALJ erred in recommending that no administrative penalty be assessed against Respondents because the grounds upon which this decision was made are most appropriately addressed by other means.

The ALJ recommended that no administrative penalty be assessed against Respondents because: 1) Respondents' lack of knowledge that the USTs existed when the property was purchased; 2) Respondents' loss of the property at foreclosure sale; and 3) Respondents' poor financial condition. As discussed below, each of these are improper factors on which to base a reduction in penalty.

1. Respondents' lack of knowledge that the USTs existed when the property was purchased.

In supporting this contention, the ALJ writes, "Respondents purchased the property where the USTs are located without knowledge of their existence and in reliance on the Seller's representation that there were no USTs on the property. Respondents made no attempt to use the USTs in any way." Proposal for Decision, page 6.

These considerations are improper in an analysis of "other factors as justice may require" because it is outweighed by the policy concern of encouraging persons to employ due diligence in ascertaining the existence of USTs or other health and environmental concerns on prospective property, and it is best handled in other forums than the administrative process.

The ALJ concedes, "the ED's enforcement policy should encourage persons who engage in a commercial real estate transaction, to employ due diligence to ascertain whether USTs are present so that proper compliance measures will be undertaken as part of the transaction." Proposal for Decision, page 6.

In respect to the ALJ's assertions that the Respondents relied on the Seller's representations that no USTs were on the property, this is a misstatement of fact. The Contract of Sale & Purchase (Respondent's Exhibit #4) between the Respondents and the prior owners of the property states that "the Sellers represent to Purchasers that they have no actual knowledge of fuel tanks being located on the property." Page 3. This statement does not say that the Sellers represent that no tanks exist, but rather that Sellers have no knowledge of any tanks' existence. Thus, this statement places the burden on the Purchaser (in this contract Respondents, Ms. Gordan and Ms. Percy) to perform their due diligence in determining whether the USTs existed.

Had Respondents done the due diligence, they would have very easily found the vent pipes for the USTs, which gives every indication that tanks exist on the property.

Further, the administrative process is not the proper forum in which to determine whether or not such a misrepresentation was made by the Seller to the Purchaser. This is better determined in a civil suit between the parties. In fact, Respondents have brought such a suit against the Sellers. Respondents can best mitigate the expenses of these violations by praying for the recovery of the cost of any administrative penalty.

2. Respondents' loss of the property at foreclosure sale.

The Executive Director is empathetic of Respondents' situation in this regard. The Executive Director recognizes that in these difficult economic conditions foreclosures are becoming more common. However, the Executive Director must treat the regulated community even-handedly, maintain a commitment to bring the regulated community into compliance, and deter future violations.

3. Respondents' poor financial condition.

There is certainly no confusion that a Respondents' poor financial condition is a valid reason for reducing a penalty under "other factors as justice may require"; however, such a reduction is improper in this specific case. The only information we have to base a conclusion that Respondents are in poor financial condition is their own vague assertions. There is no supporting documentation and no in depth discussion as to their assets, income, or expenses upon which to base an informed decision.

For the above reasons, the Executive Director respectfully asserts that no downward adjustment should be made based on "other factors as justice require". The Executive Director respectfully requests that the Commission assess the full penalty of $5,250 against Respondents, Gwen Gordan and Wanda Percy dba Holiday Café.

IV. PRAYER

The Executive Director respectfully requests that the ALJ reopen the record, order a financial review of the Respondents for admission into evidence, and consider the financial review in making a proposal for decision. Should the ALJ opt to send the PFD before the Commission without changes, the Executive Director respectfully requests that the Commission remand this case to SOAH with instructions that the ALJ order a financial review of the Respondents for admission into evidence and consider the financial review in making a proposal for decision. Alternatively, the Executive Director respectfully requests that the Commission assess the full penalty of $5,250 against Respondents, Gwen Gordan and Wanda Percy dba Holiday Café.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

by _____

Barham A. Richard
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ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Finding Violations by Gwen Gordon
And Wanda Percy dba Holliday Cafe
SOAH DOCKET NO. 582-08-1691
TCEQ Docket No. 2007-0741-PST-E

On _____, 2009, the Texas Commission On Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (Petition) recommending that the Commission enter an enforcement order assessing administrative penalties against Gwen Gordon and Wanda Percy dba Holliday Café. Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing on this matter on December 18, 2008, in Austin, Texas, presented the Proposal for Decision.

The following are parties to the proceeding: the Commission's Executive Director (ED), represented by Barham Richard, an attorney in TCEQ's Litigation Division; Gwen Gordon and Wanda Percy dba Holliday Cafe, represented by attorney Jesse L. Nickerson; and the Public Interest Counsel. The Public Interest Counsel did not appear or otherwise participate in the hearing.

After considering the ALJ's Proposal for Decision, the evidence and arguments presented, and the exceptions to the Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

The Violations

1. Gwen Gordon and Wanda Percy dba Holliday Cafe (Respondents) owned property used for a cafe located at 10934 Texas Highway 24 South, Paris, Lamar County, Texas (Facility).

2. The Facility has two abandoned underground storage tanks (USTs).

3. A Commission inspection of the Facility on January 24, 2007, and record review on April 20, 2007, revealed that the Respondents had failed to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

Penalty Considerations

1. The worksheets used to calculate the ED's proposed penalty includes matrices that took into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, economic benefit, and "other factors as justice may require."

2. Based on the worksheets, the ED proposed a penalty of $5,250 for the acts described in Finding of Fact No. 3.

3. The Respondents purchased the Facility to operate a cafe.

4. The Respondents were unaware that USTs were present on the Facility.

5. The Facility closed down and was sold at foreclosure sale prior to the hearing.

6. The Respondents made no use of the USTs while they owned the Facility.

Notice and Procedural History

1. On November 29, 2007, the ED served its Preliminary Report and Petition on the Respondents.

2. By Answer dated December 14, 2007, the Respondents requested a hearing on the ED's initial allegations.

3. The case was referred to SOAH for a hearing on January 18, 2008.

4. The Commission's Chief Clerk issued notice of the hearing to all parties on February 11, 2008.

5. The preliminary hearing was waived by agreement of the parties and the hearing on the merits was conducted on December 18, 2008. The Respondents and the ED were represented by counsel.

6. The record closed on January 15, 2009, after the parties were given the opportunity to present additional closing arguments.

II. CONCLUSIONS OF LAW

1. The Respondents are subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. §§ 5.013 and 7.002.

2. The Commission may order the Respondents to take corrective action. TEX. WATER CODE ANN. § 7.073

3. The Respondents were notified of the alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

4. The Respondents were notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, and 80.6(b)(3).

5. SOAH has jurisdiction over matters related to the hearing in this docket, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.

6. The Respondents violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

7. 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 within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.

8. 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.

9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

10. 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 imposition of a penalty should be waived in this proceeding.~~ and Conclusions of Law, Gwen Gordan and Wanda Percy dba Holiday Café should be required to pay a total of $5,250 in administrative penalties for the violation at issue in this case.

III. ORDERING PROVISIONS

NOW THEREFORE BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Within 30 days after the effective date of this Commission Order, Gwen Gordan and Wanda Percy dba Holiday Café shall pay an administrative penalty in the amount of $5,250 for their violation of 30 TEX. ADMIN. CODE § 334.47(a)(2).

2. ~~The action taken in this proceeding and the Respondents' compliance with all the terms and conditions set forth in this Order resolve only~~ The payment of this administrative penalty will completely resolve the violations that ~~are~~ is the subject of the Order. The Commission shall not be constrained in any manner from requiring corrective action or penalties for violations that are not raised here.

3. The Chief Clerk shall provide a copy of this Order to all of the parties.

4. 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.

5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Buddy Garcia
Chairman

ATTACHMENT C

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER Finding Violations by Gwen Gordon
And Wanda Percy dba Holliday Cafe
SOAH DOCKET NO. 582-08-1691
TCEQ Docket No. 2007-0741-PST-E

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The following are parties to the proceeding: the Commission's Executive Director (ED), represented by Barham Richard, an attorney in TCEQ's Litigation Division; Gwen Gordon and Wanda Percy dba Holliday Cafe, represented by attorney Jesse L. Nickerson; and the Public Interest Counsel. The Public Interest Counsel did not appear or otherwise participate in the hearing.

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Penalty Considerations

1. The worksheets used to calculate the ED's proposed penalty includes matrices that took into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, economic benefit, and "other factors as justice may require."

2. Based on the worksheets, the ED proposed a penalty of $5,250 for the acts described in Finding of Fact No. 3.

3. The Respondents purchased the Facility to operate a cafe.

4. The Respondents were unaware that USTs were present on the Facility.

5. The Facility closed down and was sold at foreclosure sale prior to the hearing.

6. The Respondents made no use of the USTs while they owned the Facility.

Notice and Procedural History

1. On November 29, 2007, the ED served its Preliminary Report and Petition on the Respondents.

2. By Answer dated December 14, 2007, the Respondents requested a hearing on the ED's initial allegations.

3. The case was referred to SOAH for a hearing on January 18, 2008.

4. The Commission's Chief Clerk issued notice of the hearing to all parties on February 11, 2008.

5. The preliminary hearing was waived by agreement of the parties and the hearing on the merits was conducted on December 18, 2008. The Respondents and the ED were represented by counsel.

6. The record closed on January 15, 2009, after the parties were given the opportunity to present additional closing arguments.

II. CONCLUSIONS OF LAW

1. The Respondents are subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. §§ 5.013 and 7.002.

2. The Commission may order the Respondents to take corrective action. TEX. WATER CODE ANN. § 7.073

3. The Respondents were notified of the alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

4. The Respondents were notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, and 80.6(b)(3).

5. SOAH has jurisdiction over matters related to the hearing in this docket, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ch. 2003.

6. The Respondents violated 30 TEX. ADMIN. CODE §§ 334.47(a)(2) by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements.

7. 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 within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.

8. 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.

9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

10. Based on consideration of the above Findings of Fact and Conclusions of Law, Gwen Gordan and Wanda Percy dba Holiday Café should be required to pay a total of $5,250 in administrative penalties for the violation at issue in this case.

III. ORDERING PROVISIONS

NOW THEREFORE BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. Within 30 days after the effective date of this Commission Order, Gwen Gordan and Wanda Percy dba Holiday Café shall pay an administrative penalty in the amount of $5,250 for their violation of 30 TEX. ADMIN. CODE § 334.47(a)(2).

2. The payment of this administrative penalty will completely resolve the violation that is the subject of the Order. The Commission shall not be constrained in any manner from requiring

corrective action or penalties for violations that are not raised here.

3. The Chief Clerk shall provide a copy of this Order to all of the parties.

4. 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.

5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Buddy Garcia
Chairman