

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 15, 2008

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 SEP 15 AM 8:51
CHIEF CLERKS OFFICE

Les Trobman
General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

VIA FACSIMILE NO. (512)239-3311

Re: SOAH Docket No. 582-08-1316; TCEQ Docket No. 2007-0795-MLM-E; IN THE MATTER OF AN ENFORCEMENT ACTION AGAINST LIBERTY WASTE SYSTEMS, INC.; RN101889236

Dear Mr. Trobman:

I have reviewed the exceptions and brief filed on August 18, 2008, by the Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission) in the above-referenced matter. Liberty Waste Systems, Inc. (Respondent) did not reply to the ED's exceptions by the August 28, 2008 deadline. Although the ED has ably argued its position regarding imposition of the requested \$4,400 administrative penalty, I am not persuaded that any substantive changes to my Proposal for Decision or my recommendation are warranted. Although not listed as an exception, I recommend that in Conclusion of Law 7(b) of the proposed Default Order, the cite 30 TEX. ADMIN. CODE § 70.160(b) be corrected to read 30 TEX. ADMIN. CODE § 70.106(b).

There are two problems with recommending imposition of the ED's requested administrative penalty of \$4,400: (1) the ED's Petition and Penalty Recommendation (EDPRP) incorporated in the hearing notice was missing the penalty calculation worksheet (PCW) referenced as Attachment B, so was incomplete pursuant to 30 TEX. ADMIN. CODE (TAC) § 70101(b); and (2) while the alleged violations by Respondent are deemed admitted in this default proceeding, the relief sought by the ED is not a factual allegation that is admitted.

In its argument, the ED relies in part on SOAH's default rule found at 1 TAC § 155.55 to show that its recommended \$4,400 penalty is a factual allegation deemed admitted upon granting the ED's default motion. But 1 TAC § 155.55(b) distinguishes factual allegations and relief that is sought:

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(b) Any default proceeding under this section requires adequate proof of the following:

(1) proper notice under Tex. Gov't Code, Chapter 2001 and § 155.27 of this title (relating to Notice of Hearing) was provided to the defaulting party; and

(2) such notice included a disclosure, in at least twelve-point, bold-face type, that the factual allegations listed in the notice could be deemed admitted, and the relief sought in the notice of hearing might be granted by default against the defaulting party that fails to appear at the hearing.

The ED's January 15, 2008 Notice of Public Hearing sent to Respondent states in at least 12-point bold face type: "Upon failure of Liberty Waste Systems, Inc., to appear at the preliminary hearing or evidentiary hearing, *the factual allegations* in the notice *will be deemed admitted as true*, and *the relief sought* in the notice of hearing *may be granted by default.*" [emphasis added]

In addition, language in the EDPRP itself distinguishes factual allegations from administrative penalties. The EDPRP states in item 11 that the PCWs for the recommended administrative penalty are attached and incorporated by reference as Attachments A and B. Item 11 continues: "The PCWs set forth *each alleged violation* and the statutory factors the Executive Director considered in determining the recommended *administrative penalty.*" [emphasis added] However, only Attachment A, which addresses some but not all of the alleged violations and proves up an administrative penalty of \$2,200, is attached.

The ED's conclusory statements in Item 10 of the EDPRP that the required factors were considered in arriving at the recommended administrative penalty and, in Item 12, asserting that the ED followed an established Penalty Policy, are not factual allegations and are not adequate to prove the recommended \$4,400 penalty was correctly calculated.

Therefore, while EDPRP items 4-7 under the "Facts Supporting Violations" heading are factual allegations deemed admitted upon granting the ED's motion for default, the requested penalty amount of \$4,400 is not a factual allegation and is not deemed admitted.

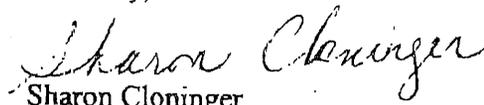
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In conclusion, I recommend that either the Proposal for Decision be adopted without the changes set out in the ED's exceptions or, in the alternative, that this case be remanded to the ED so a Notice of Hearing incorporating the complete EDPRP with both Attachment A and Attachment B may be provided to Respondent.

Sincerely,



Sharon Cloninger
Administrative Law Judge

SC/lh
cc: Mailing List

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STYLE/CASE: LIBERTY WASTE SYSTEMS, INC

SOAH DOCKET NUMBER: 582-08-1316

REFERRING AGENCY CASE: 2007-0795-MLM-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ SHARON CLONINGER**

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EXCEPTIONS LETTER BY ALJ
582-08-1316

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EXCEPTIONS LETTER BY ALJ

JUDGE SHARON CLONINGER
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